WCAT Decision Number: WCAT-2004-00080
WCAT Decision Date: **January 12, 2004**
Panel: Jane MacFadgen, Vice Chair

Introduction

The Workers' Compensation Board (Board) accepted the worker's claim for a November 2002 left shoulder injury in the course of her employment as a bakery production worker. The employer appealed the March 18, 2003 decision to pay wage loss benefits after January 30, 2003, when the orthopaedic specialist cleared the worker for light duties. The August 22, 2003 decision of the Board's Review Division confirmed the decision to pay wage loss benefits from January 31 – February 17, 2003.

The employer has appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). It did not request an oral hearing, and I am satisfied that one is not required to consider fully the issue under appeal. The worker was invited to participate in the appeal, but has not done so.

Issue(s)

Whether the worker was entitled to wage loss benefits between January 31 – February 17, 2003 and, if not, whether an overpayment of benefits should be declared.

Jurisdiction

This appeal is brought under section 239(1) of the *Workers Compensation Act* (Act), which permits appeals from Review Division findings to WCAT. Section 250 of the Act provides that WCAT must make its decision based on the merits and justice of the case but, in so doing, must apply relevant policies of the board of directors of the Board. Section 254 gives WCAT exclusive jurisdiction to inquire into and determine all matters of fact and law arising or required to be determined in an appeal before it. This is therefore a rehearing by WCAT.

Background and Evidence

The worker is 48 years old and right hand dominant. She sustained a left shoulder injury in the course of her employment as a bakery production worker in November 2002. She first reported this injury to the employer on December 10, 2002.

The Board's February 19, 2003 letter accepted the claim for a left shoulder strain and advised the worker that she would receive wage loss benefits for the period January 11 – February 17, 2003.

The employer protested the payment of wage loss benefits beyond January 30, 2003, when orthopaedic specialist Dr. McKenzie diagnosed a rotator tendonopathy for which he scheduled a shoulder injection the next week. Dr. McKenzie wrote that she could continue on at light duties in the meantime, with the restriction that all work should be under shoulder height, with minimal lifting.

The worker did not return to light duties but saw Dr. Januszewska, her family doctor, the same day. There is no report on file for this visit, but the worker provided a January 30, 2003 note from Dr. Januszewska stating that she was unable to return to work until February 10 due to her left shoulder injury.

The employer submitted that the worker was not entitled to wage loss benefits beyond January 30, 2003 when the orthopaedic specialist recommended that she continue with light duties. The employer wrote that it had a Board recognized light duty return to work program in place which met the requirements of *Rehabilitation Services and Claims Manual, Volume 2* (RSCM) policy #34.11. In light of the obvious discrepancy in the medical opinions concerning the worker's fitness to perform light duties, the employer asked the Board to determine her current medical status with respect to performing light work, and requested that an overpayment be declared on this claim.

A file memo notes that the worker had a cortisone injection in her left shoulder on February 12, 2003, and said she could not go to work because of the pain and side effects (dizziness, nausea) from the injection. Although the employer had offered her modified duties (as confirmed in a February 7, 2003 telephone message from the employer), the worker told the Board officer that she could not even drive.

The file records the worker returned to modified duties on February 18, 2003, although she stopped work again shortly thereafter. The case manager asked a Board medical advisor if the period of time loss between January 11 – February 17, 2003 was reasonable.

Dr. Newman's March 18, 2003 memo noted there was some discrepancy in the physicians' opinions on file. Dr. Januszewska's January 22, 2003 report indicated the worker would be totally disabled for seven to 13 days. The orthopaedic surgeon's January 30 report indicated she was capable of modified work, but had to come back for an injection. Dr. Newman noted it was not clear whether this injection occurred on February 4 or February 12, but he wrote that it was not unreasonable for there to be a period of a few days of total disability after an injection of this type. She claimed to have had some complications from her injection which were not documented on the file.

Dr. Newman wrote that the physiotherapy treatment plan also reported an increase in symptoms after January 11 and did not recommend that she begin a graduated return to work until February 18, 2003. He concluded it was reasonable that the worker was probably temporarily totally disabled for the period January 11 – February 17, 2003.

Based on Dr. Newman's opinion, the case manager issued the March 18, 2003 decision under appeal advising the employer that the worker was considered temporarily totally disabled between January 11 – February 17, 2003.

The employer continued to request the Board's assistance in returning the worker to work, enclosing a list of modified duties which were typically available. The employer indicated that it had provided this information to the worker's physician at the time of her first medical assessment in December 2002.

The employer requested a review of the March 18, 2003 decision by the Review Division, arguing that the worker was fit for modified duties from January 30, when she was assessed by the orthopaedic specialist, until her injection on February 12, 2003. The employer submitted that the expert opinion of the orthopaedic specialist superseded that of the general practitioner and physiotherapist and thus the worker was not entitled to wage loss benefits during this period, in accordance with RSCM policy #34.11. It requested that an overpayment be declared under policy #48.41.

The worker submitted a copy of the January 30, 2003 note signed by her doctor and wrote that she did not go back to work because her doctor did not want her to, and she was only following her doctor's orders.

The August 22, 2003 Review Division decision confirmed the Board's decision to pay wage loss benefits for the period in question. The review officer noted there was a difference of medical opinion as to whether the worker could return to light duties on January 31, 2003. On January 22, 2003 the worker's doctor reported that she was disabled for another one to two weeks, and the physiotherapist supported ongoing disability and suggested a graduated return to work beginning on February 18, 2003. Dr. McKenzie did not dispute that the worker was partially disabled on January 30, 2003 but suggested that she could continue on at light duties with noted restrictions. It appeared that Dr. McKenzie thought she was working light duties at the time, and should continue what she was doing. The review officer did not consider this to be a reasoned analysis as to whether she should return to work for four days before her injection.

The review officer decided that the worker had not delayed inordinately in getting the injection from her own doctor on February 12, and that this was reasonable. The review officer accepted Dr. Newman's opinion that a period of temporary total disability from January 11 - February 17, 2003 was reasonable. As the review officer upheld the payment of wage loss benefits, she did not need to address the overpayment issue.

The employer has appealed the Review Division decision. Its submission essentially reiterated its prior arguments to the Review Division. The employer submitted that the

review officer misinterpreted Dr. McKenzie's report and that his report indicated the worker was fit to start performing modified duties as offered by the employer for the period January 31 to February 11, 2003.

Reasons and Findings

RSCM policy #34.11 outlines the Board's published policy and criteria with respect to selective or light employment as a temporary work alternative to promote a worker's gradual restoration to her pre-injury level of employment. The work must be safe for the injured worker to perform. The attending physician must be apprised of the nature of the work and conclude that it will neither harm the worker nor slow recovery.

If the attending physician is unable or unwilling to provide the required advice, a Board medical advisor must make the necessary determination. The Board will intervene to determine if a particular offer of light employment is suitable if the worker and employer disagree over the terms of the return to work or the Board adjudicator considers that further inquiry is required. The Board's evaluation will include a review of the physical requirements and detailed medical information outlining the worker's medical requirements and physical restrictions. If the Board decides that the worker's refusal of light duties is unreasonable, benefit entitlement may be determined under section 30 of the Act.

In this case there is an obvious conflict between the assessing health care professionals with respect to the worker's fitness to perform modified duties over the period in question. Given this conflict, the Board officer appropriately sought the opinion of a Board medical advisor to determine if the worker's refusal of the light duties offered by the employer was reasonable in the circumstances. The Board medical advisor concluded that, in the circumstances, it was reasonable to consider the worker temporarily totally disabled for the period in question.

I recognize that the worker's injury was to her non-dominant shoulder, and that the orthopaedic specialist's opinion was that she was fit for light duties with restrictions regarding lifting and below shoulder height duties. I have, however, taken into account the fact that the worker had already been performing modified light duties for a period of time prior to January 10, 2003 and that her doctor advised her to stop working altogether, presumably because her injury was not resolving despite the performance of the modified duties offered by the employer. It appears that the opinion of the attending physician was shared by the treating physiotherapist, and that the Board medical advisor concurred with their opinion.

Considering the various medical opinions with respect to the worker's fitness to perform modified duties during this time frame, on balance I conclude that the Board

appropriately paid the worker temporary total disability benefits for the period in question. Given this finding, the issue of an overpayment is moot.

Conclusion

I confirm the August 22, 2003 decision of the Review Division. I deny the employer's appeal.

Jane MacFadgen
Vice Chair

JM/rbe/cda

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