**WCAT Decision Number:** WCAT-2004-00067-RB
**WCAT Decision Date:** **January 09, 2004**
**Panel:** Lorne Newton, Vice Chair

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## Introduction

The worker appealed a July 18, 2001 decision of a Workers' Compensation Board (Board) officer to conclude her wage loss benefits following an April 22, 2001 compensable back injury. The Board officer informed the worker in the July 18, 2001 letter that as her current complaints were solely related to pain and there were no objective signs of ongoing disability, the Board was going to refer her to a pain program in Alberta. The Board officer noted the worker's diagnosed condition of mechanical back pain was considered temporary in nature and the worker would not be left with a permanent functional impairment. The Board officer noted that the worker would be able to return to her full-time work following completion of the pain program which was to conclude on August 3, 2001. The Board officer informed the worker that her wage loss and health care benefits would conclude on August 3, 2001.

## Issue(s)

At issue is whether the worker continued to be temporarily disabled from August 4, 2001 and whether she was entitled to additional wage loss and health care benefits. If the worker was no longer temporarily disabled, at issue is whether the worker had recovered from the effects of her compensable injury as fit to return to her pre-injury employment.

## Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).



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This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

An oral hearing was held on August 19, 2003. The worker was represented by her union. While the employer provided a notice of appearance, the employer subsequently informed WCAT that he would not be attending the hearing.

**Background and Evidence**

As documented on the claim file, on April 22, 2001, the worker sustained an injury to her low back while employed by a large chain grocery store. The Board accepted the worker's claim for benefits for a low back strain arising from an incident in which she caught her right foot on something sticking out from under a sink while walking backwards pulling a dolly of trays. She attempted to break her fall but was unsuccessful and fell and landed on her sacrum/low back. The worker immediately experienced pain in her low back with radiation into both legs.

The file evidence shows that prior to the April 22, 2001 injury arising out of an accident, the worker had a prior compensable low back injury.

The worker sustained an injury to her low back on June 9, 2000 while employed with the accident employer and missed approximately five months time loss from work. File evidence shows that when the worker returned to work in October 2000 following the June 9, 2000 injury she returned to light duties in October 2000 and was restricted from lifting. The worker eventually returned to her regular cake duties in the bakery and continued to see her physician.

Prior to the April 22, 2001 injury, the worker was apparently assessed by Dr. D in March 2001. The file record shows the worker continued to complain of symptoms of pain in her back when assessed by Dr. D on March 23, 2001. A Board officer carried out a summary of the worker's claim for the June 9, 2000 injury as set out in an electronic file entry. The Board officer noted that Dr. D in the March 23, 2001 report indicated the worker continued to have pain with sitting and was also a bit depressed at times because of her slow course of recovery. The Board officer also noted Dr. D recorded that the worker was managing but barely coping.

The worker at the hearing confirmed that when she returned to work on light duties after the June 9, 2000 injury, she was not fit to resume her regular employment. The worker said she returned to work too early and she needed assistance to carry out various tasks in her job such as moving things around in the freezer and carrying heavy items. She could not carry buckets of custard and other heavy items from the freezer nor could she lift a mixing bowl. She said prior to the April 22, 2001 injury, she never

returned to her pre-injury status even though she returned to work. The worker said that on a scale of one to ten, her pain level was five out of ten when she returned to work on October 23, 2000. Following her return to light duties her pain continued to increase with activities. By December 2001 her pain was at a level of six out of ten.

The worker said when she reinjured her low back on April 22, 2001 her pain level was off the chart at ten out of ten. When the Board terminated her wage loss benefits in August 2001, she learned how to cope with her pain. The worker said her condition has never really settled down and has not resolved.

The worker said the evaluators at the pain clinic did not feel the worker could return to her regular duties even though the Board determined she would be able to return to work after completion of the pain program. I find this evidence of the worker to be consistent with the reports from the pain program.

The worker said that after she completed the pain program following the April 22, 2001 injury, her employer was wonderful at accommodating her back to her job. She did everything she could to carry out her modified job but was unable to continue. The worker continues to have low back problems and eventually secured employment at a Gas Bar adjoined to the grocery store. She is still employed with the accident employer in the Gas Bar and has increased her hours to approximately 30 hours per week. Her earnings in the Gas Bar are much lower than when she worked in the bakery as she could not carry her seniority into this job.

The worker said she currently does not take medications and she does have a TENS machine which she uses. Since her injuries of June 2000 and April 2001 she has had to discontinue all of her outside activities. She gets help with daily activities such as laundry and vacuuming.

The worker submitted while she feels she returned to work too early following the June 2000 injury and she was unable to carry out all aspects of her job, her employer was very accommodating following the second return to work program after the April 2001 injury.

The worker submitted not only did the employer make accommodations for her, they gave her an opportunity to work into her job with significant modifications which she could not manage because of her pain. The worker submitted she was able to work in the Gas Bar only because there are no physical work activities.

The worker's representative at the hearing asked that the panel look at the written submissions previous submitted by the worker's union.



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With regards to the medical assessment of the worker, Dr. R, the worker's attending physician recorded in medical reports from the date of injury through to June 2001 that the worker continued to have severe low back pain diagnosed as mechanical low back pain. The pain clinic in Alberta that assessed the worker in June 2001 and treated the worker until August 3, 2001 determined on discharge (discharge report of August 3, 2001) that the worker had completed the second module of the chronic pain program and had reduced her level of depression and anxiety. The evaluators opined that the worker had made exceptional progress in managing her moods and disability despite her continuing pain and they recommended the worker continue to work at managing her pain. The evaluators visited the worker's worksite at the accident employer and concluded the worker was not yet able to demonstrate the activities required for that job; they noted the worker was planning to return to work at the accident employer in their transitional work program. While the worker's range of motion of the lumbar spine had improved somewhat, her flexion and extension were still limited; she showed that all movements were much less guarded. The evaluators encouraged her to continue with a home exercise program in the long term and recommended she be followed up in mid-September 2001, which she was.

The evaluation team recorded in a follow-up report dated September 28, 2001 that the worker had done a good job of maintaining the functional gains she had made in the pain program. The worker told the pain program team that she was pleased to be back at her regular place of employment on modified duties through the employer's transitional work program. The evaluation team noted there had been little significant change in the worker's pain level since her discharge, however, her physical ability and confidence had continued to improve markedly. The worker was no longer taking medication except for the occasional Extra Strength Tylenol. This information is consistent with the worker's testimony at the hearing.

Following the September 2001 meeting with the evaluation team at the pain program, the worker continued to see her own doctor. Her physician continued to report that the worker continued with mechanical back ache and depression and the worker's pain was getting worse with activity.

A Board medical advisor provided a medical opinion as set out in the electronic file entry dated December 12, 2001. The Board medical advisor noted that none of the physicians had provided documented objective evidence to suggest any changes had occurred in the worker's condition and the worker's attending physician was only recommending light duties based on the worker's subjective complaints of increasing pain and depression. The Board medical advisor said that until there was a confirmed diagnosis that takes into account the worker's complaints of numbness involving the lower medial leg, he was unable to answer whether the worker has been left with a permanent functional impairment. The attending physician noted there was file evidence with a history of psychosocial stressors that have been present for some time that contributed to the worker's anxiety and depressive symptoms.

**Reasons and Findings**

Section 29(1) of the *Workers Compensation Act* (Act) sets out that wage loss benefits are payable so long as there is evidence of temporary total disability. Section 30(1) of the Act sets out that wage loss benefits are payable where there is evidence of a temporary partial disability and are payable only so long as the temporary partial disability lasts.

The worker, who has had compensable injuries in June 2000 and April 2001 has continued to complain of low back pain with radiation into her legs following her discharge from the pain clinic in Alberta. When the Board officer informed the worker that wage loss benefits would be concluded on August 3, 2001, this decision was set out in the July 18, 2001 letter on the basis that the worker would recover in the future following attendance at the pain program. The Board officer made a decision on the speculation that the worker's subjective complaints of pain would resolve with the pain program. I find the preponderance of evidence does not support such a conclusion.

Following the worker's discharge from the pain clinic in Alberta, the worker returned to modified duties. At the hearing the worker said she was only able to return to her accident employer in the bakery as the employer was very accommodating and provided modified duties through the transitional work program. She said that as they were unable to continue to provide her with such accommodation in the long term, she had no choice but to discontinue her employment in the bakery and with the assistance of the employer, secure employment in the Gas Bar. The worker said she loved her job in the bakery and did not want to leave that job but had to do so only because of her persistent pain that increased with activities.

The worker presented as a credible witness. While the file record shows she has suffered from mechanical low back pain with depression, the pain clinic evaluation team concluded upon discharge that the worker was not fit to resume her regular employment. The evaluation team applauded the worker for her motivation and participation in the program and concluded she had made significant gains in managing her pain. However, the evaluation team also noted the worker was only fit to resume modified duties. I find this opinion is not consistent with the Board officer's speculative decision to conclude benefits.

The worker provided evidence that she did return to her pre-injury employment in mid-August 2001 on modified duties. I am unclear as to whether the worker did receive her regular duties. When noting the medical reports from the worker's doctor combined with the discharge report from the pain program, I find the worker continued to be at least temporarily partially disabled from August 4, 2001 until the date she returned to her modified duties. The worker is entitled to full wage loss benefits from August 4, 2001 until the date she returned to her accident employer on modified duties through

the transitional work program. If the employer did not pay the worker the equivalent of her wage rate while back at work on modified duties, the Board must pay the worker the difference in accordance with section 30(1) of the Act until her condition had plateaued.

The panel notes that the file record including the follow-up reports from the pain program shows the worker continued to have a significant level of mechanical low back pain although she had developed an ability to manage her pain well with the techniques taught at the clinic. The worker at the hearing said that her condition is pretty much the same as it was when she was discharged from the pain clinic although it does worsen with activity. The panel recommends that the Board upon the determination of the worker's plateau status, refer the file to the Disability Awards Department to determine whether the worker has been left with a permanent functional impairment.

**Conclusion**

The panel allows the worker's appeal and varies the Board officer's decision. I refer the file back to the Board to determine the quantum of temporary wage loss benefits followed by consideration for a referral to the Disability Awards Department.

The worker is entitled to any costs incurred to attend the hearing.

Lorne Newton
Vice Chair

LN/rbe/hba



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