WCAT Workers' Compensation Appeal Tribunal

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DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

WCAT DECISION DATE: **April 20, 2017**

WCAT DECISION NUMBER: **A1605260**

WCAT PANEL: **Guy Riecken**

Appellant and Decision(s) Under Appeal

Appellant Name: Metty Tong

Re: Metty Tong
WCAT No. A1605260
Date of Decision Appealed: July 6, 2016
WorkSafeBC File No. R0208398, Claim No.(s): 28989606

WCAT DECISION DISTRIBUTION LIST

This decision is also sent to the following additional parties:

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DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] The worker is appealing a decision (*Review Reference #R0208398*) concerning the payment of temporary disability (wage loss) benefits for her left index and middle finger injuries that occurred on April 20, 2016 in her employment as a cook. The worker was off work until May 1, 2016 when she returned to work performing light or alternate duties.

[2] The Workers' Compensation Board (Board)[1] allowed the worker's claim for health care benefits only. The Board determined that no wage loss benefits were payable, as the worker was capable of performing modified duties that had been offered by the employer on the date of injury.

[3] In the July 6, 2016 decision under appeal, a review officer confirmed the Board's decision. The review officer found that the worker had been offered and accepted light duties on April 20, 2016, but then unreasonably refused to continuing performing them until she was cleared by the her doctor to do so on May 1, 2016. The review officer determined that under the Board's policy on selective/light employment, the worker was not entitled to wage loss benefits.

Issue(s)

[4] The issue in this appeal is whether the worker is entitled to the payment of wage loss benefits commencing on April 21, 2016.

Jurisdiction and Method of Hearing

[5] Section 239(1) of the *Workers Compensation Act* (Act) provides for appeals to the Workers' Compensation Appeal Tribunal (WCAT) of final decisions by review officers regarding compensation matters.

[6] This is an appeal by way of rehearing, in which WCAT considers the record and also has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal. WCAT has inquiry power, including the discretion to seek further evidence, but is not obliged to do so.

[7] WCAT must make its decision on the merits and justice of the case, but in doing so, must apply a policy of the Board's board of directors that is applicable in the case. The applicable policy is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

[8] The worker is represented by a lawyer. The employer is participating in the appeal.

[1] The Board operates as WorkSafeBC.

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[9] In the notice of appeal the worker requested that the appeal proceed in writing. Her representative has provided written submissions, including new evidence. The employer did not provide a written submission in response, although given an opportunity to do so.

[10] Having considered the criteria for determining the appeal method in item #7.5 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) I find that an oral hearing is not required. The appeal can be properly decided based on the record and the written submissions.

Law and Policy

[11] Under section 5(1) of the Act the Board is required to pay compensation where an injury arising out of and in the course of employment is caused to a worker.

[12] Section 5(2) provides that where an injury disables a worker from earning full wages, compensation is payable from the first working day following the day of injury, but that a health care benefit is payable for the day of injury.

[13] The payment of wage loss benefits is governed by sections 29, 30 and 31.1 of the Act.

[14] The Board's policies respecting the payment of wage loss benefits are set out in Chapter 5 of the RSCM II. As explained in policy item #33.00, "Introduction," and policy item #35.30, Duration of Temporary Disability Benefits," wage loss benefits are payable during periods of temporary total disability (section 29) and temporary partial disability (section 30). Under section 31.1 the payment of wage loss benefits ceases when the worker's disability ceases. A disability ceases when it either resolves entirely or stabilizes as a permanent impairment.

[15] An exception to the payment of wage loss benefits during the period of temporary disability may occur where a worker still has a temporary physical impairment that disables the worker from performing the full duties of the pre-injury employment, but the employer provides alternate or light duties which the worker is capable of performing.

[16] Policy item #34.11, "Selective/Light Employment," states that selective/light employment is a temporary work alternative, offered by an employer, that is intended to promote a worker's gradual restoration to the pre-injury level of employment. The Board supports selective/light employment as an important component of a worker's rehabilitation and recognizes the value of maintaining an injured worker's positive connection to the workplace. To ensure that the arrangement offered by the employer is appropriate, the policy provides that they must meet the following conditions:

- While the compensable injury may temporarily disable the worker from performing his or her normal work, the worker must be capable of undertaking some form of suitable employment.
- The work must be safe, that is, it will neither harm the worker nor slow recovery. The work must be within the worker's medical restrictions, physical limitations and abilities. Where there is a disagreement regarding the safety of the selective/light offer and the Board is required to intervene, the Board is responsible for determining the

work after considering the medical evidence and other relevant information.
- The work must be productive. Token or demeaning tasks are considered detrimental to the worker's rehabilitation.
- Within reasonable limits, the worker must agree to the arrangement.

[17] The policy provides that where a worker refuses to accept the offer, the Board will consider the reasons for the refusal, and determine if they are reasonable. In making this determination, the Board will give regard to the requirements of the work, medical opinion(s), and other evidence regarding the worker's medical restrictions, physical limitations, and abilities.

Background and Evidence

[18] It is not disputed that the worker sustained laceration injuries to her left second and third fingers while working on April 20, 2016. The Board advised the worker in an April 25, 2016 letter that it was accepting her claim for these injuries for health care benefits and that her entitlement to wage loss benefits was under consideration.

[19] It is also not disputed that that the worker suffered an impairment as a result of her injuries that disabled her from performing her full pre-injury job duties. In her April 20, 2016 report to the Board Dr. Tam, general practitioner, noted the lacerations to both fingers and that the worker was able to extend both of the injured fingers, which meant that the extensor tendons were intact. She described applying Fucidin 2% ointment to the wounds and advised that the worker required daily dressing changes. Dr. Tam stated that the worker was unable to use her left hand for ten days and could not wear gloves or get her left hand wet frequently. Dr. Tam stated that the worker was not medically capable of working full duties, full time. There is no medical opinion evidence on file that contradicts Dr. Tam's assessment of the worker's injuries or her opinion that the worker was unable to work full duties, full time.

[20] On April 20, 2016 Dr. Tam also completed a Functional Abilities Form (FAF) that had been given to the worker by the employer. On the FAF Dr. Tam indicated that the worker was unable to use her left hand for lifting activities and was unable to wear gloves or wash her hands because of her wounds. The worker was unable return to her regular duties before May 1, 2016 and at that time would be reassessed. Dr. Tam provided the worker with a note stating that she was unable to use her hand and could not wear gloves, and would be off work until May 1, 2016.

[21] The disputed matter is whether the worker unreasonably refused to perform alternate or light duties that were offered by the employer.

[22] In its April 21, 2016 report of injury to the Board the employer stated that after the worker received first aid on the date of injury (when her fingers were bandaged), she was offered supervisory work which did not involve using her injured hand and did not involve wearing a glove. The employer stated that the worker did these duties and did not complain further. The worker was also given a "Dear Doctor" letter, the FAF, and a Modified Duties forms to take to her doctor in case she sought medical attention. Modified duties were explained to the worker and she agreed to do them upon her return to work the next day.

[23] The employer acknowledged that the doctor's note dated April 20, 2016, but stated that the supervisory work offered to the worker did not involve using her injured left hand and would not involve wearing gloves. Moreover, the worker could use hand sanitizer instead of washing her injured hand. The employer objected to the worker's refusal of light duties.

[24] On April 22, 2016 the entitlement officer spoke to the employer to obtain further details of the modified duties that had been offered to the worker. The employer advised that the modified duties involved supervisory work training new employees. The worker would only have to provide them with direction. At the time the duties were explained to her, the worker requested that she be given assistance in case one of the trainees required a hands-on demonstration. The employer agreed to this, and the worker agreed to do the light duties. The next day the worker's son, who also works for the employer, brought in the completed FAF and the note from Dr. Tam. When the employer spoke to the worker on the telephone about why she would not come in to work for the light duties, she just said to read the doctor's note.

[25] The entitlement officer also spoke to the worker on April 22, 2016. She advised that her injured fingers were still bleeding, as she had a deep wound with no stitches. She had been told by her doctor to rest for 10 days. The entitlement officer mentioned that the employer had offered light duties as a supervisor with no use of her left hand. The worker advised that she could not button up her uniform with her injured hand because there were too many buttons, and could not tie her shoes. She said her doctor had filled out the light duties form and that said no light duties for ten days. She stated that the employer was "really forceful" regarding light duties. According to the entitlement officer's memorandum, the worker confirmed that after her injury and after attending first aid she completed her shift doing the supervisory duties with the help of a co-worker. When she saw her doctor again the next day, the doctor said she should not get her bandage wet. Her injury was still seeping/bleeding. The worker said it was too inconvenient to work with only one hand, and that at home her husband was looking after her. The worker could not put on gloves because they were too tight (over the bandages). Because of the difficulties getting dressed and ready to go to work in the morning due to her injuries, it would take too long to get to work.

[26] On April 22, 2016 a nurse advisor at the Board provided an opinion that the duties offered to the worker would neither delay her recovery nor harm her and could have been performed effective April 21, 2016.

[27] On April 25, 2016 the entitlement officer prepared a modified work offer worksheet that set out the analysis underlying the decision to deny payment of wage loss benefits to the worker. In summary, the entitlement officer found that:

- The worker was offered and worked light duties doing supervisory work on April 20, 2016 following her injury.
- In her application for compensation the worker denied having been offered light duties.
- The supervisory work offered by the employer did not require the worker to wear gloves or wash her hands frequently.
- The worker was aware of the employer's light duties program.
- Aside from the training duties, the worker was offered other duties such as paperwork (ticking off items) but the employer advised that the worker did not want to do this.

[28] The entitlement officer concluded that the light duties that were offered were within the medical restrictions for wearing gloves and frequent hand washing. The entitlement officer found that the worker had unreasonably refused the light duties. The entitlement officer initially advised the worker of this decision by telephone on April 25, 2016, and then communicated it in an April 26, 2016 letter.

[29] On April 25, 2016 the Board received a copy of Dr. Tam's April 20, 2016 note and the FAF that Dr. Tam had completed on April 20, 2016.

[30] On April 29, 2016 Dr. Ho, the worker's regular family physician, provided a progress report in which she stated that treatment of the worker's finger injuries continued, and noted that the worker had some loss of sensation at the tips of her injured fingers. Dr. Ho stated that she could return to work to light duties on May 1, 2016 with a restriction of using her right hand only. The worker could not wear gloves, get her fingers wet, or use a knife.

[31] On May 6, 2016 Dr. Ho reported that the worker's fingers were healing well. She was now medically capable of working full duties, full time, but should wear gloves at work and avoid contact with water.

[32] In support of her appeal the worker has provided a report from Dr. Ho dated August 12, 2016, and an affidavit that was sworn by the worker on November 18, 2016. Dr. Ho recounts that in her absence, the worker saw Dr. Tam on April 20, 2016. Because fingertip injuries are prone to infection, Dr. Tam prescribed an antibiotic ointment and advised the worker not to get her fingers wet. Wearing a glove was not an option because of the bulky dressing for the injured fingers. When Dr. Ho saw the worker on April 29, 2016, the lacerations were still healing and the worker had some loss of sensation in her fingertips. Dr. Ho states, in part, that it would not have been medically advisable for the worker to have washed her hands at work at all if she had been at work from April 21 to May 1, 2016. The worker had been advised by Dr. Tam and Dr. Ho not to get her left hand wet at all except for cleansing the wounds as necessary. It is Dr. Ho's opinion that washing while at work would have slowed and harmed her recovery.

[33] In her affidavit the worker states that she was not offered light supervisory duties on April 20, 2016 after she was injured. Instead, after having her fingers bandaged by a co-worker, she returned to her work area in the food production area where she told her co-workers which vegetables still needed to be prepared and cooked. She states that she did not perform any light duties or otherwise supervise or "train" any co-workers. After that, she went to the lunch room and took a combined lunch and coffee break. She left work at about 1:30 p.m. and saw Dr. Tam at 2:30 p.m. The worker states that between the time she was injured and the time she left work, she had not received any medical advice about whether she could continue working with or without light duties or about whether continuing to work would harm her recovery. She also states that during that time period none of her supervisors or managers offered her any kind of light duties, including supervising or training other employees; nor did any of them advise her that she would not have to wash her hands if she was performing light duties.

[34] The worker also states that after her son took the doctor's note and FAF to work for her on April 21, 2016, he reported back that a manager wanted her to return to work on light duties. The worker denies that prior to May 1, 2016, a manager or supervisor phoned her to directly offer her light duties or to tell her she would not have to wash her hands while at work.

[35] The worker attaches to her affidavit a copy of the employer's Personal Hygiene Procedures Policy, which includes a detailed description of the hand-washing requirements and procedures which the employer expects employees to use. The worker states that regardless of whether she was handling food directly, under the hand-washing policy she would be required to wash both of her hands prior to entering the food handling areas, before starting work, after touching any dirty or potentially contaminated surface, after touching her own hair or skin, after using the toilet, and after breaks.

Findings and Reasons

[36] I find that the worker is entitled to the payment of wage loss benefits commencing on April 21, 2016 until she returned to work on light duties. My reasons follow.

[37] Whether or not the worker's activities at work on April 20, 2016 after she was injured are characterized as supervisory duties, or simply advising co-workers on the remaining vegetable preparation and cooking needs for the day, it is not disputed that at that time the worker had not yet received medical attention. Since she was not yet in possession of any medical advice about her restrictions and the timing of her return to work, I do not place significant weight on the fact that the worker provided some instructions to co-workers after she was injured. I do not accept the employer's position that her actions amounted to the acceptance of light duties. I tend to interpret her actions as an effort to be conscientious respecting the remaining work that needed to get done in the food production area that day.

[38] In considering whether the employer offered the worker light supervisory duties on April 20, 2016 after she was injured and before she left work, it appears that if such an offer were made it would seem to have been premature, since at that point the worker had not seen her doctor and the employer had not received the completed FAF. It is somewhat puzzling to me that the employer would determine what kind of light duties might be suitable in the absence of any medical information respecting the worker's injuries, particularly since the employer has a standard form which it uses to obtain such information from its employees' physicians.

[39] I place more weight on the worker's affidavit evidence about the sequence of events following her injury than on the evidence that the employer provided to the Board. While I consider it plausible that a supervisor or manager may have spoken to the worker before she left work on April 20 about the possibility of performing light duties, I find that an offer of specific light duties was not made to the worker by the employer on April 20, 2016. I accept that by the time the employer had described its offer of light duties to the Board, and the entitlement officer had discussed these with the worker on April 22, 2016, an offer of specific light duties had been made, which the worker refused to accept.

[40] I find it noteworthy that the employer's FAF does not ask the physician to comment directly on any particular type of light or modified duties. It asks whether the worker can return to regular duties, to which Dr. Tam responded by ticking a box that indicated "no." The form also asked if working extra or overtime hours would delay the worker's recovery, to which Dr. Tam responded "yes." The form asks about the estimated duration of the worker's limitations, to which Dr. Tam answered "until May 1/2016 then reassess." The form then sets out a number of functional

activities related to sitting, standing, walking, lifting, and upper body use, among others, which a physician is meant to address by ticking various boxes and providing comments. Dr. Tam indicated that the worker could not perform any lifting activities with her left hand, could not use her left hand, could not wear gloves, and could not wash her hands due to her wounds. Dr. Tam also indicated a number of functional activities for which the worker had no limitations.

[41] Since the FAF does not address any specific form of light duties, it is to some extent a matter of interpretation whether the limitations and restrictions identified by Dr. Tam would prevent the worker from performing the light duties described by the employer to the Board.

[42] The employer has placed considerable emphasis on the fact that the light duties that it described would not have required the worker to use or wash her left hand, or to wear a glove on her left hand. The employer's position is that it follows that the worker could have performed the duties without contravening Dr. Tam's medical restrictions.

[43] Having considered the matter, I do not accept the employer's argument with respect to the suitability of the supervisor/training duties in the food preparation area. The copy of the employer's personal hygiene procedures in its policies and procedures document, which the worker has provided in support of her appeal, provides some clarity on this issue. Without setting out all of the numerous details pertaining to hand hygiene that are included the employer's policies, I note the following:

- Under the heading of Hand Hygiene, item 3.1 of the policy states that all visitors must also comply with the hand-washing requirements, which I understand to mean that the application of the hand hygiene policies is not limited to those employees actively performing hands-on food preparation duties.
- Item 3.2 states that cuts, scratches, burns, and other wounds not showing signs of infection, must be covered with a waterproof, coloured dressing or plaster (i.e. a Band-Aid); however, the information and photographs provided by the worker show that her injuries were covered with bulky fabric dressings, not with waterproof dressings or plasters.
- Item 3.3 states that hands must be washed whenever needed, especially on numerous occasions listed in this item; these include the hand-washing requirements the worker describes in her affidavit.
- Item 3.4 describes the mandatory hand washing steps, which involve the use of warm, running water, and liquid soap.

[44] Also attached to the worker's affidavit are photographs of signs posted outside the food preparation area of her workplace that state that all employees and visitors must comply with hand-washing requirements before entering.

[45] Given that the employer operates as a commercial food preparation business, it is not surprising from a public health perspective that its policies rigorously promote hygiene for employees and visitors entering the food preparation areas of the work site, including hand washing requirements. In light of these policies, I find the worker's interpretation of Dr. Tam's medical restrictions was not unreasonable. I accept that, notwithstanding any statements by the employer about the worker not being required to use or wash her left hand while on temporary light duties, the worker understood the medical restrictions to mean that she could not go to

work in the food preparation area because if she did, she would be required to comply with the hand washing policy. I also find that the employer's offer to allow the worker to use a hand sanitizer on her left hand was not practical, in the sense that its application would have required the worker to remove her bandages and apply the solution to her open wounds, and then replace the bandages. Aside from the practical difficulty posed by this procedure, it does not appear to be contemplated by her physician's restrictions for hand washing.

[46] I find on the preponderance of the evidence that the worker did not unreasonably refuse to perform the light alternative duties that the employer offered.

[47] I allow the worker's appeal. I find that she is entitled to wage loss benefits starting on April 21, 2016 and continuing until she returned to work on light duties. I do not make any finding with respect to her entitlement to benefits after that date.

Conclusion

[48] I allow the worker's appeal and vary the review decision dated July 6, 2016 (*Review Reference #R0208398*).

[49] The worker requested reimbursement of the expense of obtaining Dr. Ho's August 12, 2016 report. The worker has provided a copy of Dr. Ho's invoice in the amount of $345.

[50] Item #16.1.3 of the MRPP provides that WCAT will generally order reimbursement of expenses for attendance of witnesses or obtaining or producing evidence where the evidence was useful or helpful in deciding the appeal, or if it was reasonable for the party to have sought evidence. As I found Dr. Ho's evidence useful, I find that reimbursement is warranted.

[51] Item #16.1.3.1 provides that WCAT will usually order reimbursement of expert opinions at the rate established by the Board for the same or similar expenses. Dr. Ho refers to her report as a medical-legal letter. However, given the contents of her report, I find that it is better described as a medical-legal report (item 19932 of the Board's fee schedule). The fee schedule describes a medical-legal report as a report which recites symptoms, history, and records and gives a diagnosis, treatment, results, and the present condition, and includes a factual summary of all the information about when the injured work can return to work. As the amount of Dr. Ho's invoice is within the amount allowed in item 19932 of the Board's fee schedule, I order reimbursement of the full amount of the invoice.

Guy Riecken
Vice Chair

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ADVISORY NOTICE

The enclosed WCAT decision is final and conclusive pursuant to section 255 of the *Workers Compensation Act.* It cannot be appealed. The Workers' Compensation Board, operating as WorkSafeBC (Board), must comply with a final decision of WCAT.

A copy of this decision has been sent to the Board to ensure that:

- the decision is placed on the appropriate Board case file;
- the Board takes the necessary steps to implement the decision (if applicable).

NOTE: If you have any questions concerning the implementation of this decision, please contact the Board officer or department that is handling the case file.

For telephone inquiries:

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For information on processes that may be available to you after this decision, see WCAT's Post Decision Guide available on our website at www.wcat.bc.ca.
Time limits apply to some of these processes.