Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *R. Z. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 79

Tribunal File Number: GE-16-877

BETWEEN:

R. Z.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Martin Bugden

HEARD ON: May 17, 2016

DATE OF DECISION: June 20, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant (claimant), Mr. R. Z., attended the hearing accompanied by his representative, Mr. Jeffrey Pariag.

The Respondent (Commission) did not attend the hearing.

INTRODUCTION

[1] On June 11, 2015 the Appellant submitted a claim for Employment Insurance benefits.

[2] The Appellant was paid Employment Insurance sickness benefits.

[3] On November 23, 2015 the Canada Employment Insurance Commission (Commission) notified the Appellant that they were unable to pay him Employment Insurance regular benefits from October 26, 2015. He had informed the Commission that he had recovered, but he had not given medical evidence to confirm this. Therefore, he had not proven that he was able to work.

[4] The Appellant filed a Request for Reconsideration which was also rejected by the Commission in a letter dated February 5, 2016.

[5] The Appellant subsequently applied to the Social Security Tribunal (the Tribunal).

[6] After reviewing the evidence and submissions of the parties to the appeal, the hearing was held by Teleconference for the reasons provided in the Notice of Hearing dated March 23, 2016.

ISSUE

[7] The Appellant is appealing the Commission's decision resulting from his request for reconsideration under section 112 of the *Employment Insurance Act* (the Act) regarding a disentitlement imposed pursuant to sections 18 and 50 of the Act and section 9.001 of th *Employment Insurance Regulations* (the Regulations) because the Commission determined that he failed to prove his availability for work.

THE LAW

[8] Section 18 of the Act:

> (1) 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.

[9] Subsection 50(1) of the Act states that claimant who fails to fulfil or comply with a condition or requirement under this section is not entitled to receive benefits for as long as the condition or requirement is not fulfilled or complied with.

[10] Subsection 50(8) of the Act states that for the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment.

[11] Subsection 50(10) of the Act states that the Commission may waive or vary any of the conditions and requirements of this section or the regulations whenever in its opinion the circumstances warrant the waiver or variation for the benefit of a claimant or a class or group of claimants.

[12] Section 9.001 of the Regulations states that for the purposes of subsection 50(8) of the Act, the criteria for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts are the following:

> (a) the claimant's efforts are sustained;
>
> (b) the claimant's efforts consist of

(i) assessing employment opportunities,

(ii) preparing a resumé or cover letter,

(iii) registering for job search tools or with electronic job banks or employment agencies,

(iv) attending job search workshops or job fairs,

(v) networking,

(vi) contacting prospective employers,

(vii) submitting job applications,

(viii) attending interviews, and

(ix) dergoing evaluations of competencies; and

(c) the claimant's efforts are directed toward obtaining suitable employment.

[13] Section 9.002 of the Regulations states that for the purposes of paragraphs 18(1)(a) and 27(1)(a) to (c) and subsection 50(8) of the Act, the criteria for determining what constitutes suitable employment are the following:

(a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;

(b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs;

(c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs;

(d) the daily commuting time to or from the place of work is not greater than one hour or, if it is greater than one hour, it does not exceed the

claimant's daily commuting time to or from their place of work during the qualifying period or is not uncommon given the place where the claimant resides, and commuting time is assessed by reference to the modes of commute commonly used in the place where the claimant resides;

(e) the employment is of a type referred to in section 9.003; and

(f) the offered earnings correspond to the scale set out in section 9.004 and the claimant, by accepting the employment, will not be put in a less favourable financial situation than the less favourable of

(i) the financial situation that the claimant is in while receiving benefits, and

(ii) that which the claimant was in during their qualifying period.

[14] Section 9.003 of the Regulations:

(1) type of employment is

(a) in respect of a claimant who was paid less than 36 weeks of regular benefits in the 260 weeks before the beginning of their benefit period and who, according to their income tax returns for which notices of assessment have been sent by the Canada Revenue Agency, paid at least 30% of the maximum annual employee's premium in 7 of the 10 years before the beginning of their benefit period or, if their income tax return for the year before the beginning of their benefit period has not yet been filed or a notice of assessment for that year has not yet been sent by that Agency, in 7 of the 10 years before that year,

(i) during the first 18 weeks of the benefit period, the same occupation, and

(ii) after the 18th week of the benefit period, a similar occupation;

(b) in respect of a claimant who was paid more than 60 weeks of regular benefits in at least three benefit periods in the 260 weeks before the beginning of their benefit period,

(i) during the first six weeks of the benefit period, a similar occupation, and

(ii) after the sixth week of the benefit period, any occupation in which the claimant is qualified to work; and

(c) in respect of a claimant to whom neither paragraph (a) nor (b) applies,

(i) during the first six weeks of the benefit period, the same occupation,

(ii) after the sixth week and until the 18th week of the benefit period, a similar occupation, and

(iii) after the 18th week of the benefit period, any occupation in which the claimant is qualified to work.

(2) For the purposes of this section,

(a) "same occupation" means any occupation in which the claimant worked during their qualifying period;

(b) "similar occupation" means any occupation in which the claimant is qualified to work and which entails duties that are comparable to the ones that the claimant had during their qualifying period; and

(c) "occupation in which the claimant is qualified to work" includes an occupation in which the claimant could become qualified to work through on-the-job training.

(3) In the counting of weeks referred to in subsection (1) and section 9.004, account shall be taken only of the waiting period, of any week in respect of which regular benefits are paid to the claimant and of any week of disqualification referred to in subsection 28(1) of the Act.

EVIDENCE

[15] On June 11, 2015 the Appellant submitted an application for Employment Insurance benefits.

[16] On September 9, 2015 the Appellant stated to the Commission that he does not know the difference between regular and sickness benefits. He can work light duties. He is a driver but he cannot do any pushing or pulling so he cannot deliver boxes, for example. He was not looking for work as he was waiting for Workers' Compensation Board (WSIB) to resolve the issue with his employer because the employer does not have light duties for him. He could do small things like fork lift operator or driving without heavy lifting. His job was a delivery driver, but he could be just a regular driver.

[17] On October 9, 2015 Service Canada received a copy of a medical note. It indicated that the Appellant has medical problems that prevented him from working.

[18] On November 23, 2015 the Commission notified the Appellant that they were unable to pay him Employment Insurance benefits from October 26, 2015. He had informed the Commission that he had recovered, but he had not given medical evidence to confirm this.

Therefore, he had not proven that he was able to work.

[19] On a Request for Reconsideration, dated December 16, 2015, the Appellant's representative submitted that he disagreed with the decision identified in Section 2 because the Appellant is ready, willing and able to work on a full-time basis.

a) The Appellant did suffer a workplace injury that has left him unable to perform his old job. As a result of this injury, the Appellant has limitations/work restrictions. The Appellant was ready, willing and able work on a full-time basis by performing tasks that

are within his functional abilities. The Appellant has actively searched for employment that is within his functional abilities, and will continue to do so.

b) The Appellant's workplace injury occurred on July 7, 2014. After the injury, the Appellant performed modified duties for approximately 1 year. The Appellant started modified duties almost immediately after his injury and worked full-time hours for the entire time that he was performing such duties. The medical restrictions that applied to the Appellant had been in place since the date of his injury, July 7, 2014. The Appellant was ready, willing, and able to perform work that was within his functional abilities for his employer or a new employer. The Appellant was currently not working at Stephenson's Rental Service because the employer had indicated that modified duties were no longer available.

c) Attached was a form that was completed by the Appellant's doctor at the request of his employer. As noted on the form the Appellant was "capable of returning to work with restrictions". This form is dated October 9, 2015. None of the restrictions hinder the Appellant’s ability to work full-time. The Appellant worked full-time and performed modified duties for over one year.

In support of the submissions were copies of a Functional Abilities Form (FAF), dated October 10, 2015. This form outlines the Abilities and Restrictions that applied to the Appellant who was able to perform work that was within the abilities and restrictions noted. It was also noted that the Appellant was able to "return to work on modified work", and a recommendation was that the Appellant perform "regular full-time hours".

Other FAF forms and documents, from the previous 6 months, were included to demonstrate that the Appellant's doctors had recommended that he return to work on a full-time basis (GD3-22 to GD3-30).In addition, there were documents concerning communication regarding the Appellant and the employer and additional FAF forms (GD3-31 to GD3-41).

[20] On January 14, 2016 the employer stated to the Commission that the Appellant had been placed on an approved medical leave. He had slipped and fallen. The injury prevented him from working as a delivery driver. Around October 2015, the WSIB doctor determined the Appellant

could return to his normal duties. However, the Appellant's doctor disagreed and felt he could return to work only on modified duties. As a delivery driver the Appellant was required to lift 50 pounds. At that time, the restrictions prevented him from returning to work as a driver. The employer had no modified work for him. His medical leave was extended in the hope he would be cleared to return to work.

[21] On January 19, 2016 the Appellant's representative stated that the Appellant had injured himself. He was able to return to work on modified duties. He would do light duties, office tasks, and wash vehicles. There was no heavy lifting allowed. As a result, he was unable to return to his normal work as a delivery driver. As of June 10, 2015 the employer no longer had modified work so the Appellant applied for benefits. There was no change in his health as of that date and he could work within his restrictions but he was unable to return to his last employer since they did not have modified work for him. Since June 10, 2015 he was able to perform his modified duties.

The Appellant's representative submitted that the Appellant was still available for modified work since his last day of work and should have been paid regular benefits. He was not sure how far the Appellant could drive to work, or what type or work he could do, or what times of the day he can work (GD3-43).

[22] On February 5, 2016 the Appellant's representative stated that the Appellant can take public transportation to and from work. He can sit for up to 1 hour and then he needs to take a 10-minute break. He can drive to work and even drive for an employer. He can do some lifting, but not heavy lifting. He might not be able to do long haul driving, but if he could take breaks every hour then it might be possible. He can do some general office work, which he did at his last employer. As long as he can get up and stretch and walk around every hour. Office work can allow for the Appellant's restrictions. The Appellant did not provide his representative with a job search. The Appellant applied to Wal-Mart and talked to employers at a job fair, but he had no dates of these events or for what he applied or jobs he enquired into. In addition, the Appellant's representative requested more time to produce a detailed job search.

[23] In a letter, dated February 5, 2016 the Commission notified the Appellant that their decision dated November 23, 2015 had not changed and was being maintained.

OTHER DOCUMENTED EVIDENCE

[24] On September 9, 2015 the Commission determined that there was no work possible for the Appellant and he can be paid sickness benefits. The Appellant was advised that a medical note was required to assess that he still has the same limitations from July 7, 2015 (GD3-19).

[25] On April 15, 2016 the Tribunal received additional documents from the Appellant's representative. This included a record of job search efforts (GD5-3 to GD5-7).

[26] The Commission determined that the Appellant was an occasional claimant and the expectations to be available for work.

[27] The Appellant's representative was advised by the Commission that the Appellant was provided a reasonable period to produce the job search or contact the reconsideration agent. In addition, the Appellant was sent a written request for a telephone interview to which he did not respond (GD3-45).

SUBMISSIONS

[28] The Appellant's representative submitted that:

a) He disagrees with the Commission's decision. The Appellant is able and available for work. He submitted medical restrictions which restrict what he can do but the decision should have been made to grant him benefits.

b) In June 2014 the Appellant was injured at work. A vehicle malfunctioned and he injured his head and back. He went unconscious.

c) His current condition is that he has physical back pain all the time. His FAF lists his restrictions (GD3-29 to GD3-30). He can sit 60 to 90 minutes, then he has to stretch or move around before he can sit again for another 30 to 40 minutes. He can push and pull, lift 5 to 10 pounds from his waist, 5 to 10 kilograms from floor to waist.

d) He has applied to the WSIB but was not receiving benefits. He applied for regular Employment Insurance benefits but was refused. He was then paid Employment

Insurance sickness benefits for 15 weeks. When the sickness benefits ended he was informed he could only be paid sickness benefits. He did not receive correct information from the Commission.

e) He was looking, searching for employment, even before while he was receiving sickness benefits. He searched almost every day since September; mostly through the Internet but sometimes in newspapers and friends looking for potential openings. His friends were looking too. He mostly used the Toronto Star, Metro and Chinese newspapers at the library. He signed up for web search tools. He used Workopolis in April 2016 and can provide all recent job openings and job details.

f) He was looking not so much for other jobs but jobs for his qualifications and knowledge and not just a driving job. Most jobs he cannot do; office, sales as his qualifications and physical conditions are not met. Retail, cash handling cannot work as he cannot stand for long periods. That is also the reason he has not applied at fast-food restaurants. Office work normally uses computers and administration skills he does not have. He can use basic computer "Word" but just a letter. Some keyboarding, but has to look at the keys, and some jobs demand 40 to 50 words per minutes. He has worked in an office but only for light duties with basic filing. He can read some common English but is slow to understand as English is not his first language. When on the phone and the talking is fast he sometimes gets confused. He can use basic e-mail features. He has no experience with customer service or taking of credit card or orders.

g) He was out of Canada January 10, 2016 to February 24, 2016 and is not seeking benefits for that time. During that time he was sent a letter by the Commission which he did not receive.

h) The Commission submitted that "the claimant told him he applied for a job at Wal-Mart and talked to employers at a job fair. The claimant did not advise the Commission when he contacted the employers or what jobs he enquired into" (GD4-3). He did not attend job fairs; did not apply to Walmart. The Commission's statements are not correct.

i) The Commission submitted that “The claimant stated that he was not looking for work because he is waiting for the WSIB to resolve the issue with his employer.” (GD4-2). That statement was made but it was during the time he was receiving sickness benefits. The statement was prior to his application for regular benefits. The Commission also submitted that “The claimant is not willing or capable of accepting full-time employment because his employer no longer has modified duties for him and he is waiting for the Workers’ Compensation Board to resolve the issue with the employer” (GD4-6). That statement is not accurate. He was working at seeking work that met his qualifications. He is available and capable of work. He did not expect his reoccurring injury to change his ability to work full-time hours.

j) He refutes the statements of the Commission at the second paragraph (GD4-5). He had applied for positions not associated with his former employer. He was available for work since prior to the period he was seeking benefits.

k) He refutes the statements of the Commission, “The claimant's health and physical capability is one of the six criteria used to determine what constitutes suitable employment”, at the middle paragraph (GD4-5). His capabilities may have hindered him but they did not stop him from actively seeking employment for his qualifications.

l) The employer made statements in a letter (GD3-31). That statement of the employer must be in context. The employer is not a doctor. Whether an employee has a modified position does not explain why a position is not available to him in the labour market.

m) He came to Canada in 2001 and worked in a factory and then truck driving. He provided a list of employers where he has looked for work (GD5-3 to GD5-5). He has more; sometimes he just wrote them on a piece of paper and lost them. The list is only part of his job search. He would search the Internet for 3 hours every day. He cannot load or unload because of his lifting restrictions but he could drive a short-distance truck as he can meet his sitting restrictions.

n) He has not delivered pizza but thinks he can do that. He has experience working with deliveries. Truck driver or light deliveries are what he was looking for.

o) He applied for jobs for which he was not qualified as there may be a chance he can be trained. He is a truck driver that needs training for some of the jobs for which he applied. Employers do train new employees. The Commission's submission is that he had applied for jobs which are too physically demanding; jobs which he did not have the necessary experience (GD6-1). He is a truck driver and the employer may train him to use the mobile crane. He should be able to use a crane; he is a good truck driver. Any new employee receives training.

p) He was able to perform modified duties with his former employer. He was able to work 8 hours per day, 5 days a week; full-time. He can, and is willing, to work every day.

q) The Appellant referred to CUB 78127, A-132-12 and 2013 FCA 294. In 2013 FCA 294 the claimant was medically unable to work, looked for lighter work, was injured and told to look for lighter work and met the tests.

r) The Commission provided Canada (AG) v. Bois, 2001 FCA 175 and the Appellant has met the tests.

s) Availability is a question of fact. There are 3 factors: 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 unduly limit the chances of returning to the labour market. He demonstrates that he has met all 3.

t) He has provided a job search which should assist the Tribunal.

u) His evidence and testimony demonstrates desire to return to work and to the labour market. He is actively seeking employment.

v) He could work at pizza delivery or courier. With training he already has the core function to drive, which he still can do. Any job has a learning curve and an employer may want an experienced driver.

[29] The Respondent submitted that:

a) For the purpose of proving availability under paragraph 18(1)(a) of the Act, subsection 50(8) of the Act states that the Commission may require the claimant to prove that he is making reasonable and customary efforts to obtain suitable employment.

b) Section 9.001 of the Regulations lists specific criteria for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts. Those criteria include whether the claimant's efforts are: 1) sustained, 2) directed toward obtaining suitable employment and 3) consistent with nine specified activities that can be used to assist claimants to obtain suitable employment.

c) Availability is a question of fact, which should normally be disposed of on the basis of an assessment of the evidence. It is determined by analyzing three factors:
1. the desire to return to the labour market as soon as a suitable job is offered;

2. the expression of that desire through efforts to find a suitable job; and

3. not setting personal conditions that might unduly limit the chances of returning to the labour market.

d) The claimant had submitted his renewal for regular benefits (GD3-3). At such time, the claimant was reminded that for this type of benefits, he was required to be capable of and available for work and unable to obtain suitable employment. In addition, the claimant was informed that he needs to be actively searching for and accepting offers of suitable employment. The application included examples of job search activities (GD3-6 to GD3- 8).

e) On September 8, 2015, the Commission had contacted the claimant and he was informed of his rights and responsibilities in regards to being available for work. The claimant advised the Commission that he was not looking for work because his employer no longer had modified duties for him and he was waiting for the Workers' Compensation Board to resolve the issue with the employer (GD3-17 to GD3-18).

f) Unfortunately for the claimant, he has been unable to contact the Commission and clarify his statement of non-availability and preference to return back to his last employer (GD3- 17 to GD3-18).

g) One who admits being not available for work cannot of course be considered available. Non-availability is also obvious where the situation is such as to prevent one from accepting any work. Whether or not the admission of non-availability is attributed to ignorance of the law, it remains valid if it actually reflects the claimant's frame of mind.

h) No matter how valid the reason for being unavailable, only those rights granted by legislation may be recognized. The receipt of benefits depends on evidence that the claimant is available for work, not on the reason for being unavailable.

i) Extenuating circumstances, the claimant's good faith, financial need or sympathetic situations, or even the fact that the Commission staff did not warn the claimant in advance to expand his or her job search, cannot preclude or otherwise affect the requirement of proving availability for work, or shorten the period of disentitlement.

j) Furthermore, the claimant's health and physical capability is one of the six criteria used to determine what constitutes suitable employment. Under section 9.002 of the Regulations, if health reasons or physical capabilities place significant limitations on a claimant's ability to accept specific types of work, working conditions, hours of work or daily commuting distance, then the employment becomes unsuitable. However, when a claimant indicates health or physical capabilities as the reason for not pursuing otherwise suitable employment, it may have to be supported by medical evidence.

k) For the situation at hand, the claimant's medical information demonstrated that he can work full-time hours but his injury had restricted him to modified work (GD3-29 to GD3 30). The Commission acknowledges the fact that the claimant was unable to return to his last employer because there was no more modified work available (GD2-6). However, the claimant has been unable to provide the Commission with a detailed job search to suggest he is looking for modified work with another employer. The Commission maintains that applying for 1 job and contacting employers at a job fair, without providing dates or what he applied for (GD3-45), only demonstrated that the claimant does not have a sincere desire to return to the labour market as soon as a suitable job is offered. Moreover, the claimant lives in one of the largest labour markets in Canada (GD3-4), which suggest the claimant, given his medical restrictions, would have been able to apply to more than 1 job since October 26, 2015.

l) The Commission contends that the claimant has been unable to prove that his medical condition does not prevent him from seeking and accepting offers of suitable employment. Furthermore, the claimant has not made reasonable and customary efforts to find suitable employment because his efforts are not sustained nor are they directed toward obtaining suitable employment. The facts on file demonstrate that the claimant is still maintaining a preference to return to his last employer because they have provided him with modified duties in the past.

m) The claimant is not willing or capable of accepting full-time employment because his employer no longer has modified duties for him and he is waiting for the Workers' Compensation Board to resolve the issue with the employer (GD3-17). In addition, the claimant has been unable to demonstrate a sincere desire to return to the labour market as soon as a suitable job is offered by submitting a detailed job search to the Commission. Unfortunately, a person who places a condition on his availability such that he will only perform modified duties for his last employer has taken himself out of such a large portion of the labour market has failed to rebut the strong presumption of non- availability. Given the claimant's restriction not being sanctioned by legislation, he cannot prove his availability as is required by law.

n) Whether they are voluntary or involuntary, restrictions have the same effect in that they reduce the chances of obtaining employment. Accordingly, the Commission finds that the claimant has failed to demonstrate he was capable of and available for work while restricted to modified duties. As a result, a disentitlement is warranted in accordance with Section 18(a) of the Act from October 26, 2015, onwards.

o) The explanations provided by the claimant and his 3rd party requestor are commendable, but this does not excuse him from the Commission's legal test for availability.

ANALYSIS

[30] In the absence of a definition of the notion of "availability" in the Act, the criteria developed in the case law can be used to establish a person's availability for work as well as their entitlement to receive Employment Insurance benefits. Availability is a question of fact that requires that three general criteria established in the case law be taken into account.

[31] In Faucher (A-56-96), the Federal Court of Appeal (the Court) set out three factors to be considered in determining whether a claimant has proved his or her availability for work. In this case (A-56-96), the Court stated as follows:

> "There being no precise definition in the Act, this Court has held on many occasions that availability must be determined by analyzing three factors - 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 unduly limit the chances of returning to the labour market - and that the three factors must be considered in reaching a conclusion."

[32] In Whiffen (A-1472-92), the Court stated as follows:

> "… Availability is usually described, in the case law, either as a sincere desire to work demonstrated by attitude and conduct and accompanied by reasonable efforts to find a job, or as a willingness to reintegrate into the labour force under normal conditions without unduly limiting one's chances of obtaining employment … It is to

be noted that the notion of "suitable employment" in these provisions is defined in part with reference to the personal circumstances of the claimant and, more importantly still, that it is a notion that may vary as the period of unemployment is prolonged. … It is a well- established general rule, and one imposed by the legislation as well as the most common understanding of what a sincere desire to work may imply, that a claimant who imposes unreasonable restrictions regarding the type of work he or she is looking or the area in which he or she wishes to be employed fails to prove availability. Bearing in mind that availability is to be assessed on the basis of attitude and conduct and taking into account all circumstances, the reasonableness of a restriction placed by a claimant to his or her willingness to return to the labour market has to be assessed in like manner."

[33] The case law clearly states that availability is assessed by working day in a benefit period in which the claimant can prove that he or she was capable of and available for work on that day and unable to obtain suitable employment (Cloutier, 2005 FCA 73; Boland, 2004 FCA 251).

[34] In Bertrand (A-613-81), the Court stated as follows:

> "The question of availability is an objective one – whether a claimant is sufficiently available for suitable employment to be entitled to unemployment insurance benefits – and it cannot depend upon the particular reasons for the restrictions on availability, however these may evoke sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the relative lack of it."

[35] In Cornellisen O'Neill (A-652-93), the Court cited the Chief Umpire's statement in Godwin (CUB 13957) that:

> "... the Act is quite clear that to be eligible for benefits a claimant must establish his availability for work, and that requires a job search."

[36] In De Lamirande (2004 FCA 311), the Court stated as follows:

> "The case law holds that a claimant cannot merely wait to be called in to work but must seek employment in order to be entitled to benefits …"

[37] In its assessment of the evidence, the Tribunal considered the 3 criteria mentioned above that are used to establish a person's availability for work. These criteria are: 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 unduly limit the chances of returning to the labour market.

[38] In this case, the Appellant did not meet any of the above criteria. He can work light duties. He looked for work in positions that had driving responsibilities but for which required additional training to perform. An example of which, a crane operator, has a significant training requirement far in excess of the short-term training the Appellant submitted would be required for him to be able to perform the job functions. He was not looking for work as he was waiting for WSIB to resolve the issue with his employer because the employer did not have light duties for him. He could do small things like fork lift operator or driving without heavy lifting. His job was a delivery driver, but he could be just a regular driver. His evidence was that he was not looking for work and, as he submitted with his FAF, he had personal conditions that might unduly limit his chances of returning to the labour market.

<u>The desire to return to the labour market as soon as a suitable job is offered.</u>

[39] The Appellant failed to show his "desire to return to the labour market" as soon as a suitable job was offered. The Appellant failed to show this desire since he refused to expand his job search based on his experience as a driver. He submitted that he would expand his job search but that was not until his claim for benefits had progressed from the initial claim up to an including his appeal to the Tribunal.

[40] In its submissions, the Commission noted that the Appellant had submitted his renewal for regular benefits (GD3-3). He was reminded that for that type of benefit, he was required to be capable of and available for work and unable to obtain suitable employment. In addition, the

Appellant was informed that he needs to be actively searching for and accepting offers of suitable employment. The application included examples of job search activities.

a) On September 8, 2015, the Commission had contacted the Appellant and he was informed of his rights and responsibilities in regards to being available for work. The Appellant advised the Commission that he was not looking for work because his employer no longer had modified duties for him and he was waiting for the WSIB to resolve the issue with the employer (GD3-17 to GD3-18).

b) One who admits being not available for work cannot be considered available. Non-availability is also obvious where the situation is such as to prevent one from accepting any work. Whether or not the admission of non-availability is attributed to ignorance of the law, it remains valid if it actually reflects the Appellant's frame of mind.

c) The Appellant's health and physical capability was one of the six criteria used to determine what constitutes suitable employment. Under section 9.002 of the Regulations, if health reasons or physical capabilities place significant limitations on an Appellant's ability to accept specific types of work, working conditions, hours of work or daily commuting distance, then the employment becomes unsuitable. However, when an Appellant indicates health or physical capabilities as the reason for not pursuing otherwise suitable employment, it may have to be supported by medical evidence.

d) The Appellant s medical information demonstrated that he can work full-time hours but his injury had restricted him to modified work (GD3-29 to GD3 30). The Appellant had been unable to provide the Commission with a detailed job search to suggest he was looking for modified work with another employer.

e) The Commission asserted that applying for 1 job and contacting employers at a job fair, without providing dates or for what he applied (GD3-45), only demonstrated that the Appellant did not have a sincere desire to return to the labour market as soon as a suitable job was offered. The Appellant lived in one of the largest labour markets in Canada (GD3-4), which suggested to the Commission that the Appellant, given his

medical restrictions, would have been able to apply to more than 1 job since October 26, 2015.

f) The Commission further asserted that the Appellant had been unable to prove that his medical condition did not prevent him from seeking and accepting offers of suitable employment. He did not make reasonable and customary efforts to find suitable employment because his efforts were not sustained nor were they directed toward obtaining suitable employment. The Appellant was still maintaining a preference to return to his last employer because they had provided him with modified duties in the past.

g) The Commission further asserted that the Appellant was not willing or capable of accepting full-time employment because his employer no longer had modified duties for him and he was waiting for WSIB to resolve that issue with the employer (GD3-17). The Appellant had been unable to demonstrate a sincere desire to return to the labour market as soon as a suitable job was offered by submitting a detailed job search to the Commission. A person who places a condition on his availability, such that he will only perform modified duties for his last employer, has taken himself out of such a large portion of the labour market has failed to rebut the strong presumption of non-availability. Given the Appellant's restriction not being sanctioned by legislation; he could not prove his availability as is required by law.

[41] The evidence submitted shows that the Appellant determined on his own what he intended to accept or look for as suitable employment, even though the criteria defining the notion are clearly set out in section 9.002 of the Regulations.

[42] To determine what constitutes “suitable employment,” paragraphs 9.002(e) and 9.002(f) of the Regulations stipulate as follows:

> “… For the purposes of paragraphs 18(1)(a) and 27(1)(a) to (c) and subsection 50(8) of the Act, the criteria for determining what constitutes suitable employment are the following: … (e) the employment is of a type referred to in section 9.003; and (f) the offered earnings correspond to the scale set out in section 9.004 and the claimant, by

accepting the employment, will not be put in a less favourable financial situation than the less favourable of (i) the financial situation that the claimant is in while receiving benefits, and (ii) that which the claimant was in during their qualifying period."

[43] The Appellant submitted that he was available for work, that he had always indicated that he was available, except in the information in the statements to the Commission in the file, and that he was ready to return to work that met his abilities and restrictions. It depended on the type of employment, driving, but limited by his choices of work, and to those abilities and restrictions.

a) The Appellant asserted that the suitable job that he was looking for had to be similar to his job at Stephenson's Rental. He could do small things like fork lift operator or driving without heavy lifting. His job was a delivery driver, but he could be just a regular driver or relevant jobs that were comparable to the one that he had, but may require training by the new employer. The Appellant also specified that he had restrictions as to the tasks he can perform, and for how long of a duration, as documented in the FAF's.

b) On July 7, 2014 the Appellant suffered a workplace injury that left him unable to perform his old job. As a result of the injury, he had limitations and work restrictions. After the injury, the Appellant performed modified duties for his employer for approximately 1 year. The Appellant started modified duties almost immediately after his injury and worked full-time hours for the entire time that he was performing modified duties. A medical note indicates that the Appellant has medical problems that prevented him from working. He can work within his restrictions for his former employer, who indicated that modified duties were no longer available, or for a new employer.

c) The Appellant further asserted that he was ready, willing and able to work on a full-time basis by performing tasks that were within his functional abilities and he actively searched for such employment.

d) A medical note, dated October 9, 2015, was completed at the request of his employer. Notes on the form indicate that the Appellant was "capable of returning to work with

restrictions". None of the restrictions hindered the Appellant's ability to work full-time. A FAF, dated October 10, 2015, outlines the abilities and restrictions that apply to the Appellant who was able to perform work within those abilities and restrictions. It was also noted that the Appellant was able to "return to work on modified work" and the recommendation was that the Appellant perform "regular full-time hours". The Appellant's doctors recommended that he return to work on a full-time basis (GD3-22 to GD3-30). His condition was that he had physical back pain all the time. His FAF lists his restrictions (GD3-29 to GD3-30). He can sit 60 to 90 minutes, then he has to stretch or move around before he can sit again for another 30 to 40 minutes. He can push and pull, lift 5 to 10 pounds from his waist, 5 to 10 kilograms from floor to waist.

e) The Appellant's representative submitted that the Appellant cannot do most jobs; office and sales as his qualifications and physical conditions are not met, retail, cash handling cannot work as he cannot stand for long periods which were also the reason he had not applied at fast-food restaurants. Office work normally uses computers and administration skills that he does not have. He has worked in an office but only for light duties with basic filing. He can read some common English but is slow to understand as English is not his first language. When on the phone and the talking is fast he sometimes gets confused. He can use basic e-mail features. He has no experience with customer service or taking of credit card or orders. He can take public transportation to and from work. He can sit for up to 1 hour and then he needs to take a 10-minute-break. He can drive to work and even drive for an employer. He can do some lifting, but not heavy lifting. He might not be able to be a long haul driver, but, if he could take breaks every hour, then it might be possible. He can do general office work which he did at his last employer. As long as he can get up and stretch and walk around every hour. Office work can allow for the Appellant's restrictions.

f) The Appellant's representative further asserted that the Commission's statements were not correct that he did not attend job fairs; did not apply to Walmart. The Commission submitted that "The claimant stated that he was not looking for work because he is waiting for the WSIB to resolve the issue with his employer." (GD4-2). That statement was made but it was during the time he was receiving sickness benefits. The statement

was prior to his application for regular benefits. The Commission also submitted that "The claimant is not willing or capable of accepting full-time employment because his employer no longer has modified duties for him and he is waiting for WSIB to resolve the issue with the employer" (GD4-6). That statement is not accurate. He was working at seeking work that meets his qualifications. He was available and capable of work. He did not expect his reoccurring injury to change his ability to work full-time hours. He refutes the statements of the Commission at the second paragraph (GD4-5). He had applied for positions not associated with his former employer. He was available for work since prior to the period he was seeking benefits. He refutes the statements of the Commission, "The claimant's health and physical capability is one of the six criteria used to determine what constitutes suitable employment", at the middle paragraph (GD4-5). His capabilities may have hindered him but they did not stop him from actively seeking employment for his qualifications.

g) The Appellant's representative further asserted that the employer made statements in a letter (GD3-31). That statement of the employer must be in context. The employer is not a doctor. Whether an employee has a modified position does not explain why a position is not available to him in the labour market.

h) The Appellant had not delivered pizzas but thinks he can do that. He has experience working with deliveries. Truck driver or light deliveries are what he was looking for. He applied for jobs for which he was not qualified as there may be a chance he can be trained. He is a truck driver that needs training for some of the jobs for which he applied. Employers do train new employees. The Commission's submission is that he had applied for jobs which are too physically demanding; jobs which he did not have the necessary experience (GD6-1). He is a truck driver and the employer may train him to use the mobile crane. He should be able to use a crane; he is a good truck driver. Any new employee receives training. He could work as at pizza delivery or courier. With training, as he already has the core function to drive, which he still can do. Any job has a learning curve and an employer may want an experienced driver.

i) The Appellant' representative referred to CUB 78127, A-132-12 and 2013 FCA 294. In 2013 FCA 294 the claimant was medically unable to work, looked for lighter work, was injured and told to look for lighter work and met the tests. The Commission provided Canada (AG) v. Bois, 2001 FCA 175 and the Appellant has met the tests. Availability is a question of fact. He demonstrates that he has met all 3 tests. His evidence and testimony demonstrates desire to return to work and to the labour market. He was actively seeking employment.

j) The employer was not a doctor and their statements should be considered accordingly.

[44] The employer submitted that the Appellant was placed on an approved medical leave. He had slipped and fallen. The injury prevented him from working as a delivery driver. Around October 2015, the WSIB doctor determined the Appellant could return to his normal duties. However, the Appellant's doctor disagreed and felt he could return to work only on modified duties. As a delivery driver the Appellant was required to lift 50 pounds. At that time, the restrictions prevented him from returning to work as a driver. The employer had no modified work for him. His medical leave was extended in the hope he would be cleared to return to work.

[45] The Tribunal finds that the Appellant had to show his desire to return to the labour market as soon as a suitable job was offered without establishing his own criteria in that regard. The Tribunal reiterates that the notion of "suitable employment" is "a notion that may vary as the period of unemployment is prolonged" (Whiffen, A 1472 92).

[46] In summary, the Tribunal is of the view that as of October 26, 2015, the Appellant showed that he did not want to return to the labour market as soon as a suitable job was offered. The Appellant explanations indicate that he would prefer to seek work for his experience as a driver but not provide a bona-fide job search of work that met his abilities and restrictions, for which he acknowledged and was medically diagnosed. He did not meet the requirements of the Act or the Regulations.

The expression of that desire through efforts to find a suitable job.

[47] The Appellant also did not express his desire to return to the labour market through significant efforts to find a suitable job for each working day in his benefit period from October 26, 2015.

[48] The Appellant's representative submitted that the Appellant had conducted job searches, the Appellant indicated that he was looking for employment while he was receiving sickness benefits. He searched almost every day since September; mostly through the Internet but sometimes in newspapers and friends. He signed up for web search tools. He was looking not so much for other jobs but jobs for his qualifications and knowledge and not just a driving job.

[49] When he completed his benefit claim, the Appellant also received the following instruction:

> "… keep a detailed record as evidence that you made efforts to find a suitable job, since you could be asked to provide it at any time. The record of job searches must be kept for a period of six years."

[50] The Appellant was responsible for actively seeking a suitable job in order to be able to continue to obtain Employment Insurance benefits (Cornelissen O'Neil, A 652 93; De Lamirande, 2004 FCA 311). The evidence shows that the Appellant failed to fulfill this responsibility.

[51] The Tribunal received a record of job search efforts (GD5-3 to GD5-7). The Tribunal notes that the job searches were all dated in 2015. All but 5 of the efforts were dated in October, 2015. Only 8 of the recorded job searches were on or after October 26, 2015, the date from which the Commission indicated that they were unable to pay the Appellant regular benefits as, he had informed the Commission that he had recovered, but he had not given medical evidence and had not proven that he was able to work.

[52] The Appellant's representative asserted that the Appellant searched for jobs. The Tribunal finds that the job search was restricted to search for jobs for his qualifications and knowledge, not just a driving job and not for any job.

[53] The Tribunal finds that there was not enough evidence of a bona-fide job search. When there was evidence, it is brief and submitted after the Appellant had been requested to provide such a job search and had stated to the Commission that he was not looking for work.

Not setting “personal conditions” that might unduly limit the chances of returning to the labour market.

[54] While it may seem legitimate for the Appellant to look for a job that is similar to his job at Stephenson's Rental Services, and to not want to accept a job that was too different from his duties with that employer, he had to comply with the Act and the Regulations to show his availability for work.

[55] The Appellant, to his credit, acknowledged his medical restrictions, his inability to perform certain tasks, or groups of tasks to be a cashier or office worker, amongst others. However, his focus for employment with his driving experience clearly limited his options and was personal conditions that might unduly limit the chances of returning to the labour market. He therefore did set personal conditions that unduly limited his chances of returning to the labour market.

[56] The Tribunal finds that the Appellant’s primary desire was to remain available to return to work for his employer, for resolution to his WSIB claim and for modified work. Therefore, he unduly limited his availability for full-time work.

[57] While knowing that there were no positions available that met his medical limitations, in his specific field or that were equivalent to his job with the employer, or for which he was not qualified, such as a crane truck driver, he stated that, first, he was not looking for work and then he could work at jobs, such as pizza delivery, for which he had not even applied. The requirements that the Appellant insisted on maintaining for the type of job that he wanted to obtain limited his chances of finding a suitable job (Bertrand, A-613-81).

[58] By stating the conditions in which he would be able to accept a job, while knowing that his medical restrictions limited his ability and experience to accept such employment, he did not comply with the conditions set out in the Act and the Regulations, the Appellant therefore

established, as of October 26, 2015, personal conditions that unduly limited his chances of returning to the labour market (Faucher, A-56-96).

[59] In summary, the Tribunal finds that the Appellant's concentration of job searches was in the period of time that was mostly before the Commission refused his regular benefits from October 26, 2015. Before the appeal to the Tribunal the Appellant's representative stated to the Commission that the Appellant did not provide him with a job search. He said that he applied to Wal-Mart and talked to employers at a job fair, but he has no dates of these events or for what he applied or jobs he enquired into. The Appellant did not respond to the Commission's request for information nor attend a Commission-requested interview prior to his appeal. The Appellant continued to state on his reports that he was sick after he requested regular benefits. There was no evidence that the Appellant had given medical evidence to confirm that he had recovered. He had not proven that he was able to work.

[60] The Tribunal considered all of the submissions of the Appellant, his representative, the Commission and the employer. The Tribunal finds that the submissions of the Commission are concise and consistent. Those of the Appellant changed over the course of time as his claim progressed from his application for benefits through to his appeal. The Tribunal prefers the earlier statements of the Appellant, as his statements changed over time. His statement that he was not looking for work is more credible.

[61] The Tribunal finds that the Appellant did not meet the legal test for availability pursuant to the Act and regulations.

[62] The Tribunal finds that the Appellant's entitlement to receive Employment Insurance regular benefits, following the exhaustion of his sickness benefits, cannot be established because he failed to show his availability for work, under paragraph 18(1)(a) of the Act, from October 26, 2015.

[63] The appeal on this issue has no merit. Misinformation from the Commission

[64] The Appellant submitted that he was provided with incorrect or misinformation by Service Canada or the Commission. He was informed that when the sickness benefits ended he

could only be paid sickness benefits. He did not receive this or other correct information from the Commission.

[65] The Tribunal refers to the case law, which clearly established that if the Appellant received erroneous information from a Commission officer, he was still subject to the requirements of the Act A-373-92; A-684-85; and A-672-95.

[66] The Tribunal finds that any misinformation provided by the Commission and the interpretations which they may give of the law do not themselves have the force of law. Any commitment which the Commission or its representatives may give, whether in good or bad faith, to act in a way other than that prescribed by law is void.

[67] The Tribunal finds that any misinformation provided by the Commission is void.

CONCLUSION

[68] The Tribunal finds that the Appellant failed to prove his availability for work.

[69] The Tribunal has sympathy for the Appellant's cause. However, the decision must be based on law.

[70] The appeal is dismissed.

Martin Bugden
Member, General Division - Employment Insurance Section