WCAT Decision Number: WCAT-2004-00083-RB
WCAT Decision Date: **January 12, 2004**
Panel: Nora Jackson, Vice Chair

Introduction

In a decision letter dated June 13, 2002, a Workers' Compensation Board (Board) case manager advised the worker that in implementation of the Workers' Compensation Review Board (Review Board)'s decision, her claim had been accepted for a temporary aggravation of a pre-existing right arm condition. Wage loss benefits would be paid from August 9, 2000 to October 17, 2000 inclusive, at a wage rate based on the earnings information provided by the worker. It was considered that the condition accepted as compensable had resolved as of October 17, 2000, and that her injury had not resulted in any permanent impairment. The worker appeals that decision (Appeal B).

Issue(s)

Was the worker still temporarily disabled as a result of her compensable injury after October 17, 2000?

Was the wage rate on which the worker's entitlement was based correctly determined?

Did the worker suffer a permanent impairment as a result of her compensable injury?

Jurisdiction

This appeal was filed with the Review Board. Pursuant to Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, the former Review Board and Appeal Division have been replaced by the Workers' Compensation Appeal Tribunal (WCAT) effective March 3, 2003. Section 38 of the legislation provides that all Review Board appeals are to be transferred to WCAT to be completed as WCAT appeals, unless a panel of the Review Board had completed an oral hearing, or unless written submissions were completed and a panel of the Review Board had commenced deliberations, before March 3, 2003.

As this appeal was not considered by a Review Board panel by March 3, 2003, it was transferred to WCAT and has been considered as a WCAT appeal except that no statutory time frame applies to the making of this decision. One effect of this change is that WCAT must apply policies set by the board of directors and the former governors of the Board.

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Evidence

I have reviewed the evidence in the claim file, any submissions made by the worker and the accident employer in support of their respective positions, the *Workers Compensation Act* (Act) in effect at the time of the events here in question, and applicable Board policy as set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM). Interested parties have received full disclosure of the claim file, and the medical and claim history will not be repeated in detail here except as relevant to the current appeal.

The worker was employed by the employer as a card dealer at the casino. In 2000, the worker was 47 years old; she began working for the employer in about 1990 on a part-time basis. The worker also worked as a home care worker on a full-time basis, doing driving, light housekeeping and personal care for her clients. The worker had a number of claims relating to shoulder and neck pain over the years; each involved negligible trauma with trapezius, thoracic, right shoulder and scapular symptoms.

The worker reported that she was injured on August 8, 2000, when she reached out with her right arm in the course of her work as a dealer at the black jack table and felt a pull. She reported her pain to her employer, who put her on a game that required less arm movement. She went to the emergency ward about two and a half hours later complaining of right shoulder pain.

The worker submitted an application for compensation to the Board; she was of the opinion that her right arm and shoulder pain were caused by her work activities on August 8, 2000. The worker saw Dr. Fike, on August 9, 2000; he diagnosed upper right arm muscle strain, and indicated that the worker was disabled from working. He thought that the worker's symptoms were the result of working at a larger table than usual. In investigating the worker's claim, the case manager contacted the employer who advised that all the black jack tables were the same size, with the squares located about 16 to 18 inches from the worker's body.

The worker advised the entitlement officer that she had previous problems in her right shoulder and neck, but was of the opinion that the then-current symptoms were the results of her work activities on August 8, 2000. However, in a decision letter dated September 13, 2000 the worker's claim was denied; it was the opinion of the entitlement officer that there was insufficient evidence to support the proposition that the worker's right upper arm muscle pain arose out of and in the course of her employment.

The worker did not return to her work as a dealer for about two months, and there were no medical reports submitted to the Board indicating ongoing symptoms. She continued working at her other job as a home support worker. On October 17, 2000, she returned to work as a dealer. She worked for an hour and a half before her symptoms recurred. A medical report from the worker's attending physician dated October 18, 2000 indicated that the worker felt perfectly well prior to her shift on the previous day. Dr. Ritenburg recommended that the worker stop working at the casino, as that work seemed to bring on

her right shoulder symptoms. An x-ray of the worker's right shoulder on October 18, 2000 showed no abnormality. The x-ray of her cervical spine showed mild degenerating disc disease and uncovertebral osteoarthritis at C5/6.

The worker stopped working at the casino, the symptoms, which had recurred during her October 18, 2000 shift, resolved, and the worker did not return to that work. She continued her daytime work as a home support worker. The worker had a recurrence of her symptoms in August 2001 while making a bed in the course of her employment. At that time she submitted another claim to the Board. That claim was denied, but the worker's appeal to the Review Board was again successful. At the oral hearing on that matter, the worker advised the Review Board panel that she had basically been asymptomatic subsequent to her recovery in October 2000. No evidence was presented in the hearing that the worker had suffered a recurrence of her previous injury. The Review Board panel allowed her appeal on the basis that the worker had suffered a new injury arising out of and in the course of her employment.

The worker also appealed the Board's September 13, 2000 decision on the claim here at issue to the Review Board, and in its findings dated April 8, 2002, a panel of the Review Board allowed the worker's appeal. The panel found that the worker's claim should be accepted as an aggravation of a pre-existing condition. The worker's condition appeared to the panel to be permanent, in that the worker was now unable to carry out the specific motion of pushing cards required for the job of dealing without a return of her symptoms.

However, the worker's claim file was returned to the Board to determine whether the aggravation was permanent, and if so, on what date the worker's condition had plateaued. The Board was directed to pay the worker the compensation due to her in light of the Review Board's finding.

The worker's claim was discussed at a team meeting on June 12, 2002. Participants were a client services manager, a Board medical advisor and a vocational rehabilitation consultant, as well as a Board case manager. The meeting is documented in a memo to the claim log of the same date. Dr. Dundas was not of the opinion that a return to her pre-injury occupation as a dealer would put the worker at a significantly increased risk of developing a permanent functional impairment as a result of the accepted injury. The team thought that the worker's condition had plateaued in October 2000.

In a clinical care plan filed on June 12, 2002, Dr. Dundas confirmed his opinion that the worker's condition had reached the maximal medical recovery in October 2000, when she had tried to return to work but her symptoms had recurred. It was his understanding that the worker would likely experience ongoing exacerbations of pain on performing the job of dealer. He noted that the worker's pre-existing condition was recurring regional myofascial pain, probably secondary to cervical spondylosis. He thought that it was less than 50 percent probable that the worker would have any permanent impairment.

In a decision letter dated June 13, 2002, a Board case manager advised the worker that it was the opinion of the Board that the aggravation of the worker's pre-existing condition had resolved by October 17, 2000, when she returned to work. The case manager thought that the aggravation had been temporary, and that there was no medical evidence of a permanent aggravation. The case manager said there were no objective findings which suggested ongoing or permanent disability as a result of the temporary aggravation now accepted as compensable under her claim.

The case manager thought that the worker's decision to stop working at the casino was a preventative one, because the motions required by her job as a dealer brought her underlying condition to her attention. The case manager advised the worker that wage loss benefits would be paid from August 9, 2000 to October 17, 2000 inclusive, at a wage rate based on the earnings information provided by the worker, including tips as had been reported to Revenue Canada. No further benefits were being considered.

In support of her appeal of the June 13, 2002 decision, the worker has submitted a letter dated July 24, 2002 from Dr. H. Ritenburg, her attending physician. Dr. Ritenburg confirmed that the worker's right shoulder problems had resolved, as she was not reaching or stretching with that arm. He noted that the worker did not have a pre-existing condition when that injury first occurred in 1994 (it is not clear to what injury the doctor is referring).

Dr. Ritenburg said that although the worker might have had a car accident causing neck and back pain, she had not been treated in his office for that condition at least since 1996. With regard to whether the worker's right arm condition, which he does not name, is permanent, he noted that on examination on July 24, 2002, it was apparent that the worker had limitation of forward stretching because of pain. It was therefore probable that if she continued to do this activity (presumably, Dr. Ritenburg means reaching or stretching) it would cause more pain and the possibility of re-injury.

The employer did not participate in the worker's appeal, although given the opportunity to do so.

Reasons and Findings

Was the worker still temporarily disabled as a result of her compensable injury after October 17, 2000?

Payment for temporary total disability is provided for in section 29 of the Act. The Board's policy regarding temporary total disability is set out in item #34.50 of the RSCM. Benefits payable under section 29(1) of the Act will be terminated when the worker's compensable impairment ceases to be a temporary total disability. That is, if the worker's impairment becomes partial, disappears entirely, or stabilizes, no further temporary wage loss benefits are payable under section 29(1).

Board policy, as set out in item #34.51 of the RSCM provides that, if a worker's physical impairment has disappeared or stabilized, wage loss benefits must be terminated even though the worker, to prevent further occurrences of her or her condition, remains off work. Compensation is not payable for preventative measures.

On this matter, I deny the worker's appeal. Dr. Ritenburg's October 18, 2000 medical report indicates that the worker was "perfectly fine" prior to her return to work the previous day. He advised that the worker stop working as a dealer at the casino, because her doing so caused a recurrence of her symptoms. As noted above, Board policy, which I am bound to uphold, does not allow payment of compensation for preventative measures. The worker's appeal is denied.

Was the wage rate on which the worker's entitlement correctly determined?

When wage loss is first calculated after a compensable injury, the wage rate used is based on the earnings of the worker at the time of the injury. After eight weeks of wage loss benefits have been paid, a worker's wage rate is automatically reviewed to ensure that the wage rate is reflective of the worker's long-term earnings pattern.

The worker did not dispute the wage rate used to determine her entitlement on this claim, which was based on information from the worker herself and included tips reported to Revenue Canada. Having reviewed the material in the claim file, I find no obvious error in the Board's calculation of the worker's wage rate, and confirm it.

Did the worker suffer a permanent impairment as a result of her compensable injury?

The Board's decision making with regard to pensions is governed by policy set out in item #38.10 of the RSCM. The disability awards adjudicator is responsible for making the decision as to the degree of a worker's disability, and whether a pension should be awarded.

Board policy, as set out in item #96.20 of the RSCM, provides that a file must be sent to the Disability Awards Department for further evaluation if there is any indication that there might be a permanent disability or potential permanent disability.

On this matter, I deny the worker's appeal. What was accepted as compensable under this claim was an aggravation of the worker's underlying condition. She has degenerating disc disease at the C5/6 level of her neck, and osteoarthritis. The worker has had numerous prior injuries to her right neck, thoracic area and upper arm, including several automobile accidents as well as incidents at work. It has been the worker's own evidence, at two hearings before the Review Board, that these incidents were discreet, and that, over time they resolved, as did the incident currently under consideration.

The worker was found to be “perfectly fine” when she saw her doctor in October 2000. Although a brief period of working brought about a recurrence of her symptoms, they too resolved. In short, the worker's remaining symptoms, as described by Dr. Ritenburg in his medical-legal opinion, would appear to be the result of the underlying condition and not the minor trauma which caused a temporary aggravation of that underlying condition.

Conclusion

With regard to the issue of whether the worker continued to be disabled as a result of her compensable injury after October 17, 2000, I deny the worker's appeal. With regard to the wage rate used to determine the worker's entitlement, I deny the worker's appeal. With regard to the issue of whether the worker suffered a permanent impairment as a result of her compensable condition, I deny the worker's appeal. The Board's June 13, 2002 decision is confirmed. No expenses are awarded.

Nora Jackson
Vice Chair

NJ/jkw

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