Application of Earning Capacity Assessments to Reduce Weekly Benefits

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Introduction

A partially incapacitated worker's entitlement under s.40 is, at least where the worker is not in suitable employment, to be the difference between the probable earnings but for injury and "*the average weekly amount which the worker ... would be able to earn in some suitable employment from time to time after the injury*".

Section 40(3) provides that the ability to earn in suitable employment is to be determined having regard to "*the general labour market reasonable accessible to the worker*" in a geographical sense and also to the matters set out in s.43A. That section requires that the determination of what constitutes suitable employment for a particular worker be determined having regard to the nature of the worker's incapacity and pre-injury employment, age, education, skills and work experience, place of residence, the details given in a medical certificate, the provisions of any Injury Management Plan for the worker, any suitable employment for which the worker has received rehabilitation training, the length of time the worker has been seeking suitable employment and "*any other relevant circumstances*".

In practical terms, this section together with a large amount of case law, invests the Commission with a broad discretion when assessing ability to earn in suitable employment which takes into account not only the worker's physical or psychological restrictions resulting from an injury but also a number of more subjective matters which serve to identify not only what might constitute suitable employment for that worker but also the worker's realistic prospects of obtaining such employment on the open labour market.

An assessment of an injured worker's earning capacity by the Commission only arises where a dispute has arisen in relation to that worker's entitlement under s.40 as a result of a decision made by an insurer to reduce those benefits.

An insurer can only make a soundly based decision in relation to a worker's hypothetical capacity to earn in some suitable employment on the basis of a vocational assessment undertaken by appropriately qualified people.

Obtaining a vocational assessment

This is acknowledged by s.40A of the 1987 Act, which requires that a partially incapacitated worker may be required by the employer or its insurer to undergo an assessment of the worker's ability to earn in some suitable employment. A worker is, however, only required to undergo such an assessment after being informed of possible entitlements under s.38 and the matters required to be complied with in order to obtain such entitlements and also in relation to the possible effects of s.52A. If an injured worker fails, without reasonable excuse, to undergo any such assessment, the right to receive s.40 benefits is suspended while the failure continues.

What a vocational assessment contains

Generally speaking, a vocational assessment undertaken at the request of an insurer involves a multidisciplinary approach where the worker's functional capacity in physical terms is assessed and a history which includes a number of the matters referred to in s.43A, such as the worker's age, educational background, vocational experience, transferable skills and prior job seeking efforts (or lack of them) is taken.

Based upon this information, the vocational assessors will identify employments considered to be suitable for the worker and provide evidence of likely earnings in such employments and also of the availability of such employments in the labour market reasonably accessible to the worker in a geographic sense.

Commonly, insurers will take an average of the earnings identified by the vocational assessors, deduct that amount from the worker's probable earnings but for injury and issue a s.54 Notice reducing the worker's benefits under s.40 on the basis of the difference between those amounts.

It is recommended that this course continue to be adopted as there are practical difficulties in an insurer attempting to undertake the broader, more discretionary assessment of entitlement under s.40 which will ultimately be undertaken by an arbitrator of the Commission should the worker wish to challenge the insurer's decision.

Difficulties with maintaining decisions based on vocational assessments

Insurers are often frustrated and disappointed when an arbitrator of the Commission assesses a s.40 entitlement which is greater than the mathematical difference between the probable earnings but for injury and the ability to earn in suitable employment as assessed by a vocational assessor or where legal advice suggests that a voluntary agreement to make weekly payments at a higher rate should be accepted.

This phenomenon, however, is simply a manifestation of the broader issues which an arbitrator is required to take into account and of the fact that there is no rigid formula for assessing an injured worker's ability to earn on the open labour market.

The discrepancy between the ability to earn as assessed by a vocational assessor and as assessed by an arbitrator will vary according to the circumstances of the case and, to some extent, on the quality of the earning capacity report itself.

If, for example, the earnings capacity report takes into account only the worker's physical capacity to perform certain types of employment or fails to identify physical demands of a suitable employment which may be beyond the capacity of a particular worker, then an arbitrator of the Commission will more readily dismiss the conclusions reached in the report.

If, on the other hand, the report candidly acknowledges any particular barriers confronting a worker in terms of their ability to undertake the particular suitable employments identified or, in a more general sense, being less competitive on the open labour market when applying for positions which are also open to uninjured workers without a compensation history, then it will be more difficult for an arbitrator of the Commission to dismiss the earning capacity report out of hand.

One particular problem arises where one or more of the treating doctors have certified the worker to be fit for suitable work on a part time basis, while the vocational assessor, sometimes supported by other medical evidence obtained by the insurer, concludes that the worker would in fact be able to undertake the suitable employments identified on a full time basis. In these circumstances, it is appropriate to reduce the worker's benefits on the basis of fitness to perform full time suitable duties although it must be born in mind that an arbitrator may accept the opinions expressed by the treating doctors.

Conclusion

Vocational assessments provide the only basis upon which an insurer can undertake the mathematical exercise required to reduce a partially incapacitated worker's benefits from the applicable statutory rate. It is appropriate for an insurer to base a decision to reduce benefits on the mathematical difference between the worker's probable earnings but for injury and the averaged amount of the weekly earnings identified by a vocational assessor and to apply the amounts identified as representing a market rate rather than those under an industrial award.

Even if an arbitrator of the Commission ultimately concludes that the worker's capacity to earn in some suitable employment is less than that identified by a vocational assessor, there remains a reasonable prospect, depending on the circumstances of the case, that an award of weekly payments entered by the Commission will be less than the applicable statutory rate.

The following recommendations are made in relation to vocational assessments:

- A vocational assessment should be obtained as soon as a worker is in receipt of benefits under s.40, provided that they are not in suitable employment with either the pre-injury employer or some other person;
- Accurate and up to date evidence of the worker's probable earnings but for injury should be obtained;
- The worker's entitlement under s.40 should be determined by deducting from the probable earnings but for injury the averaged amount which the vocational assessors have determined the worker as being capable of earning in suitable employment;
- On receipt of the vocational assessment report, the GP and NTD and any treating specialist should be asked to comment upon which the employments identified by the vocational assessors are suitable and, if not, why not and their responses should also be attached to a s.54 Notice;
- A s.54 Notice should be issued which clearly sets out the basis upon which the mathematical exercise has been undertaken and such s.54 Notice should, of course, have attached to it the vocational assessment report, together with any other relevant material including medical reports;
- Should a dispute relating to the decision to reduce weekly benefits based on a vocational assessment report be referred to the Commission, a flexible approach should be adopted to the resolution of any such dispute in acknowledgment of the fact that arbitrators enjoy a broad discretion to take into account a number of factors, including that the worker is less competitive on the open labour market simply because they have suffered an injury.

Finally, a vocational assessment will be of little assistance where the worker is in fact in suitable employment. This is because s.40 requires that the entitlement under the section is to be the difference between the worker's probable earnings but for injury and the worker's actual earnings in suitable employment unless it can be shown that the worker is deliberately under utilising their earning capacity and could reasonably be expected to obtain better paid suitable employment. In this regard, it is noted that the worker need only be in "*some*" suitable employment and that the legislation does not require the worker to have obtained the most suitable or best paid employment hypothetically available.

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