

[TRANSLATION]

Citation: *M. K. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 222

Date: December 21, 2015

File number: GE-15-1321

GENERAL DIVISION – Employment Insurance Section

Between:

M. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Charline Bourque, Member, General Division – Employment Insurance Section

Heard by videoconference on September 29, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. K., the claimant, participated in the hearing by teleconference. He was accompanied by Me Sophie Mongeon, who acted as representative. S. A., the claimant's wife, was also present and acted as witness and interpreter.

INTRODUCTION

[1] The Appellant filed a claim for employment insurance starting on November 18, 2012. On March 24, 2014, the claimant applied for regular benefits as of March 17, 2013. On March 24, 2014, the Employment Insurance Commission of Canada (the "Commission") notified the claimant that it could not pay him employment insurance benefits effective March 18, 2013,¹ because, although the claimant had informed it he had recovered, he did not provide any medical evidence. The Commission determined that the claimant was unable to work. On June 3, 2014, the Commission informed the claimant that it had reconsidered his claim for benefits but still could not pay him benefits. The Commission found that the documents that had been submitted (opinion of Bureau d'évaluation médicale and conciliation agreement) provided no proof that the claimant was capable of and available for work on March 17, 2013. On July 30, 2014, further to his request for reconsideration, the Commission notified the claimant that it had not amended the decision communicated on June 3, 2014, with regard to availability. On December 17, 2014, the claimant appealed the decision to the Social Security Tribunal of Canada (the Tribunal).

[2] On November 24, 2014, the Tribunal's General Division found that the disentitlement imposed under paragraph 18(a) of the *Employment Insurance Act* (the "Act") was justified because the Appellant had not proven he was available for work. The claimant filed an application for leave to appeal to the Appeal Division on December 17, 2014. The application for leave to appeal was allowed on March 2, 2015. On April 20, the Tribunal's Appeal Division allowed the appeal and referred the matter back to the General Division for a new hearing.

¹ The Commission indicates that the notice dated March 24, 2014, contained a clerical error. [Translation] "It indicates that we cannot pay employment insurance benefits effective March 17, 2013, whereas the date should have been March 18, 2013." (GD2-94).

[3] This appeal was heard by videoconference for the following reasons:

- a) The complexity of the issue or issues.
- b) The fact that the appellant would be the only party attending the hearing.
- c) The information in the file, including the need to obtain additional information.
- d) The availability of videoconferencing in the location in which the Appellant lives.
- e) This type of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] Is the claimant available for work pursuant to paragraph 18(1)(a) of the Employment Insurance Act (“the Act”) and, if so, as of what date?

THE LAW

[5] Section 18 of the Act [Version of 2012-06-29 to 2012-12-13] provides as follows:

18. A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

- (a) capable of and available for work and unable to obtain suitable employment;
- (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
- (c) engaged in jury service.

EVIDENCE

[6] The evidence in the file indicates as follows:

- a) On June 10, 2013, the claimant applied for employment insurance. On his application he stated that he had received compensation for work injuries from June 15, 2011, to December 1, 2012. He stated that he had been unable to work for medical reasons from June 15, 2011, to June 10, 2013 (GD2-19 to GD2-35).
- b) A CSST medical report dated January 14, 2013, refers to an event that occurred on October 22, 2010. The claimant suffered a lumbar hernia and was on a work stoppage for two months.
- c) On July 4, 2013, the claimant contacted the Commission and requested backdating to November 18, 2012. He was waiting for his record of employment that his employer had prepared on May 31, 2013. The Commission de la Santé et Sécurité au travail (the "CSST") decided to terminate his compensation as of December 1, 2012. He was appealing the CSST's refusal to continue paying, and the employer was contesting the CSST period. A review committee met in August 2013 to look at the employer's CSST challenges (GD2-38/39).
- d) On May 31, 2013, 3459128 Canada inc. issued record of employment K01832666 indicating that the employment had ended because of illness or injury. The work period indicated was from September 20, 2008, to July 30, 2011 (GD2-36).
- e) On October 9, 2013, 395 9128 Canada inc. issued record of employment K01832661, which amended record K01832666 and indicated that the employment had ended for other reasons. There were additional comments to the effect that the employer could not accommodate the employee because of his health problems. The record of employment was for the period from September 20, 2008, to July 30, 2011 (GD2-40).
- f) On October 9, 2013, the employer, Groupe Adonis, confirmed that it could not offer suitable employment to the claimant because of his health problems (GD2-41).

- g) On March 24, 2013, the claimant contacted the Commission and applied for regular benefits effective March 17, 2013. The reason for the delay in claiming regular benefits was that he had to appear in court. His counsel contacted counsel for the employer Marché Adonis so that he could return to work. It was not until January 2014 that the employer Marché Adonis finally decided not to take him back. A new record of employment was requested but the claimant did not receive it until January 2014. It indicates that he was capable of and available for work effective March 17, 2013. He was available for and capable of performing the same type of work he had done previously. Since March 17, 2013, he had been looking for full-time work at a butcher shop where he would be under less pressure than at Marché Adonis. He could not go back to his job with the employer Marché Adonis because there was too much pressure, which was not suited to his medical condition. He was informed that his claim for benefits would be reactivated as of March 17, 2013, and that he would need to provide a doctor's certificate attesting to his medical restrictions and his ability to work as of that date in order to be eligible for regular benefits (GD2-42).
- h) On November 21, 2013, the Commission des lésions professionnelles (the "CLP") rendered a decision. The CLP determined that the claimant's employment injury of March 23, 2010, was consolidated (meaning that the injury had stabilized to the point that no further improvement was foreseeable) as of June 7, 2011. The CLP determined that care and treatment were no longer necessary as of June 7, 2011. The CLP determined that the Commission de la santé et de la sécurité du travail (the "CSST") decision rendered on July 23, 2012, further to an administrative review was of no force and effect. The CLP set aside the CSST decision of February 11, 2013, further to the administrative review. The CLP determined that the employment injury the worker had suffered on March 23, 2010, did not result in permanent physical impairment or functional limitations. The CLP determined that the worker was able to continue his employment as of June 7, 2011. (GD2-45 to GD2-60).
- i) Assessment by Dr. Hubert Labelle of Travail Québec, dated February 15, 2013, which indicates that the claimant [Translation] "has not noted any improvement in his condition over the past year, and none of the treatments that have performed thus far has

improved his condition. He has been on a work stoppage for one year. These pains are still lower back pains that radiate out from the posterior side of both buttocks and the thighs and sometimes reach the calves and even the feet. The symptoms increase as soon as he tries to mobilize his dorsal and lumbar spine. The pain is constant and increases when he attempts to use the lumbosacral hinge. He is unable to walk or stand for periods of more than 30 to 40 minutes. With regard to consolidation, Dr. Labelle indicates that, because the worker has received appropriate treatment, because a lumbar sprain has been diagnosed, because none of the treatments carried out thus far has improved his condition and because there are no other treatments to be done, we believe that the consolidation date of the injury should be established as today, December 10, 2012.” (GD2-61 to GD2-73).

- j) Letter from Médi-Simard inc. dated February 15, 2013, as a follow-up to a medical assessment carried out by Dr. Guimond-Simard on February 13, 2013. The report indicates that the claimant [Translation] “still says he is suffering from his condition with very crippling pain, according to him, starting in the low back (bilateral) and radiating to both lower limbs, the buttocks and thighs and as far as the heels. He also describes numbness that is not specifically localized in the area of the two lower limbs. He indicates that the pain is still very intense and has not improved despite all of the treatments that have been done in this case.” He is currently on a full work stoppage and he says he is completely incapable of returning to work. Dr. Guimond-Simard recommends an assessment by a clinical pain specialist. He states that he is of the opinion that the claimant [Translation] “could perform his work as a butcher in light of the musculoskeletal injury of lumbar sprain on a pre-existing herniated disc. However, there is a clinical picture of chronic pain and it very likely prevents him from performing such work, and once again I am therefore referring you to a specialist in this area.” (GD2-79 to GD2-88).
- k) On September 22, 2014, the employer Le Ruisseau confirmed that the claimant had been working part time since February 17, 2014. Subsequently, as of September 1, 2014, the claimant held full-time employment (GD2-111).

[7] The evidence submitted through the Appellant's testimony at the hearing is as follows:

- a) The claimant had been working as a butcher at Marché Adonis since February 28, 2006. In late March 2010, he suffered an occupational injury when he fell in the refrigerator and injured his back and his legs. There was a protracted legal battle with his employer and he had to see a number of doctors.
- b) He was initially diagnosed with a herniated disc. Dr. Labelle told him he would not be able to work. In February 2013 he saw Dr. Guimond-Simard and was advised that he could go back to work and could stop his medication. Dr. Guimond-Simard told him that there were functional limitations but they were minimal and that there was nothing to prevent him from going back to the same type of employment that he held previously.
- c) Following Dr. Guimond-Simard's report, the claimant looked for work at Costco, Inter-marché Cote vertu, Andalos and Le Ruisseau. He was looking for work as a butcher.
- d) On his application for employment insurance, the claimant stated that he was not able to work before June 10, 2013. His wife, who had helped him complete the application for benefits because of his comprehension difficulties, stated that this was the date on which he had completed his application since he had not found employment.
- e) With regard to the statement made to Dr. Guimond-Simard (subjective examination) that he was on a work stoppage, he stated that Dr. Labelle had told him he could not work, that he had no work and that he had to stay home. Dr. Simard told him that he did not have a herniated disc but rather a lumbar sprain and that he would not need surgery. The doctor told him that he could cut back on his medication and go back to work and that eventually the pain would stop but that he could go to the pain clinic if he needed to. Therefore, he could resume his life. The claimant indicated that the comments made at the time of the subjective examination were correct, that this was what Dr. Labelle had told him. The claimant indicated that he had started looking for a job after his meeting with Dr. Simard.
- f) The claimant explained that initially he had been diagnosed with a herniated disc. A discography was then requested in order to check whether the herniated disc was the

cause of his suffering. Following that examination the diagnosis was changed to a lumbar sprain. Class 1 (the lowest level) functional limitations were identified by Dr. Labelle. Dr. Simard told him that the limitations were not all that serious, that he could go back to work and that if the pain persisted he could go to the pain clinic. The claimant started looking for work and began working again as a butcher.

- g) The CSST determined that the claimant was fit to return to work. The CLP settlement backdated the consolidation date to 2011 so that the employer would not have to pay benefits. In November 2013, the claimant acknowledged that he was able to work despite some functional limitations. He could continue working as a butcher. The claimant found a job in February 2014.
- h) CLP settlements are made only when a court date has been scheduled. The employer also had numerous challenges in connection with this matter. The claimant abandoned a number of elements of the proceedings because he wanted to move on and turn the page. He was fit to work.
- i) Every assessment was done in a context of legal proceedings. Every doctor proceeded in accordance with his or her mandate. The situation was very serious from the beginning. The claimant then underwent some very painful examinations and was informed by a neurosurgeon that he would require surgery and would have limitations. The diagnosis was subsequently changed.
- j) The claimant did not see any other doctors after March 2013 aside from his family doctor for a regular general check-up.

PARTIES' ARGUMENTS

[8] The Appellant argued as follows:

- a) The claimant asserts that the issue is whether, as of March 17, 2013, he was capable of and available for work. There were never any visits to the pain clinic or medical follow-up confirming he was unfit for work any farther back than that agreed upon by the parties and by the member of the Bureau d'évaluation médicale (the "BEM"). The most

persuasive evidence is the fact that the claimant ultimately found a job in the same field on February 17, 2014, as the attached document attests. In fact, it took him less than a year to return to the labour market following the unfortunate legal battle between him and his former employer.

- b) The claimant had participated in the employment insurance program for a number of years and had the right to access regular employment insurance benefits as applied for. He therefore met the criteria in that he was capable of and available for work. The burden of proof is that of administrative and civil law, i.e. the preponderance of evidence. The medical documentation, i.e. the BEM's opinion, the CLP decisions and even Dr. Guimond-Simard's opinion, all indicate that the claimant was fit to work as a butcher. Despite the references to the pain he was suffering, there is nothing to prevent a person who is suffering pain from holding a job.
- c) Moreover, section 18 of the *Employment Insurance Act* confirms that a claimant is not entitled to benefits unless he can prove he is capable of and available for work and is unable to obtain suitable employment. In the circumstances, the ultimate medical evidence is that the claimant was able to work, he was clearly available, albeit with the after-effects attributed to him, and he was more than capable of finding suitable employment. In any event, we reiterate that the claimant returned to the same type of employment with a different employer, thus confirming that he was just as able to work on March 17, 2013, as he was in February 2014 when he finally found a job.
- d) The claimant is asking that the previous decision be set aside and that he be determined to be capable of working and physically capable of doing so so as of March 17, 2013. He is also asking to be paid the appropriate compensation.
- e) It has been established on a preponderance of evidence that as of March 2013 the claimant was available for work, especially in light of the fact that he started working again in the same type of employment, i.e. as a butcher.

[9] The Respondent made the following submissions:

- a) The claimant's representative asserted that he was capable of and available for work effective March 17, 2013, the day his sickness benefits ended, and that he received a maximum of 15 weeks. However, when he completed his claim for benefits on June 10, 2013, the claimant indicated that he had been unable to work until June 10, 2013.
- b) The claimant provided numerous pieces of medical evidence that contradicted one another. A few days after filing his claim, he submitted a medical report from the CSST dated January 14, 2013, and signed by Dr. Habib, that does not indicate a consolidation date. The report indicates he was suffering from a lumbar hernia, was waiting for follow-up at the pain clinic and was on a two-month leave. The date of the event is indicated as October 23, 2010.
- c) The agreement between the claimant and his employer dated November 21, 2013, indicates that the date of the employment injury was March 23, 2010, that the consolidation date was June 7, 2011, and that care and treatment were no longer necessary as of that date.
- d) The report from the Bureau d'évaluation médicale indicates that Dr. Habib determined that the injury was not consolidated as of July 19, 2012. The same report indicates that Dr. Pierrette Girard determined that the injury had to be consolidated as of January 27, 2012.
- e) Another physician, Dr. Greenfield, stated that he had to wait for the claimant to have another consultation with the neurosurgeon who had administered an examination in April 2012 before commenting on the consolidation date.
- f) On October 2, 2012, Dr. Habib, referred to earlier, noted that the consolidation date had to be set by the neurosurgeon.
- g) Dr. Hubert Labelle conducted the examination for the Bureau d'évaluation médicale. He determined that the injury should be consolidated as of December 10, 2012.

- h) The medical assessment signed by orthopedic surgeon Sébastien Guimond- Simard on February 15, 2013, further to his meeting with the claimant on February 13, 2013, refers to another consolidation date set by another physician. Dr. Guimond-Simard references the treatments and diagnoses of the different physicians the claimant had seen, including Dr. Jules Boivin, who identified a consolidation date of September 7, 2012. In that examination report the doctor writes that the claimant says he is still suffering, that his pain is still very intense and that he is unable to return to his work. The doctor recommends the claimant be assessed by a specialist at the pain clinic. A clinical picture of chronic pain very likely prevented him from working.
- i) The claimant's consolidation date differs depending on the physician consulted. The Commission cannot find that the claimant was able to work as of the week of March 17, 2013, when the most recent examination report the claimant submitted indicates that a month earlier he had said he was unable to return to work. There were no certificates confirming that the claimant was able to return to work.
- j) The agreement between the claimant and the employer stipulates that the claimant could return to work on June 7, 2011. The claimant worked until July 30, 2011, the date on which he stopped permanently because of illness. This was after the consolidation date indicated in the agreement.
- k) The claimant applied for sickness benefits effective November 18, 2012. The Commission cannot consider consolidation dates prior to the start of his sickness period, and there were no other doctor's notes indicating he was fit for work.
- l) The December 2012 report indicates that the claimant could not walk or stand for periods of more than 30 to 40 minutes. According to the most recent medical assessment report of February 2013, there had been no improvement despite all of the treatments that had been carried out. He was referred to a specialist at the pain clinic. No other specialists were consulted.
- m) In light of these medical assessment reports, the Commission cannot agree with the claimant's assertion that, effective March 17, 2013, he was fit for work and able to

perform the same type of employment as he had been doing. Given that he was unable to stand for more than 30 to 40 minutes, he would have had severe restrictions in working as a butcher as he did previously.

- n) Furthermore, the Commission cannot find that the claimant has proven he was fit for work as of March 17, 2013, when the most recent medical report dated the previous month indicates that there had been no improvement in his physical condition. The claimant was claiming sickness benefits as of the date of that medical report. If his condition required that he be on a work stoppage and no other medical report was provided to the Commission after that date, the claimant could not be considered capable of and available for work.
- o) Despite the claimant's assertion that he was capable of working and able to do the same type of work as before his work stoppage due to illness, his most recent medical reports indicate that his physical condition prevented him from doing so. He was unable to prove to the Commission that he could have returned to the labour force on March 17, 2013.

ANALYSIS

[10] The Tribunal noted at the hearing that the claimant did not have a complete grasp of French and had some difficulty expressing himself in that language. His wife was present and served as interpreter.

[11] The issue in this appeal is the date as of which the claimant could be considered available for work. The claimant in fact indicated that he was available for work and was looking for employment as a butcher as of March 17, 2013.

[12] For its part, the Commission indicates that it could not find that the claimant had proven he was capable of working as of March 17, 2013, when the most recent medical report, from the previous month, indicated that there had been no improvement in his physical condition. The claimant was claiming sickness benefits as of the date of that medical report. If his condition required that he be on a work stoppage and no other medical report was provided to the Commission after that date, the claimant could not have been considered capable of and

available for work. The Tribunal notes that on March 24, 2014, the Commission indicated in its report that the claimant's application for benefits would be reactivated effective March 17, 2013, and that he would need to provide a doctor's certificate attesting to his medical restrictions and indicating that he was able to work as of that date in order to be entitled to regular benefits (GD2-42).

[13] Subsection 18(a) of the Act indicates that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

[14] The Tribunal has considered that the burden of proof rests on the claimant. Availability is a question of fact that is based on a claimant's desire to return to the labour market as soon as he is offered suitable employment. That desire can be expressed through reasonable and ongoing efforts to find suitable employment as quickly as possible (see *Bois*, A-31-00; *Bertrand*, A-631-81; *Renaud* 2007 FCA 328).

Ability

[15] The claimant indicates that further to his assessment, Dr. Guimond-Simard told him that, despite the pain he might be feeling, there was nothing about his situation that would prevent him from going back to work and [translation] "resuming a normal life." The claimant indicated that he could also go to the pain clinic but was not prevented from returning to work. He stated that the waiting time at the pain clinic was two years and that he started working on February 17, 2014. He was looking for full-time employment as a butcher, i.e. the same type of employment he held previously. He stated that he could not go back to work for his employer because of the protracted legal battle they were engaged in.

[16] The claimant stated that before that meeting with Dr. Guimond-Simard he could not work, since the initial diagnosis was a herniated disc and that he had been seen by a neurosurgeon and was informed he might need surgery. Following some painful examinations, the diagnosis was changed to a lumbar sprain. After this change of diagnosis the claimant went to see Dr. Guimond-Simard. He indicated that the situation described to Dr. Guimond-Simard was as indicated by Dr. Labelle. Before that meeting he did not know that he would be able to

resume his normal activities and gradually go off his medication. Prior to that meeting he had been advised to limit his activities so as not to aggravate the herniated disc. The claimant indicated that he started looking for work as of March 17, 2013.

[17] The Commission notes that the claimant provided numerous pieces of medical evidence that contradicted one another:

- A few days after filing his claim, he submitted a medical report from the CSST dated January 14, 2013, and signed by Dr. Habib, that does not indicate a consolidation date. The report indicates that he was suffering from a lumbar hernia, was waiting for follow-up at the pain clinic and was on a two-month leave. The date of the event is October 23, 2010.
- The agreement between the claimant and his employer dated November 21, 2013, indicates that the date of the employment injury was March 23, 2010, that the consolidation date was June 7, 2011, and that care and treatment were no longer necessary as of that date.
- The report from the Bureau d'évaluation médicale indicates that Dr. Habib determined that the injury was not consolidated as of July 19, 2012. The same report indicates that Dr. Pierrette Girard determined that the injury had to be consolidated as of January 27, 2012.
- Another physician, Dr. Greenfield, stated that he had to wait for the claimant to have another consultation with the neurosurgeon who had administered an examination in April 2012 before commenting on the consolidation date.
- On October 2, 2012, Dr. Habib, referred to earlier, noted that the consolidation date had to be set by the neurosurgeon.
- Dr. Hubert Labelle conducted the examination for the Bureau d'évaluation médicale. He determined that the injury should be consolidated as of December 10, 2012.
- The medical assessment signed by orthopedic surgeon Sébastien Guimond- Simard on February 15, 2013, further to his meeting with the claimant on February 13, 2013, refers

to another consolidation date set by another physician. Dr. Guimond-Simard references the treatments and diagnoses of the different physicians the claimant had seen, including Dr. Jules Boivin, who identified a consolidation date of September 7, 2012. In that examination report the doctor writes that the claimant says he is still suffering, that his pain is still very intense and that he is unable to return to his work. The doctor recommends the claimant be assessed by a specialist at the pain clinic. A clinical picture of chronic pain very likely prevented him from working. The claimant's consolidation date differs depending on the physician consulted. The Commission cannot find that the claimant was able to work as of the week of March 17, 2013, when the most recent examination report the claimant submitted indicates that a month earlier he had said he was unable to return to work. There were no certificates confirming that the claimant was able to return to work.

- The agreement between the claimant and the employer stipulates that the claimant could return to work on June 7, 2011. The claimant worked until July 30, 2011, the date on which he stopped permanently because of illness. This was after the consolidation date indicated in the agreement.
- The claimant applied for sickness benefits effective November 18, 2012. The Commission cannot consider consolidation dates prior to the start of his sickness period, and there were no other doctor's notes indicating he was fit for work.
- The December 2012 report indicates that the claimant could not walk or stand for periods of more than 30 to 40 minutes. According to the most recent medical assessment report of February 2013, there had been no improvement despite all of the treatments that had been carried out. He was referred to a specialist at the pain clinic. No other specialists were consulted.
- In light of these medical assessment reports, the Commission cannot agree with the claimant's assertion that, effective March 17, 2013, he was fit for work and able to perform the same type of employment as he had been doing. Given that he is unable to stand for more than 30 to 40 minutes, he would have severe restrictions in working as a butcher as he did previously.

[18] The Commission indicates that it could not find that the claimant had proven he was capable of working as of March 17, 2013, when the most recent medical report, from the previous month, indicated that there had been no improvement in his physical condition. The claimant was claiming sickness benefits as of the date of that medical report. If his condition required that he be on a work stoppage and no other medical report was provided to the Commission after that date, the claimant could not be considered capable of and available for work.

[19] The representative noted that the medical assessments had been performed in the context of the legal battle before the Commission des lésions professionnelles. Therefore, the variations depended partly on which party had requested the medical report.

[20] She explained that the final agreement of November 21, 2013, set the consolidation date as June 7, 2011, since the claimant was fit to return to work on that date. Because the claimant was able to go back to work, he abandoned most elements of the proceedings against his employer. The representative indicated that the date was to the employer's advantage as it enabling it to reduce its CSST contributions. She noted that if the claimant had remained unable to work because of his injury he would not have abandoned any of the motions he had filed. He wanted to turn the page and had been informed by Dr. Guimond-Simard that he could return to work.

[21] The Tribunal notes that the claimant did not consult any other physicians after Dr. Guimond-Simard and was unable to provide a doctor's note indicating that he was fit to work. It finds that Dr. Guimond-Simard was clearing him to resume a normal life and to look for work as a butcher.

[22] According to the agreement made with the employer in connection with the CLP process, the consolidation date is in June 2011. Dr. Guimond-Simard's most recent medical report is dated February 15, 2013, and the claimant stated that he considered himself capable of working effective March 17, 2013. He filed a claim for employment insurance sickness benefits on June 10, 2013 (GD2-20). He then requested that his sickness benefits be converted to regular benefits on March 24, 2014.

[23] The Tribunal notes that CUB 8465 and CUB 62286 discuss a claimant's obligation to provide a doctor's note in order to indicate he is fit to return to work. CUB 8465 and CUB 62286 indicate respectively as follows:

Clearly this claimant is not pregnant and he does not claim to be unable to work.

There does not appear to be any requirement, statutory or otherwise, that has been brought to my attention or that I have been able to find, that a claimant must produce a medical certificate when the contrary is the case, that is that he is capable of work despite an affliction. (CUB8465).

I find that the Board imposed on the claimant an onus that it could not impose on him, that is to provide medical evidence that he was able to accept work. (CUB62286).

[24] The Tribunal is therefore of the opinion that the claimant is under no obligation to provide a doctor's note indicating that he capable of working. Nevertheless, in the absence of a doctor's note clearly indicating that he is capable of working, the matter of the date on which the claimant was capable of working still remains. A claimant's availability may be limited by the fact that he is unable to work, even when the claimant asserts he is available for work. Moreover, as noted earlier, the burden of proof rests on the claimant to show that he is available for work.

[25] In his assessment Dr. Guimond-Simard confirms the diagnosis of lumbar sprain with Class 1 functional limitations as established by the IRSST. The representative indicated that Class 1 is the lowest of the functional limitation classes. Dr. Guimond-Simard confirms a 2% impairment for a lumbar sprain with objectified functional sequelae. He recommends an assessment at the pain clinic because of chronic pain that does not seem to have been treated optimally. With regard to his ability to return to his work as a butcher, Dr. Guimond-Simard indicates that the claimant [Translation] "could perform his work as a butcher in light of the musculoskeletal injury of lumbar sprain on pre-existing herniated disc. However, there is a clinical picture of chronic pain and it very likely prevents him from performing such work, and once again I am therefore referring you to a specialist in this area." (GD2-88).

[26] In the Tribunal's view, a claimant with limited physical abilities must be available for work to the extent that his abilities permit (CUB4584).

[27] The functional limitations identified by Dr. Guimond-Simard may have restricted the claimant's job search but without being an obstacle to his availability. Furthermore, because these restrictions were not imposed by the claimant himself but rather by his physical abilities, the Tribunal cannot find that there were personal conditions that restricted his availability.

[28] The Tribunal has considered the fact that Dr. Guimond-Simard's assessment, i.e. the last one performed, is dated February 15, 2013. The claimant says he was available for work and was looking for a job as of March 17, 2013, on the basis of the diagnosis received from Dr. Guimond- Simard.

[29] The claimant received employment insurance sickness benefits from November 18, 2012, to March 16, 2013. On June 10, 2013, he applied for employment insurance sickness benefits (GD2-20) and said he was unable to work before that date. On July 4, 2013, the claimant contacted the Commission to request backdating to November 18, 2012. The Commission granted this request and the claimant received sickness benefits from November 18, 2012, to March 16, 2013.

[30] The Tribunal is of the opinion that Dr. Guimond-Simard's findings must also be taken as whole. The report indicates that the pain very likely prevented the claimant from returning to his position as a butcher but that he would be able to perform this type of work. Moreover, the Tribunal cannot overlook the fact that this was the last assessment done for the claimant. It was on the basis of that assessment that a settlement agreement was reached and the claimant stated that he had gradually cut back on his medication and had started looking for work. In addition, the claimant confirmed that he had been looking for work as a butcher and had contacted Costco, Inter-marché and Andalos. He finally found a job as a butcher in February 2014.

[31] On the basis of the evidence and the submissions, the Tribunal is of the opinion that the claimant was able to return to his employment to the extent that his abilities allowed as of the date of that report, i.e. February 13, 2013.

[32] Finally, the Tribunal must not only look at the claimant's ability to perform his work but must also assess his availability to do so.

Availability

[33] In *Faucher*, the Federal Court of Appeal established three factors that determine whether a claimant is available for work: the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might limit the chances of returning to work. (*Faucher* A-56-96, A-57-96).

[34] The first criterion a claimant must meet in order to demonstrate availability to work is that of demonstrating his desire to return to the labour market.

[35] The claimant stated that he had started looking for work as a butcher as of March 17, 2013.

[36] The second criterion for demonstrating availability to work is putting in the necessary effort to find suitable employment.

[37] The claimant stated that he had looked for work as a butcher and had contacted Costco, Andalos and Inter-marché. The claimant found part-time work at Le Ruisseau on February 17, 2014. He started working full time for the same employer on September 1, 2014.

[38] On the basis of the evidence and the arguments presented by the parties, the Tribunal is satisfied that the claimant demonstrated his desire to return to the labour force. In addition, the claimant made the necessary effort to find suitable employment.

[39] The third criterion is that of not limiting availability through personal conditions.

[40] The claimant received sickness benefits until March 15, 2013. He himself said he was unable to work prior to that date because of illness. The Tribunal is therefore of the opinion that the claimant could not receive regular employment insurance benefits before March 17, 2013, because he himself said he was unable to work.

[41] When his application for employment insurance benefits was filed on June 10, 2013, the claimant stated that he was unable to work until June 10, 2013, which matches the date on which the claimant completed the employment insurance application for sickness benefits. At the hearing the claimant stated that this was a mistake, given that this date corresponds to the one when he completed his employment insurance application indicating that he was still unemployed. The Tribunal is satisfied with the claimant's explanation.

[42] The Tribunal also notes that the claimant did not apply for regular employment insurance benefits until March 24, 2014. At that time he requested backdating to the end of his sickness benefits, i.e. March 17, 2013.

[43] The Tribunal notes that the claimant was in an ongoing legal battle with his employer and that it was not until November 21, 2013, that a settlement was signed and that the consolidation date was established as June 7, 2011. The representative indicated that the claimant was capable of working as of March 15, 2013, despite the fact that the agreement with the employer was signed in November. The difference between the two dates can be explained by the need to have a date in order to appear before the CLP and the fact that the date had been set as November 21, 2013.

[44] The Tribunal has considered the fact that the dispute between the claimant and his employer ended on November 21, 2013, when the settlement agreements were signed. On October 9, 2013, the employer issued an attestation stating that it could not offer suitable employment to the claimant because of his health problems (GD2-41), and a new record of employment was issued (GD2-40). The representative indicated that those documents had been issued in the context of the settlement agreement. The claimant abandoned some elements of the proceedings because he was able to return to work and wanted to turn the page.

[45] The Commission's report dated March 24, 2014, indicates that the claimant [Translation] "applied for regular benefits effective March 17, 2013. The reason for the delay in claiming regular benefits was that he had to appear in court. His counsel contacted counsel for the employer Marché Adonis so that he could return to work. It was not until January 2014 that the employer Marché Adonis finally decided not to take him back. A new record of employment was requested but the claimant did not receive it until January 2014." (GD2-42).

[46] In *Fortin*, the Court indicates as follows: “The fact that he was exercising his right to present a grievance seeking reinstatement in employment from which he was in his view unjustly dismissed did not relieve the applicant from his obligation, if he wanted to receive unemployment insurance benefits, of showing that he was seeking employment and available for work in the meantime. By the applicant’s own admission, this was clearly not established on the evidence.” (*Fortin v. Canada (Attorney General)* FCA #A-855-97).

[47] Although this case does not involve a grievance, the Tribunal is of the opinion that the claimant nonetheless has an obligation to demonstrate that he was looking for employment and was available for work while waiting for his situation to be resolved before the CLP.

[48] The claimant stated that he had started looking for work as of March 17, 2013. The Commission indicates that it would have reactivated the claim for benefits as of that date if the claimant had provided a doctor’s certificate attesting to his medical restrictions and the fact that he was able to work as of that date.

[49] As determined previously, the Tribunal is of the opinion that the claimant was capable of and available for work effective February 15, 2013, i.e. the date of Dr. Guimond-Simard’s report. Nevertheless, given that the claimant himself said he was unable to work until March 17, 2013, the Tribunal is of the opinion that his regular employment insurance benefits could not start until that date. Accordingly, on the basis of the evidence and the parties’ submissions, the Tribunal is of the opinion that the claimant was available as of March 17, 2013.

CONCLUSION

[50] Accordingly, on the basis of the evidence and the arguments submitted by the parties, the Tribunal is of the opinion that, on a balance of probabilities, the claimant was capable of and available for work as of March 17, 2013.

[51] The appeal is allowed.

Charline Bourque
Member, General Division – Employment Insurance Section