An amendment was issued for WCAT-2004-00137 and is attached to this document.

WCAT Decision Number: WCAT-2004-00137-RB
WCAT Decision Date: **January 13, 2004**
Panel: Eric S. Sykes, Vice Chair

Introduction

The worker appeals a decision made by an officer of the Workers' Compensation Board (Board) contained in a letter dated August 9, 2002. In that letter a case manager, following review of video evidence, and consultation with a Board medical advisor (BMA), decided that the worker was no longer disabled due to his right bicep and shoulder injury that occurred on August 16, 2001. Accordingly, the case manager ended wage loss and health care benefits effective August 1, 2002.

On the notice of appeal - part 1 the worker argues that he remained disabled and unable to work due to his compensable injury.

My finding is based on the file evidence, an oral hearing and application of Board law and policy.

Issue(s)

Is the worker entitled to wage loss and health care benefits due to his August 16, 2001 injury after August 1, 2002?

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and 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).

Under section 250 of the Act (as enacted by the *Workers Compensation Amendment Act (No. 2), 2002*), WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decisions on the merits and justice of the case, but in so doing, it must apply a policy of the Board's Board of Directors that is applicable in the case.

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File Information

The worker, then a 46-year old right-handed warehouse worker completed an application for compensation on August 26, 2001. He recorded that, on August 16 while unloading a container, a stack of chairs fell on his right arm and shoulder.

In a claim log entry dated August 23, 2001 a client services representative recorded that the worker's claim had been accepted for a right-arm upper sprain/strain and right-shoulder sprains/strains in the clavicle and scapula area. The worker was disabled from working.

The Board carried out the program of physiotherapy and conditioning but the worker did not seem to improve. In an MRI report dated December 16, 2001 Dr. Hodges recorded his findings of an injury of the biceps labral complex: the doctor identified some partial thickness rotator cuff tears.

In a claim log entry dated December 28, 2001 a BMA noted that the MRI report recorded a partial tear of the long head of the biceps, involving labrum. The worker was referred to a surgeon for an opinion regarding possible shoulder surgery.

On an April 11, 2002 post-operative report, surgeon Dr. Hawkins, recorded that he had carried out an arthroscopic debridement and biceps tenodesis of the right shoulder.

In a May 23, 2002 medical rehabilitation program initial medical assessment report, Dr. Adrian recorded the worker's comments that he could not perform any lifting activities. The worker had difficulty driving, using cutlery, putting on his shirt and shaving. The doctor noted there was no wasting over the right shoulder girdle.

In a June 11, 2002 letter Dr. Hawkins reported the results of his examination of the worker. He recorded that the worker's right shoulder was still significantly tight with only 110 degrees of elevation and 40 degrees of external rotation. The doctor opined that the worker should continue to carry on with physiotherapy, particularly to overcome the tightness of his shoulder.

In a July 29, 2002 physiotherapy review, the physiotherapist recorded the worker's comments that he had no power in his right arm, forearm and hand. The worker acknowledged that the shoulder/biceps tendon was the injured area and he did not have an injury to the forearm or hand. The worker was unsure why his entire arm felt weak. The worker noted he was unable to lift his 6-1/2 year old son, who weighed approximately 20 kilograms, with his right arm due to right-arm weakness. The physiotherapist was unable to determine the worker’s right arm strength due to the worker being unable to resist in all directions. The physiotherapist was able to overpower the worker’s right arm with minimum force. Right arm bicep curls were limited to 4 pounds by reports of weakness, 16 pounds with both arms. Lift with wrist

extension, (both arms) was limited to 11 pounds. Right arm pronation/supination was limited to lifting of 5 pounds.

In a July 31, 2002 industrial workshop report the instructor noted that the worker limited the use of his right arm to a sedentary level when the instructor was nearby, but at times displayed a more functional use of the right arm up to a light level.

In an August 2, 2002 medical assessment report for the medical rehabilitation program, BMA Dr. Adrian recorded objective findings of subtle wasting of the supraspinatus on the right side. The worker also had distal bulging of the biceps on the right as compared to the left. The doctor noted that the worker had an MRI pending in the next two weeks. The worker was unable to put his arm above shoulder level. The doctor opined that it was important for him to see the worker after that as it would be important to rule out a rotator cuff tear.

In a claim log entry dated August 1, 2002, a case manager recorded a conversation with the worker in which she advised him that his claim ended effective that date. The case manager recorded that recent evidence clearly demonstrated the worker was not credible in his presentation. Specifically, the worker was able to do much more with his right arm than he was presenting. The case manager believed the worker was capable of returning to his pre-injury employment.

In an August 9, 2002 claim log entry, a BMA gave his opinion following observation of video surveillance tapes. The doctor noted that the tapes showed that the worker was able to flex and elevate both his shoulders to at least 150 degrees bilaterally and showed both elbows in near full extension and equal while lifting a child weighing at least 40 pounds. The video showed the worker lifting a bag of rice that weighed at least 20 pounds (video shows this bag as 20 kg) from a low rack of a shopping cart into the back of his car with only his right arm, the left arm not needed for any additional support. The doctor found that the worker's efforts for testing and examination purposes were completely unreliable and the video showed near full range of motion for both the shoulder and the elbow. The doctor concluded that, based on the videotapes, the probability was greater than 50 percent that the worker did not have a permanent functional impairment.

On August 9, 2002 a case manager issued the letter which is the subject of this appeal. The Board ended wage loss and health care benefits effective August 1, 2002.

In a November 5, 2002 physician's progress report, Dr. Stavros recorded the worker as disabled due to his right shoulder. The right shoulder was improving and was 80 percent better. The worker had tenderness over the right shoulder incision with a range of motion restricted on abduction.

On the physician's progress report dated May 30, 2003, Dr. Stavros recorded that the worker continued to be disabled due to his right shoulder and upper right arm. The doctor recorded a right shoulder range of motion of 80 percent.

In a July 30, 2003 physician's progress report, Dr. Stavros recorded the right shoulder strength as 80 percent of normal. In an August 29, 2003 report he recorded a relative weakness of the right biceps with a full range of motion.

At the hearing the worker presented a November 25, 2003 medical-legal letter from attending physician, Dr. Larigakis. The doctor first treated the worker on August 28, 2002. At that time the doctor noted a restricted range of motion and diminished strength in the right shoulder. The doctor concluded that the worker experienced weakness due to the April 11, 2002 surgery. He recommended an active exercise program. The doctor opined that as of August 1, 2002 the worker was not fit to return to a job involving heavy lifting.

Videotape Evidence

Contained in the file was a field investigation report addressed to a case manager. Two videotapes were included with the report. I viewed the tapes prior to the hearing. Below is my summary of the field investigator's notes for July 31, 2002.

On July 31, 2002 at 11:25 a.m. the worker was observed leaving his home in his vehicle. He drove to an apartment building that he entered, and exited one hour later at 12:35 pm. At 12:40 p.m. he purchased a newspaper and returned to his residence. At 16:12 p.m. he departed his residence and drove to a local auto plan store where he renewed his auto insurance. At 16:41 p.m. he was observed rubbing his rear license plate to clean it in preparation for applying an insurance sticker. The worker returned to his residence at 16:45 p.m.

Hearing Evidence

The worker described his pre-injury work as unloading shipping containers for customs inspection. The work required physical effort as the contents of the containers frequently had to be manually lifted out. Some items were light. The worker testified that, with the assistance of another person, he sometimes had to lift items of 200 pounds in weight.

With regards to the videotape evidence, the worker said that he lifted his child into the shopping cart mostly with his left arm. As it had been some time since I viewed the videotape, and because the worker's statement did not match my recollection of the video, we played the video in the hearing room. The worker confirmed that it was him on the videotape. He was observed lifting the child as described in the investigator's report and as described by the BMA in his August 9, 2002 claim log entry.

The worker testified that, on July 31, 2002, he left home in his vehicle at 6:00 a.m. to attend a Board sponsored program. At 6:30 a.m. his vehicle broke down in Delta. He called the Board to inform them his car was broken down, and he called his brother and a friend. The brother is a mechanic and the friend has a BCAA membership. The worker rode home in the BCAA tow-truck with his car towed behind. He arrived home at noon. His brother fixed the car. He called the Board program when the car was ready. The Board representative said there was only 30 minutes left in the program, so there was no point in the worker driving to Richmond.

The worker testified that since Board benefits ended, he had continued to work at his second job with a security company. He had done home exercise and swimming to improve his strength. He had not undergone any other examinations or treatments.

The worker's representative summarized the reasons for the appeal. She argued that there was nothing in the file that supported the Board's belief that the worker was no longer disabled, and that he could do his pre-injury work. The representative argued that no one gets cut off from Board benefits for missing a day at a Board program, and exhibiting pain magnification. She argued this was a punitive action by the Board.

Findings and Reasons

Section 29(1) of the Act sets out that where a temporary total disability results from the injury, compensation is payable only so long as the disability lasts.

There are signs in the Board file information, before the video evidence was produced, that the subjective signs of the worker's impairment were inconsistent with the injury and the surgical treatment received. For example; the worker reported his entire right arm as weak when the surgery for which he was recovering was in the shoulder. The worker exhibited sedentary use of the arm when closely observed by Board officers, but displayed more functional use of the arm when observed from afar. It was likely that because of these inconsistencies, the Board established video surveillance. The test results that the worker provided during the Board-supervised rehabilitation program indicated that he could not lift more than 5 pounds, that he could not lift his right arm above his shoulder, and that he had virtually no strength in his right shoulder or arm. He specifically noted that he could not lift his son, except with his left arm. The video evidence of July 26, 2002, particularly the lifting of his son into the shopping cart and the lifting of a 20 kilogram sack from the shopping cart to his vehicle using only his right arm, showed his test results and statements to be untrue. The worker's credibility is damaged by this video evidence. His credibility is further damaged by the video evidence of July 31, 2002 that is contrary to his oral testimony. He testified that he returned home at noon as a passenger in a tow truck with his broken down car in tow. However, the video evidence recorded him driving his vehicle away from his home at 11:35 a.m.

From the above information, I conclude that the worker can be less than credible when it suits his purposes.

Because I find the worker to have low credibility, I reviewed the evidence to determine what other evidence I have before me that will help me to determine whether the worker continued to be disabled after the Board ended benefits on August 1, 2002. I find that the BMA's opinion, after he had reviewed the videotapes, that the worker was capable of doing much more physical work, and that he had a near full range of motion in both the shoulder and the elbow, supports a finding that the worker had recovered or was near total recovery. However, I find the best evidence to be the videotape that shows the worker lifting and holding his son well over his head with both arms, and handling a 20 kilogram sack with his right hand easily and smoothly. The possibility is the worker was not symptom-free when the Board ended his benefits, but because of the low credibility that I have found about the worker's report of his own condition, and because of the lifting and range of motion shown in the video, and because of the BMA's opinion, I find that, on the balance of probabilities, the worker was no longer disabled from working in his pre-injury job when the Board ended his benefits. For that reason, I deny his appeal.

Dr. Laragakis continued to record the worker's subjective reports of reduced strength and range of motion and noted these in his medical-legal letter. With respect to the doctor, because of the subjective nature of the symptoms and the worker's low credibility, I prefer the evidence presented in the video and the BMA's opinion, and continue to find that the worker was no longer disabled when the Board ended wage loss and health care benefits.

Conclusions

I confirm the Board decision. I deny the worker's appeal.

No costs are awarded.

Eric S. Sykes
Vice Chair

ESS/jtr

WCAT Amended Decision Number: WCAT-2004-00137a-RB
WCAT Amended Decision Date: January 28, 2004
Panel: Eric S. Sykes, Vice Chair

Amended Decision

In WCAT Decision #2004-00137-RB, issued on January 13, 2004 I denied costs associated with the medical legal letter obtained from the worker's doctor and presented in evidence. In a letter dated January 19, 2004 the worker's representative requested that the cost of the medical legal letter be allowed. After reviewing the original decision, and based on the WCAT Manual of Rules, Practices and Procedures, Section 13.00, I am amending the final paragraph of page six as follows:

> **In accordance with the Workers Compensation Act Appeal Regulation, B.C., Reg. 321/02 paragraph 7(1)b, expenses associated with producing the medical legal letter used in the appeal procedure are allowed.**

Eric S. Sykes
Vice Chair

ESS/dcl

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