

June 25, 2004

Memo To: Jill Callan, Chair

Memo From: Randy Lane, Vice Chair

Re: Referral to Chair, Policy Item #1.00(4), *RSCM II*

I am referring this file as I consider that there is a significant concern as to whether policy at item #1.00(4) of the *Rehabilitation Services and Claims Manual, Volume II*, as of February 2003, regarding recurrences and permanent partial disabilities is patently unreasonable.

Introduction

In February 2001 the worker, a former ironworker, submitted a claim for asbestos-related pleural plaques, fibrosis, and rounded atelectasis (incomplete expansion of the lung). He was born on November 12, 1930 and had retired in 1989, although information on file suggests that he was on a union disability pension from January 1987 onward. The file information does not suggest that the disability pension was for asbestos-related impairment.

By decision of the May 9, 2001 the Workers' Compensation Board (Board) awarded the worker a pension of 20% of total disability effective September 29, 2000. That effective date was chosen because while in hospital on that date for heart-related problems the worker underwent x-rays which revealed pleural plaques.

He was assessed at a March 26, 2002 follow-up. By letter of April 11, 2002 the Board advised that no change would be made in his award, but he would be reassessed in one year.

By letter of February 28, 2003 a disability awards officer noted that the worker was scheduled to be re-assessed regarding his permanent condition. The officer noted amendments to the *Workers Compensation Act (Act)* effective June 30, 2002 which indicated that compensation for permanent disability was not payable beyond the date of the worker's retirement. He indicated that the worker was considered to be retired and, as result, a formal re-assessment was not required as no additional permanent disability benefits were payable. The worker was advised that his existing benefits paid under the former provisions of the Act would continue to be paid.

By decision of October 21, 2003 a review officer of the Review Division of the Board confirmed the February 28, 2003 decision.

The worker appealed the October 21, 2003 decision to the Workers' Compensation Appeal Tribunal (WCAT). His representative provided a February 18, 2004 submission which included her argument that Board policy is not capable of being supported by the legislation.

Discussion

The February 28, 2003 decision was issued after the *Workers Compensation Amendment Act, 2002* (the Amendment Act1) came into force on June 30, 2002 (the transition date).

The key concern is the extent to which the amended Act applies to the worker's claim.

Section 35.1(8) of the Act provides that "If a worker has, on or after the transition date, a recurrence of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the recurrence based on this Act, as amended by the *Workers Compensation Amendment Act, 2002*." I consider that the phrase "an injury" would include an occupational disease.

Item #1.00(4) of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) as it read as of February 28, 2003 provides guidance as to the meaning of "recurrence of a disability":

If the injury occurred before June 30, 2002, and the disability recurs on or after June 30, 2002, the current provisions apply to the recurrence.

For the purposes of this policy, a recurrence includes any claim that is re-opened for:

- any additional period of temporary disability where no permanent disability award was previously provided in respect of the compensable injury or disease;
- any additional period of temporary disability where a permanent disability award was previously provided in respect of the compensable injury or disease; and,

- **any permanent changes in the nature and degree of a worker's permanent disability.**

The following are examples of a recurrence:

- A worker totally recovers from a temporary disability resulting in the termination of wage-loss payments. Subsequently, there is a recurrence of the disability and the claim is re-opened for compensation.
- **A worker is in receipt of a permanent disability award and the disability subsequently worsens. The claim is re-opened to provide compensation for a new period of temporary disability and/or an increase in entitlement for the permanent disability award.**

Thus, Board policy clearly provides that a change in a worker's permanent disability involves a recurrence. *Practice Directive #38A* issued by the Board reinforces that policy. It provides that "If the injury occurred before June 30, 2002, and the claim is reopened on or after June 30, 2002, due to a recurrence of disability that commenced on or after June 30, 2002, the current provisions apply." The directive notes that as per RSCM item #1.00 there are three situations in which the recurrence provisions apply to bring a claim with a date of injury prior to June 30, 2002 under the current provisions and it lists one of the situations as "Any permanent changes, on or after June 30, 2002, in the degree of a worker's permanent disability."

That definition of recurrence is relevant to the appeal before me because of the language of section 23.1 of the Act concerning the duration of permanent partial disability benefits paid under section 23:

Compensation payable under section 22 (1), 23 (1) or (3), 29 (1) or 30 (1) may be paid to a worker, only

- (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:
 - (i) the date the worker reaches 65 years of age;
 - (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and
- (b) if the worker is 63 years of age or older on the date of the injury, until the later of the following:

- (i) 2 years after the date of the injury;
- (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

The review officer considered that any assertion by the worker that his permanent disability had worsened would involve a recurrence with the result that any additional permanent disability would be evaluated under the amended Act. The review officer considered that assessment under the amended Act would result in a conclusion that the worker had no eligibility for additional benefits because the worker was retired and over age 63 at the date of injury in 2000; by the spring of 2003, the worker was outside the two year post-injury period found in paragraph 23.1(b)(i).

The review officer rejected the argument that the term “date of injury” in section 23.1 should be read as also including the date of recurrence of an injury. The worker’s representative had argued that with such an interpretation the worker would have been entitled to an increased permanent partial disability pension for two years pursuant to paragraph 23.1(2)(i). As well, the review officer rejected the argument that section 23.1 was inapplicable because it deals with compensation payable to a worker. The worker’s representative had argued that as a pensioner the worker was not a worker within the meaning of section 23.1.

Whether any permanent deterioration in the worker’s permanent disability should be assessed under the provisions of the Act as amended by the Amendment Act1 turns on whether any deterioration in the worker’s disability would be properly termed a “recurrence of a disability.” The policy at item #1.00(4) would support a conclusion that it was a recurrence.

The worker’s representative contends that a deterioration in these circumstances is not be a recurrence. Her arguments can be summarized as follows:

1. Recurrence is defined by the Merriam-Webster dictionary as “to occur again after an interval.” The worker’s disability did not recur, but rather it worsened or deteriorated, an entirely different process.

I add that the *Oxford Concise Dictionary* defines “recur” as to “present itself again; occur again, be repeated.” That dictionary defines “recurrent” as “occurring again or often or periodically.” Notably, *Dorland’s Illustrated Medical Dictionary*, 26th ed. defines “recurrence” as “the return of symptoms after a remission.”

2. The Legislature contemplated a difference between a recurrence and a deterioration, as evidenced by the different wording in paragraphs 96(2)(a) and (b)

of the Act following amendments flowing from *Workers Compensation Amendment Act (No. 2), 2002* (the Amendment Act2):

Despite subsection (1), at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,

- (a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or
- (b) there has been a recurrence of a worker's injury.

If recurrence were the same as a deterioration, worsening or change, there would have been no need to make a separate and specific reference to a significant change in a worker's medical condition in the reopening provisions. The Board's policy as it relates to the definition of recurrence makes paragraph 96(2)(a) redundant and is therefore "offensive in the face of the legislation."

3. Subsections 32(1),(2), and (3) contemplate a difference between a "recurrence" and an "increased degree of permanent disability." Since the Legislature has made clear that the two processes are not interchangeable, the Board cannot make them interchangeable by policy.

4. The policy conflicts with the presumption against retroactivity as it takes the statutory exception relating to recurrence in subsection 32(1) and expands it to include any claim in which a worker's permanent disability changes. There is nothing in the Act to suggest that substantive changes should apply to a permanent functional impairment that first occurred before June 30, 2002. While she frames her arguments in terms of retroactivity, the representative's submission seems to contend that the policy has no basis in law.

5. The policy is inconsistent with subsection 35.1(4) because the worker's permanent partial disability first occurred in September 2000 and the Act as it read before June 30, 2002 applies. That what is being dealt with is an increased permanent disability "does not take the situation outside the consideration of S.35.1(4)." The representative's argument is hard to follow as that subsection provides that where a permanent disability first occurs on or after the transition date, the Act as amended by the Amendment Act1 applies to the permanent disability. That subsection appears to be inapplicable as the worker's permanent disability first occurred before the transition date.

6. It is irrational that section 23.1 of the current Act should apply. That section presumes that compensation is payable under the provisions of the current Act whereas the worker's permanent partial disability award was calculated and paid under the provisions of the Act as it existed before June 30, 2002.

Viability of policy

Subsection 250(2) provides that WCAT must apply a policy of the board of directors of the Board that is applicable to a case.

Section 251(1) of the Act provides that WCAT may refuse to apply policy of the board of directors of the Board only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

I consider that there is a significant concern as to whether the policy at item #1.00 as it applies to changes in permanent disability after June 30, 2002 is patently unreasonable. "Recurrence of a disability" does not appear to be a broad enough phrase to encompass a significant permanent change in a worker's permanent disability that the Board had accepted as compensable prior to June 30, 2002.

I note that *Practice Directive #33B* indicates that "recurrence of disability" has three general meanings:

- may refer to the application of the transition rule in section 35.1(8);
- may refer to section 32 (which was not changed by Bills 49 or 63); or
- is treated by policy as similar in concept to one of the grounds for reopening ⁵.

[Footnote 5 indicates that Section 96(2) uses the term recurrence of injury].

I do not consider that that Practice Directive significantly buttresses the policy at item #1.00(4). In fact, one could argue that it recognizes that a "recurrence" does not include "a significant change in a worker's medical condition that the Board has previously decided was compensable" given that it notes that recurrence is similar to one of the reopening grounds; recurrence is not declared to encompass both reopening grounds.

I appreciate that the worker's representative's argument relies on the terms of the revised subsection 96(2) of the Act, a provision which was not in effect as of February 28, 2003 when the decision appealed to the Review Division was issued. The revisions took effect on March 3, 2003 when the bulk of the Amendment Act2 came into force. I do not consider that sequence of events undermines her arguments as any reassessment of the worker would have taken place after the

revisions to subsection 96(2) took effect. Thus I consider it appropriate to take into account the language of subsection 96(2) in assessing the viability of the policy at item #1.00(4).

In reviewing this matter, I note that an earlier version of item #1.00(4) was significantly different. *Resolution 2002/06/18-02* of the panel of administrators which came into force on the transition date created item #1.00(4) which did not classify a deterioration in a permanent disability as a recurrence:

4. If the injury occurred before June 30, 2002, and the disability recurs on or after June 30, 202, the current provisions apply to the recurrence.

This transitional rule only applies to a recurrence. A recurrence is to be distinguished from a deterioration. An example of a recurrence is where there has been total recovery from a disability and wage-loss payments have been terminated. Subsequently, there is a recurrence of the disability and the claim is reopened. An example of a deterioration is where a disability award has been assessed and the disability subsequently worsens.

By *Resolution 2002/10/16-08* the panel of administrators revised item #1.00(4).

The resolution noted that item #1.00 “distinguishes a recurrence of a disability from a deterioration of a permanent disability with no further explanation” and observed that “[c]larification is required with respect to whether compensation for the recurrence of a disability includes a deterioration of a permanent disability is to be determined under the correct provisions of the *Act*.” The panel of administrators resolved that “Policy item #1.00 of the RS&CM II is amended to remove the distinction between a deterioration of a permanent disability and a recurrence of a disability, and to clarify the application of section 35.1(8) of the *Act*.” The resolution brought into force language very similar (save for one word) to that found in the current item #1.03(b)(4), although it was still numbered as #1.00(4). The numbering change occurred as a result of board of directors’ *Resolution 20030617-03* which also changed the word “the” to “an” in the first line of #1.00(4). That resolution declared that the changes did not change the substance of the policy.

The above recitation of the initial policy and changes to policy illustrates that it was initially considered that a recurrence did not include a deterioration of a permanent disability. The October 2002 resolution does not reveal why the policy was changed other than to indicate that clarification was needed. While that October 2002 resolution takes issue with the earlier version of policy because the earlier policy did not provide an explanation as to why recurrence should be distinguished from a deterioration of a permanent disability, the October 2002 resolution and the

accompanying policy changes do not articulate why a deterioration should be seen as a recurrence.

I note that the Board has issued a May 21, 2004 discussion paper entitled "Clarification of the Reconsideration and Reopening Policies." The paper notes that recurrence includes a claim that is reopened for any permanent changes in the nature and degree of a worker's permanent disability. In the section entitled "Reopening Issues" the paper discusses that a recurrence of an injury might occur in the following situation:

- A worker has a compensable injury for which temporary disability benefits are paid and a permanent disability award is granted. The compensable condition has stabilized, but later occurs again without any intervening new injury. The result is that the claim may be reopened for an additional period of temporary and/or additional permanent disability compensation under the original claim.

The phrase "recurrence of an injury" is different from the phrase "recurrence of a disability" found in subsection 35.1(8). Thus, I question whether the above example from the paper supports viewing a deterioration of a permanent partial disability as a recurrence of a disability as discussed in subsection 35.1(8). Further, I question whether such an example involves a recurrence of a disability to the extent that it concerns a case where there is a deterioration of a permanent disability that is not accompanied by a further period of temporary disability. By that, I mean that one may be able to argue that there is a recurrence of a disability where a claim on which a permanent partial disability pension has been awarded is reopened for a further period of temporary disability. The temporary disability would be a recurrence of the earlier temporary disability which occurred at the outset of the claim. However, where there is an ongoing permanent partial disability and there is a deterioration of that disability in the absence of a further period of temporary disability, I do not think that the permanent disability has recurred.

In conclusion, I strongly question whether recurrence includes a permanent deterioration of a permanent disability, and I question the viability of item #1.00(4) which seeks to classify such a deterioration as a recurrence.

Randy Lane
Vice Chair