WCAT Decision Number: WCAT-2004-00122-RB
WCAT Decision Date: **January 13, 2004**
Panel: Kathryn P. Wellington, Vice Chair

Introduction

The worker disputes two decisions made about his September 16, 1995 psychological claim by officers of the Workers' Compensation Board (Board).

In a June 20, 1997 letter a claims adjudicator outlined the details of the wage loss benefits to which the worker was entitled. The Board paid wage loss benefits for the period October 2, 1996 to January 30, 1997. The Board also reimbursed the employer for the cost of 50 percent of the worker's salary up to and including June 5, 1997. The claims adjudicator advised the worker that his claim would be referred to the Board's Disability Awards Department (DAD), to determine whether he was entitled to any benefits as a result of permanent restrictions to his work as a firefighter. While the claims adjudicator did not specifically say so, the decision letter implied that the worker's condition no longer was temporary in nature.

In a letter dated March 29, 2000, a claims adjudicator, Disability Awards Department (CADA), advised the worker that, while his subjective symptoms were recognised, the CADA concluded the worker did not have a significant impairment of function that in the long term would affect his earning capacity. Accordingly, the CADA advised the worker he was not entitled to receive a permanent partial disability award.

The worker disagreed with these decisions and initiated two appeals.

Issue(s)

Is the worker entitled to temporary wage loss benefits after June 5, 1997; and,
Is the worker entitled to a permanent partial disability award?

Jurisdiction

These appeals were filed with the Review Board. On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As these appeals had not been considered by a Review Board panel before that date, they have been decided as WCAT appeals. (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 WCB's board of directors

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).

These are appeals by way of rehearing, rather than hearings *de novo* or appeals on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decisions for the decisions under appeal.

Relevant Background Information and Evidence

The worker is 52 years old. When he developed his disabling condition the worker was employed as a firefighter. In January 1996 he applied for compensation benefits for psychological symptoms he had developed the previous year. The worker identified specific events on the job that led to the onset of his symptoms. Initially, he did not seek medical attention. When the worker eventually attended a doctor in December 1995, he presented with anxiety, somatic complaints, claustrophobia, symptoms of depression and various fears. The attending physician observed blunt affect, poor eye contact and blunted responses; and he diagnosed work-related anxiety phobias, and queried depression. The worker's fearful recollections dominated his thinking to the point where his physician concluded that the worker was not safe to perform his job duties. He referred the worker to a registered psychologist, Dr. JLK.

In a January 31, 1996 report, Dr. JLK advised the Board that the worker's problems were the result of an accumulation of job stressors which persisted until he was unable to cope any longer. He concluded that the worker's condition was consistent with a diagnosis of post-traumatic stress disorder (PTSD). The worker entered into a treatment program.

Initially, the Board rejected the worker's claim (see March 4, 1996 decision letter). When the Board did so, the worker returned to work in a light duty position with the agreement and assistance of his union and the employer. Board psychologist, Dr. GS, examined the worker in January 1997, and concluded that he would not be able to resume fire fighting activities. The Board re-adjudicated the worker's entitlement, and accepted the claim for PTSD and paid temporary benefits (see memo 6 on file).

The Board concluded that, while the worker could not return to fire suppression duties, he could perform duties related to fire inspection and prevention. The Board psychologist concluded that the worker did not have a permanent functional impairment, but would be at undue risk of developing a significant permanent functional impairment if he were to return to fire suppression. She concluded that the worker's condition had plateaued (stabilised). This led to the first decision the worker now disputes.

In June 1997, the Board concluded that the worker was entitled to receive preventative rehabilitation benefits, because he was considered at risk if he returned to all the duties of his pre-injury employment. The Board underwrote the expense of providing

additional training for the worker. As of August 1997, the worker returned to work, supposedly on a full-time basis with the accident employer.

In June 1998 the worker advised the Board that he was losing earnings in the position to which he had returned with the accident employer. In August 1998, the worker had a disabling relapse of his condition. The course of his condition subsequently has been marked by periods of relative stability followed by relapses.

In February 1999, Dr. EC, a registered psychologist concluded that the worker's condition had stabilised to a greater degree than at any other time. In April 1999, the worker's doctors indicated that the worker's acute anxiety and depression were in remission due to medications. He still experienced occasional anxiety attacks. The worker commenced a gradual return to work.

In May 1999, the worker attended a psychiatric consultant, Dr. HK, who concluded that the worker's symptoms had largely resolved. The worker was diagnosed as having PTSD complicated by major depression.

In September 1999, the employer decided to close its Fire Prevention Branch where the worker then worked. The employer advised that they could accommodate the worker in a fire dispatch position if he could do the job. Otherwise, the worker faced lay off. When the worker received lay-off notice, he suffered a significant relapse. The Board re-opened the worker's claim and paid a further period of temporary total disability benefits.

In October 1999 the worker's claim was referred to the Board's Psychology Department to determine whether the worker's condition had changed since his previous assessment.

In a November 16, 1999 memo Dr. RK recorded his conclusions that the worker had no permanent functional impairment, and said that his recovery from PTSD had progressed well.

In March 2000, the DAD concluded that the worker was not entitled to receive a pension because he had no permanent functional impairment. The worker disagreed and initiated the second appeal that brought the worker before the WCAT panel.

Hearing Evidence

The WCAT heard the worker's appeals October 9, 2003. The worker attended with his representative and gave evidence under oath.

The worker advised the panel that he retired in May 2003. He summarised his extensive work history as a firefighter. He started as a volunteer in 1974 and became a full-time paid firefighter in 1975. He held the rank of officer lieutenant. In 1996, as a

result of the condition accepted under this claim, the worker changed jobs and became involved in fire prevention and inspection.

The worker described the circumstances in 1995 that gave rise to his claim. In 1996 he submitted a claim when he became unable to work for six months. When he was able to work again finally, the worker did not return to his regular fire fighting duties. The employer was able to accommodate the worker in a job that involved 20 percent fire fighting and 80 percent investigation and prevention. In this job the worker inspected businesses and was responsible for public relations concerning fire issues. The worker did not respond to emergencies and did not attend fires, so he was not able to complete the 20 percent of the job that required him to work in fire suppression. Other fire fighters worked the 20 percent of the job that the worker could not fulfill as a result of an agreement between the union and the employer.

In about 1998 when the worker suffered a relapse, he was not able to work again for four or five months, after which he went back to fire prevention. He was able to do this job without any long periods of disability until he retired. Although he worked full time in the fire prevention position, the worker said he earned ten percent less than previously because the position was classified at a lower wage rate than the position he held at the time of his injury. Furthermore, in this position the worker did not have access to overtime, as he did prior to his injury when he was involved in firefighting.

The worker said that he did not take the prevention position out of choice. But for the condition accepted under the claim, the worker would have stayed a lieutenant fighting fires and hopefully would have risen to the rank of captain before retiring with thirty years of service. He had no immediate plan to retire, and could have continued to work for several more years in the fire department. According to the worker, his retirement pension is less now than it would have been had he continued to work. His doctors advised the worker that he ought to retire as soon as possible, in light of his condition.

The worker requires ongoing medications to suppress his symptoms. He said that, since 1995, he has experienced stomach complaints, panic attacks, shaking, fatigue, inability to eat, feeling "down and out", and lacking in desire for activities. His relationship with his wife has been strained due to the effects of the condition accepted under the claim.

The worker maintained that, prior to 1995, he was always healthy.

From 1995 to the present the worker has had only a brief period when he was able to do without medications. He thinks that he will require Luvox forever. He also uses Ativan. The worker said that his symptoms have not gone away. He said he lashes out at night in his sleep; and sometimes he falls out of bed. At present the worker does not receive counselling, although he said he found counselling helpful.

According to the worker, the union had to give up something significant in negotiations in order to acquire his accommodation in the fire investigation job. Other firefighters had to work the night shifts that he could not be on duty.

The worker's wife gave evidence under oath. She indicated that she has been married to the worker since before he became a firefighter. She described his psychological breakdown in 1995. She said she encouraged him to seek medical attention when he lost weight and looked ill. Eventually, he admitted that he was afraid to go to work. She noticed changes in his behaviour. He seemed in a daze and was confused, she said. Eventually, the worker was able to return to work in 1997, but had a relapse in 1998 and had to stop work again.

According to the worker's wife, the worker remained anxious after 1999. He was not comfortable going to work. He still has nightmares and wakes up screaming. Once he struck her during a nightmare. The worker puts on a good front, his wife said, but he is struggling still. The worker's wife said she can tell if her husband is stressed now by observing his behaviour.

The worker's wife described many changes in the worker since 1995. In particular, she described his apparent inability to be happy. She said the worker's condition has interfered with his relationship with family members and friends. The worker's condition has not improved since he retired this past May, in his wife's opinion.

In submission the worker's representative asserted that, since 1995, the worker has suffered a significant impairment, and this is disabling. The Board psychologist has described a permanent restriction on the worker's job duties. Furthermore, the worker continues to have symptoms that entitle him to a psychological pension. The worker continues to meet all the criteria for post-traumatic stress disorder, according to Dr. RP; who estimates his level of permanent functional impairment as equal to 30 percent of a totally disabled person.

Reasons and Findings

The worker's entitlement in this case is adjudicated under the provisions of the *Workers Compensation Act* (Act) that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). WCAT panels are bound by published policies of the Workers' Compensation Board (Board) pursuant to the *Workers Compensation Amendment Act, (No. 2), 2002* (Bill 63). Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) which relates to the former (pre-Bill 49) provisions of the Act.

Is the worker entitled to temporary wage loss benefits after June 5, 1997?

Sections 29 and 30 of the Act provide that temporary total or partial disability benefits are payable only so long as the disability lasts and remains temporary. If a

compensable condition stabilises but does not resolve, the Board must assess whether the worker is entitled to a pension award under sections 22 or 23 of the Act. Board policies concerning temporary wage loss benefits are set out in the RSCM in chapter 5. Policy item #34.51 concerns termination of wage loss benefits. Policy item #35.00 (and following) concern temporary partial disability benefits. Policy #35.10 states that:

> Claimants will … be considered to have a temporary partial disability when, even though they would ordinarily be considered as temporarily totally disabled, they do in fact continue to carry out their previous jobs in part or perform some other type of light work.

Policy item #35.30 concerns termination of payments. It provides that:

> …the benefits payable under this section will be terminated when the worker's physical impairment resulting from the injury ceases to be temporary partial, i.e. it disappears entirely, becomes total or stabilizes. …If the impairment has stabilized the worker will be entitled to be assessed for a permanent partial disability award. The principles to be followed in determining a condition has stabilized are set out in #34.54.

The panel has reviewed the medical evidence to determine whether the worker's condition stabilised on or about June 5, 1997.

Much has transpired since the Board took its decision to terminate the worker's wage loss benefits in June 1997. The panel has the benefit of hindsight that was not available to the claims adjudicator.

With benefit of hindsight, the panel can now say with some degree of certainty that the worker's compensable condition did not resolve in 1997, but has continued to be problematic and has impacted adversely on the worker's ability to work. The worker was not able to return to his pre-injury job. The job to which he did return required an accommodation and involved an ongoing loss of wages that the Board has not fully recognised. The worker has required ongoing treatment for his condition; and the extent of his problems is set out in medical reports provided in support of the worker's appeal.

In particular, the panel notes an April 18, 2002 medico-legal report from psychiatrist, Dr. RP, a clinical psychiatrist with considerable experience working with police officers, emergency personnel and firefighters, who attended the worker. According to Dr. RP the worker continues to have all the criteria for post-traumatic stress disorder. He noted in his report that the worker's condition has continued over the past five years, and that the worker requires continued medication. This information is consistent with the evidence provided at the hearing.

Dr. RP's consultation report and the appended reports as a whole suggest to the panel that the worker's condition no longer is temporary, but has stabilised. He had an exacerbation in 1998, and the Board re-opened his claim. In 1999 consulting psychiatrist Dr. MM indicated that the worker also had symptoms of major unipolar depression associated with his post-traumatic stress disorder. Depression had been described earlier by Dr. HK. The medical reports clearly indicate that the worker has not returned to the way he was before his 1995 psychological injury.

The panel interprets the evidence as a whole to mean that the worker's condition became permanent at about the time the Board terminated wage loss benefits in 1997. Apart from the relapses during which the Board has reopened the worker's 1995 claim, the worker's symptoms have remained fairly consistent in nature, and have never totally disappeared, although some of the earlier medical reports suggest otherwise. The panel relies on the worker's own evidence and that of his wife in support of this conclusion. The panel finds, therefore, that the worker is not entitled to further temporary wage loss benefits. His ongoing loss of earnings has been due to a permanent impairment.

Is the worker entitled to a permanent partial disability award?

Sections 22 and 23 of the Act permit the Board to pay pensions to injured workers who do not completely recover from the effects of their compensable injuries. Board policies concerning permanent disability awards are set out in the RSCM in chapter 6. Policy item #39.10 concerns scheduled awards and the Board's Permanent Disability Evaluation Schedule. Appendix 4 (at page 12) sets out the manner in which the Board assesses psychological disabilities.

The worker's representative has asserted that the Board has wrongly applied occupational disease policies to what is a work injury. This worker is not out of work for preventative reasons. He was compelled to retire because he has been left with permanent restrictions as a result of his work injury. His symptoms have never gone away; and are of a nature and of an extent so as to warrant a pension on the schedule.

The panel concludes that the representative's argument has merit.

The panel accepts the worker's evidence and that of his wife as to the fact that the worker's symptoms have continued since 1995, and that they still persist, and that they continue to interfere with his ability to function.

Dr. RP, in his April 18, 2002 medical report, has indicated that the worker continues to meet the criteria for post-traumatic stress disorder. He has reviewed the Board's

appendix 4 pertaining to the categories of psychological disability, and has concluded that the worker has a moderate impairment relating to emotional (mental) and behavioural disturbances. The panel notes that Dr. RK assessed the worker in 1999

and concluded that his recovery from PTSD had progressed well, and that he would not be left with a permanent functional impairment. The panel prefers Dr. RP's more contemporaneous opinion, as it is consistent with the oral evidence the panel heard from the worker and his wife, which the panel accepts as accurate.

The worker's representative has asserted that the Board incorrectly applied occupational disease principles to the worker's claim. This assertion has merit. The worker does not have an occupational disease. He does not become symptom-free unless he tries to fight fires. His PSTD and depressive symptoms do not go away if he is away from the workplace. At best, his symptoms decrease to the point where they are less noticeable to others, except to his intimate acquaintances. He has not returned to his pre-injury status. In fact, the worker requires ongoing medication in order to suppress, albeit not to eliminate, his symptoms. The worker sustained a psychological injury and that injury has not resolved.

At the hearing the panel observed that worker showed little affect or animation. He seldom made eye contact and seemed detached from the hearing procedure in general. He was soft-spoken and provided mainly brief answers in response to questions from his representative and the panel. In her January 22, 1999 medical report the worker's consulting psychiatrist, Dr. MM, described the worker as showing very little animation and slight eye contact; and being tired, pale, flat and depressed in appearance. That description in 1999 mirrors the panel's observations more than four years later. The worker's presentation is quite different from his pre-injury personality as described on file and by the worker's wife.

The panel finds that the worker's ongoing symptoms of psychological injury amount to a permanent functional impairment, and this impairment entitles the worker to a pension.

According to Dr. RP, the worker's impairment is properly assessed at 30 percent of a totally disabled person, based on his observations. He has enumerated the worker's symptoms that have led to that assessment. The panel finds this assessment compelling, and given Dr. RP's expertise in this field, the panel is prepared to adopt that assessment as the basis for its finding. The panel finds that the worker has a permanent psychological impairment assessed by a psychiatrist as equal to 30 percent of a totally disabled person. This impairment has interfered with the worker's ability to continue working as a firefighter. The panel returns the claim file to the Board and directs the Board to award a pension that reflects Dr. RP's conclusions.

Conclusion

The panel finds that the worker is not entitled to further temporary disability benefits in respect of his 1995 psychological injury after June 5, 1997. The panel confirms the decision as it relates to further temporary disability benefits.

The panel finds that the worker has a permanent functional impairment and is entitled to a pension. The panel further finds that the worker's permanent functional impairment is equal to 30 percent of a totally disabled person. The permanent functional impairment adversely affects the worker's ability to work as a firefighter, and has resulted in loss of earnings and in impairment of earning capacity.

The panel returns the worker's claim file back to the Board to calculate the further benefits owing to the worker in light of these decisions.

The worker is entitled to be reimbursed for travelling to and from his hearing. The worker is also entitled to be reimbursed for any expenses he incurred to provide medical reports in support of his appeal, pursuant to the *Workers Compensation Act Appeal Regulation*, section 7.

The panel allows appeal 96-C and varies the March 29, 2000 decision.

The panel denies appeal 96-D and confirms the June 20, 1997 decision.

Kathryn P. Wellington
Vice Chair

KPW/hf

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