WCAT Decision Number: WCAT-2004-00161-RB
WCAT Decision Date: **January 14, 2004**
Panel: David A. Cox, Vice Chair

Introduction

The worker appeals from the April 12, 2002 decision of an officer of the Workers' Compensation Board (Board) which found him fit for sedentary duties. He was informed that the objective medical findings on his injury claim did not support total disability. A Board medical advisor had found the worker fit for sedentary duties and the employer had been able to provide suitable modified duties. Accordingly, no wage loss benefits would be paid beyond April 14, 2002.

Issue(s)

Was the worker capable of sedentary duties?

Was the worker entitled to further temporary wage loss benefits beyond April 14, 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.)

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'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).

Background and Evidence

On March 7, 2002 the worker was employed as a planerman in a sawmill. That date he was struck with the back tire of a moving forklift and suffered bruises and contusions to his abdomen, lower abdominal wall, and both legs and thighs.

In correspondence to the worker dated March 15, 2002 a Board officer informed the worker that his claim had been accepted for his injuries.

A claim log memo the same date noted that the worker had returned to work on light duties from March 8 through March 12, 2002 but then could not continue because of pain. At that point, the worker was informed that wage loss would be initiated.

The April 5, 2002 claim log entry of a nurse advisor set out that modified duties had been discussed with the accident employer who reported the worker could perform such duties as office work and computer data entry where he would be able to pace himself and sit and stand as required or to shadow another millwright and troubleshoot.

The nurse advisor's memo documented a telephone call to the attending physician who, stated to the nurse advisor that the modified duties were appropriate and that the worker could return to work.

A physician's progress report based on treatment of the worker on April 5, 2002, documented the worker's sitting limitations and considerable pain. The physician, in the comment section of the report stated the worker was not able to return to work.

In a claim log memo dated April 5, 2002, under the heading "Regarding: Telephone Call to Worker and Physician", a nurse advisor recorded that the worker had been contacted by telephone and informed that his physician had approved a return to work at modified duties. The worker stated that he had not anticipated a return to work for another month as his abdomen and legs were sore and uncomfortable.

The memo recorded that the worker had contacted the nurse advisor upon reassessment by his physician. The worker stated that his physician might have confused him with another patient when he had first spoken with the nurse advisor. The worker reported that the physician had told him he was not fit to return to modified duties and was advised to return for assessment in three weeks.

The memo stated that the worker had described his difficulties with a right hip and left thigh hematoma and the difficulty he had sitting for more than 15 minutes, due to pain. The worker documented that he had problems getting up from a sitting position and limped when he walked, favouring his left leg. The worker reported difficulty getting in and out of his automobile and was generally stiff and sore although improving slowly.

The memo documented that the attending physician had been contacted for further clarification and reported the worker's continued difficulty sitting and walking. The nurse advisor advised that the employer had offered modified work and the physician stated that the worker did not think he was ready to return to work. The doctor would not approve modified duties and stated that the Board should try and talk to the worker once again.

Subsequently, the file was referred to a Board medical advisor who, in a claim log memo dated April 11, 2002, indicated contact had been attempted with the attending

physician's office. The Board medical advisor had been informed that the doctor would be away from his office until April 22, 2002. The medical advisor noted that there had been a detailed physiotherapy report dated April 2, 2002 which indicated that the worker had improved to the point where he could climb up and down 35 stairs, power lift and do full squats. Based on this information, the Board medical advisor saw no medical reason why the worker could not perform office work such as operating a computer, answering telephones or other sedentary work that did not involve a lot of walking or climbing.

The April 11, 2002 claim log memo of the entitlement officer set out that the worker had been informed of the Board medical advisor's opinion and the worker had been asked to arrange a return to work.

The memo also reported that the accident employer was aware of the return to work plan and was to contact the worker.

The entitlement officer's April 12, 2002 claim log memo stated that the worker had been contacted and informed of the determination that he could return to work on modified sedentary duties. The worker informed the entitlement officer that he would not return to work without his doctor's approval. The worker was informed by the entitlement officer that, as the Board could not contact the physician to clarify the remarks regarding the worker's ability to perform sedentary duties, a medical advisor had reviewed the file and confirmed sedentary duties would be appropriate.

The April 12, 2002 decision from which the worker has appealed was then issued.

The April 15, 2002 claim log memo of a case manager reported that the worker had approached the employer and asked how he was going to attend physiotherapy and get to work on time. The case manager suggested that the worker's shift pattern be changed to afternoons to allow the worker to attend physiotherapy and not to miss work.

A progress report, based on treatment of the worker on April 16, 2002 set out the examining physician was not the regular physician and estimated the worker would be able to return to work in seven to fourteen days. The physician indicated on the progress report that a work conditioning program would be appropriate.

A telephone memo dated April 16, 2002 recorded that the worker's union had contacted the Board regarding the decision to return the worker to his employment on modified duties. A union representative had informed the entitlement officer that the attending physician had stated the worker could not work. However, in the entitlement officer's opinion, the physician has not provided objective findings. The union representative questioned whether it would be appropriate to have the worker examined by a Board medical advisor. The entitlement officer stated that it would not be necessary as the advisor had provided an opinion based on the file evidence. In the entitlement officer's opinion, it was evident that sedentary duties were appropriate for the worker.

A claim log memo dated April 16, 2002 recorded that contact had been made with the employer who had advised that the worker had been told that sedentary duty was available to him.

A claim log memo dated April 19, 2002 set out that a report had been received from a walk-in clinic which reported the worker would be disabled up to 14 days. The entitlement officer stated there were no objective findings noted to support this contention but that the worker had been approved for work conditioning. In the entitlement officer's opinion, work conditioning would be more strenuous than sedentary duties and the entitlement officer was not willing to change the earlier decision that the worker was fit for sedentary duties.

A physician's progress report, based on treatment of the worker April 22, 2002, set out the attending physician's comments that the worker was unable to sit for long periods of time and was to avoid walking on uneven ground or climbing stairs. The physician suggested light duty for one week beginning September 29, 2002 and then a return to regular duties.

The May 10, 2002 claim log memo of the entitlement officer set out that the worker had discussed the issue of modified duties at length with the entitlement officer and further stated that neither his employer nor he was aware of what modified duties were appropriate. The entitlement officer noted that, upon review of the claim log, there was indication that both parties were aware that sedentary duties were appropriate. The entitlement officer's memo stated that the worker had admitted that he had discussed sedentary modified duties but stated that he could not sit for long periods of time. The worker stated that the employer had told him to put on some coveralls, hide himself and basically do whatever he wanted. The worker agreed that he knew sedentary duties were available where he could sit and stand as necessary.

An oral hearing was held January 7, 2004. The worker attended and was represented by his union. The accident employer participated in the appeal process and a representative appeared at the hearing.

At the beginning of the hearing, the worker furnished a series of four separate photographs depicting the level of bruising caused by his injury. These photographs, he stated, were taken on April 6, 2002. The photographs were accepted as a package (exhibit #1).

The worker briefly described the circumstances of his March 7, 2002 injury. He explained that he had been a planer mill operator with the same employer since 1979 and that at the date of his injury, was on the night shift as a planerman. He stated that a new forklift operator was undergoing training and while having difficulty with a load had backed up out of a bay. The back tire of the forklift had pinched the worker at a 45 degree angle.

The worker explained that the following day he had visited his physician who had diagnosed multiple soft tissue damage. The worker stated that at this point, there was very little bruising or discolouration and he was of the opinion he could walk it off. However, his physician informed him that he had not realized the damage the injury had caused. The worker stated that the physician did not want him to return to work but was tentative about whether physiotherapy treatment could help him. The worker asked if it would help and he stated the doctor really was not keen on it but agreed to refer him for physiotherapy treatment. He stated he underwent treatment which was basically ultrasound and placing of compresses over his injury sites.

He stated he had visited his physician on April 4, 2002 and to his recollection, the physician had not told him he could return to work.

The following day on April 5, 2002, the physician, he stated, carried out an extensive, painful examination of his injuries and that he was in the doctor's office for over a half hour. At that point, his physician stated that the worker was not to return to work. The physician then went on a two week vacation and told the worker that his condition would be reassessed upon return.

The worker explained that two weeks after his injury his condition was worse. He said he was in pain and general discomfort, had problems sleeping and difficulty sitting for more than five to ten minutes. He stated his left leg was very painful and that he had problems arising from a sitting position. He stated he was taking up to six Tylenol 3's per day for his pain.

The worker also explained that on a previous compensable claim, he had a poor experience with a return to work which he felt was neither constructive nor led to his recovery.

He stated that when he was informed by his employer that he was to return to work, he was surprised as his physician had not informed him personally that this was the case. At that time he did not disagree with the nature of the work that was to be provided him but he did not think he could do it.

In answer to his representative's questions, the worker described his physiotherapy treatment. He stated that while he may have been able to walk 35 stairs, he used a hand rail and was in pain the whole time. He also stated that the physiotherapist often assisted him in moving from step to step. He stated that in early April, his physiotherapist had told him that he needed an extension of his physiotherapy treatment and suspected that he had a joint injury to his right hip. The worker explained that his entire leg and hip was still painful and that he had difficulty moving sideways.

The worker stated that even when he did attempt a return to work on April 15, 2002, the employer had nothing arranged and the worker himself was not aware of his restrictions. He stated his duties were sitting around with no specific duty and that during his work shift which he spent mostly visiting other employees, he had problems walking and sitting. At the end of the day while walking out of the mill he had slipped and fallen but been held up by a co-worker. However, he felt a sharp pain in his right thigh and by the following morning he could not get out of bed and had to crawl on his hands and knees to the washroom. At this point, he decided he would not return to work.

He stated that when he visited his attending physician on April 22, 2002, the physician was not aware that he had worked one day. At that point he was cleared for light work and he stated that although he was still uncomfortable he had to agree with his physician and return to work. He described that at this point his leg still hurt at boot level and that he had leg and calf swelling.

In answer to the panel's questions, the worker stated that upon his first contact with his employer regarding modified work, he was aware he would be doing sedentary duties at a computer. It was explained to him that he was able to get up and move around at will. The worker explained that at this point he was still uncomfortable and was trying to taper off his Tylenol 3 intake. He did not feel he could sit for more than 15 minutes and that his leg had a deep, "gnarly" type pain. The worker stated that in his opinion, all of these symptoms had not resolved even after a return to work.

The worker's representative stated that the worker's symptoms were of a progressive nature which included deep bruising and reduced range of motion. The representative noted that both the attending physician and the physiotherapist had medical findings in contradiction to the opinion of the Board medical advisor. She stated that despite the Board's continued attempt to garner the attending physician's support for a return to work, it had been the physician's advice to the worker on April 6, 2002 that he not return to work. Secondly, the physiotherapist's report did not estimate a return to work date until May 2002. The physiotherapist noted the worker's left thigh hematoma as painful and restrictive and suspected the worker had sustained a joint injury to his right hip. In the representative's opinion, the Board medical advisor had "cherry picked" the portions of the physiotherapy report that suited the Board's intention to return the worker to employment. The representative pointed out that the return to work date projected by the physiotherapist was one month after the entitlement officer had concluded the

worker's wage loss benefits. In her opinion, the decision to terminate wage loss benefits had been hasty and without the basis of a thorough investigation.

The employer's representative stated there was no doubt the worker had a serious injury as he had collected five weeks of wage loss. However, in the employer's perspective, the return to work attempt had turned into a battle of wills. The representative pointed out that the worker's physician did less than an exemplary job of providing information to guide the modified work process and had taken a sudden change in his direction. However, the representative stated, the Board's adjudication had been the best decision on the basis of the available evidence. In the representative's opinion, the available modified work was productive and he stated it was not uncommon for alternate work organisation to be slow at first. It was not a "cookie cutter operation" and the employment opportunities would have to match the worker's limitations. The representative stated it was not surprising to him that upon the first day of the modified work, that the program was not up to speed. Although the worker had pain and discomfort, in the opinion of the employer, he was capable of sedentary duties based on the guidance of the Board's physician. Further wage loss would not have been appropriate and the employer expressed the opinion that the worker would have been successful if he had stayed at work. The employer's representative also stated that the employer was not aware that the worker had re-injured himself upon the attempted return to work. The employer summarised by stating that although the worker was in discomfort, suitable and available modified work was a logical option.

In rebuttal, the worker's representative stated that there were problems with the attending physician's reports in that the physician had been "hounded" by the Board. She reiterated the preponderance of medical evidence was that the worker was not capable of sedentary duties at the time his wage loss benefits were concluded.

Reasons and Findings

Policy item #34.11 of the *Rehabilitation Services and Claims Manual*, *Volume 1* (RSCM) contains guidelines relevant to the provision of selective employment. The policy sets out that a claimant, while totally disabled from carrying out normal work, might be offered alternative work within the worker's capabilities which would reduce or avoid any loss of earnings. The Board's policy sets out that selective employment is appropriate and indeed valuable in all cases where the employer has a suitable and productive job available and is willing to offer that job to an injured worker who has not fully recovered from the sequela of a compensable injury but is capable of some form of suitable employment. The policy sets out that the worker's attending physician must be apprised of the nature of the work and must conclude that the job will not harm the patient nor slow recovery. Within reasonable limits, the worker must agree to a return to work.

A number of factors come into play when deciding upon the reasonableness of a worker's refusal or acceptance of selective employment. The policy sets out that the opinion of the physician about the ability of the worker to perform suitable employment must be based on a true understanding of the facts and an accurate assessment of the job offered. The policy envisions that this is accomplished with the physician taking time to enquire personally of the worker and the employer about the extent of the work.

The policy accepts that there might be cases when a physician has over-estimated a worker's capacity to perform work let alone selective duties and that a worker might well protest that in spite of a physician's opinion, there is no clear ability to physically perform the modified duties offered. The policy states that in such cases it is proper for the worker to refuse a return to work but the Board reserves the right to enquire into the reasons for a worker's disagreement with a selective job offer. If it is found that the refusal does not revolve around the physical capacity of the worker to perform work or whether the work is not productive, but is based on a simple unwillingness to return to any form of employment, it must be decided whether compensation benefits should be reduced or terminated.

A basic synopsis of the policy is that selective employment must meet a number of conditions; the worker must be capable of undertaking some form of selective employment; the work must be safe and productive and the attending physician must be appraised of the nature of the work and conclude that it is suitable and will not harm the worker's recovery. If the attending physician is not able to make that determination, a Board medical advisor has that discretion.

The promulgation of the Board's policy concerning reasonable selective work is to prevent misapplication and to eliminate controversy as to the appropriateness and suitability of the selective employment offered. The development of selective employment programs is dependant upon the co-operation of all parties in a successful return to work plan. The role of the Board is to intervene and determine the suitability of the selective employment offered and if there is a disagreement between the worker and the employer, to initiate an investigation of a medical nature to quantify the offered employment. Where there is a refusal to accept modified employment, the policy states that the Board must consider the reasons for refusal and determine if they are reasonable. This investigation should include a determination with regard to the nature of the work and the worker's physical ability to perform that work.

In the claim before me, the employer acted in a proactive manner and attempted to return the worker to sedentary employment which the employer felt was within the worker's capabilities. The appraisal of the attending physician was sought with mixed results. It appears the attending physician vacillated in support of a return to work at sedentary duty and in accordance with the worker's evidence, did not appraise the worker that he was capable of such a duty. Although the physician may have indicated to a Board officer on April 4, 2002 that the worker was capable of modified duty, the progress reports based on treatment of the worker on April 5, 2002 explicitly stated that

he was unable to return to work. The attending physician, in fact, did not clear the worker for a return to work until treatment of the worker on April 22, 2002. Under these circumstances it is understandable why the entitlement officer sought the guidance of a Board medical advisor. This of course, led to the April 11, 2002 claim log memo of the medical advisor which concluded that modified/sedentary work was appropriate for the worker. There is no intimation at this stage that the worker had misled his physician, employer or the Board regarding whether or not the light employment had been offered. I accept that he understood that his physician had not cleared him for a return to modified duty either on April 4 or April 5, 2002. Secondly, the series of photographs (exhibit #1) clearly delineates a reasonable basis for the worker's ongoing symptoms. I do not agree with the full scope of the Board medical advisor's opinion based on a interpretation of the treating physiotherapist's report. As submitted by the worker's representative, the treating physiotherapist in no way implied the worker, on or around April 14, 2002 was capable of a return to work. I accept that the treating physiotherapist was in a far better position than the Board medical advisor to determine work readiness. However, this is somewhat of a moot point as the worker's oral evidence at the hearing was that he had in fact made a return to modified employment on April 15, 2002. His testimony at the hearing was that at the end of that shift, while exiting the employer's premise, he tripped and fell against a co-worker. As a result of this incident he suffered extreme left thigh pain and did not return to the selective employment until April 29, 2002. My jurisdiction in this matter does not enable me, with the intervention of a specific new injury mechanism, to provide an original decision based on the worker's inability to work between April 15, 2002 and April 29, 2002. In accordance with policy item #107.10, it is contingent upon the Board to investigate whether the worker's inability to continue at selective employment between April 16, 2002 arose out of and in the course of his employment and met the criteria of section 5(1) of the *Workers Compensation Act* (Act).

The worker's oral evidence was that this incident led to an exacerbation of the residual of his underlying compensable condition. It was this exacerbation, which appears to have compounded his inability to remain on selective employment. Although the selective work process was rather patchy, the worker did return to modified employment upon the conclusion of his wage loss benefits April 14, 2002.

Conclusion

The Board's April 12, 2002 decision is confirmed. The worker did, in fact, return to selective employment on April 15, 2002 after the conclusion of his wage loss benefits April 14, 2002.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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The Board is to investigate whether an incident while exiting the employer's premise on April 15, 2002 meets the criteria of section 5(1) of the Act and whether the worker is entitled to either a new claim or a reopening of the April 12, 2002 injury claim. No costs are allowed.

David A. Cox
Vice Chair

DAC/cmm

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