## Noteworthy Decision Summary

**Decision:** WCAT 2003-04102 **Panel:** Randy Lane **Decision Date:** December 11, 2003

***Termination of wage-loss benefits – When is a worker's condition stabilized – Applying policy item #34.54 – Whether the worker was entitled to temporary wage loss benefits between October 2002 and his last period of disability which ended October 2001 because he required surgery in October 2002***

The worker suffered a coccyx injury when he slipped and landed on his tailbone at work in January 2000. The Workers' Compensation Board (Board) paid him temporary total disability wage loss benefits for the period July 2000 to October 2001. His claim was then reopened for temporary disability wage loss benefits effective October 2002 when he underwent a coccygectomy. The worker appealed. The issues on appeal included (1) whether he was entitled to temporary disability wage loss benefits for the period from October 2001 to October 2002; and (2) whether his temporary disability wage loss benefits as of October 2002 were properly calculated using 90 percent of his average net pre-injury earnings rather than 75 percent of gross earnings.

Having considered item #34.54 of the *Rehabilitation Services and Claims Manual* the panel found that the evidence as of October 2001 did not indicate a likelihood of significant change in the worker's condition. A specialist who examined the worker expressly indicated in October 2001 that the worker had plateaued, and this was consistent with reports from the worker's family physician around the same time indicating there was no change in the worker's clinical examination results. Although the worker eventually underwent surgery in October 2002 and gross mobility of a coccyx segment was found at surgery, that did not alter the fact that as of October 2001 surgical intervention was not considered medically appropriate and there was no expectation of a change in his condition. That the worker was again seen as temporarily disabled as of October 2002 did not mean that he had a temporary disability between October 2002 and his last period of disability which ended October 2001. The panel did not doubt that the worker had a disability after October 2001; the Board awarded a pension to recognize that disability. However, it considered that the disability as of October 2001 was permanent. Given the worker's plateau in October 2001, he was not entitled to temporary disability wage loss benefits from October 2001 to October 2002. In respect of the second issue, the panel found that item #1.03(b)(4) of the *Rehabilitation Services and Claims Manual, Volume II* applied, and hence the worker's entitlement to temporary disability wage loss benefits for the October 2002 reopening should be 90 percent of his net earnings rather than 75 percent of gross earnings.



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**Panel:** Randy Lane, Vice Chair

## Introduction

The worker, then a 52 year-old truck driver, was washing a truck on January 1, 2000 when he slipped and landed on his tailbone on the frame of the truck. Initially, the claim was accepted for health care benefits only but a July 22, 2002 finding of the Workers' Compensation Review Board (Review Board) determined that he was disabled by his coccyx injury when he recovered from his non-compensable hernia surgery of June 5, 2000. The Workers' Compensation Board (Board) paid temporary total disability wage loss benefits for the period from July 19, 2000 to October 17, 2001. The claim was then reopened for temporary disability wage loss benefits effective October 23, 2002 when the worker underwent a coccygectomy. Benefits concluded as of April 22, 2003. He was then paid rehabilitation assistance benefits.

In a July 25, 2003 decision a review officer of the Review Division confirmed the Board's decisions of January 10, 2003 and January 20, 2003 that the worker (1) had plateaued in his recovery by October 17, 2001, (2) was not entitled to temporary disability wage loss benefits for the period from October 17, 2001 to October 22, 2002, and (3) was properly paid temporary disability wage loss benefits as of October 23, 2002 at 90 percent of his average net earnings prior to the original date of injury rather than 75 percent of his average gross earnings.

The appeal was initiated by an August 7, 2003 telephone call which was followed by an August 29, 2003 notice of appeal which, in turn, was accompanied by an August 27, 2003 written submission. The worker's employer is no longer registered with the Board and the relevant employer association was given notice of the appeal but it did not indicate that it wished to participate.

By letter of November 4, 2003 the worker was advised of my decision to deny his request for an oral hearing. He was given an opportunity to provide written submissions but the November 25, 2003 deadline elapsed without any materials being received from him.

## Issue(s)

The issues on appeal are as follows:

1. Had the worker plateaued in his recovery by October 17, 2001?

2. Is the worker entitled to temporary disability wage loss benefits for the period from October 17, 2001 to October 22, 2002?



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3. Were the worker's temporary disability wage loss benefits as of October 23, 2002 properly calculated using 90 percent of his average net earnings prior to the original date of injury rather than 75 percent of gross earnings?

4. Were temporary disability wage loss benefits properly terminated as of April 22, 2003?

**Jurisdiction**

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under subsection 239(1) of the *Workers Compensation Act* (Act).

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (subsection 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).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

**Background and Evidence**

Reviews of the history of the claim are found in the Review Board's findings of July 22, 2002 and the Review Division's decision of July 25, 2003. The latter document is Review Reference #340/#343 and is viewable on the Board's website. My identification of the physicians differs slightly from that in the Review Division decision as I have listed Drs. P1 through 4 rather than 1 through 3 as the review officer did not include the orthopaedic surgeon who saw the worker on referral from Dr. S.

I consider that a close review of the medical evidence is appropriate. A July 21, 2000 bone scan of the pelvis revealed a focal increased uptake in the coccyx consistent with a fracture. In his September 21, 2000 report Dr. S, an orthopaedic surgeon, noted the worker's advice that he was unable to sit, stand, work or lay in any position for a prolonged period of time. He recommended one or a series of injections to identify and isolate the source of the worker's pain. He indicated that if the pain source could be identified with injection, and injections failed to relieve the chronic pain, the final option was excisional surgery which was "fraught with complications."

In his January 24, 2001 report Dr. S noted the results of a January 13th, 2001 MRI of the pelvis which was interpreted as not demonstrating any abnormality. He commented that two injections proved to be of no benefit. He indicated the worker would be

scheduled for dynamic x-rays of his coccyx to see if there was an obvious area of hypermobility. In his January 29, 2001 report Dr. S noted that dynamic views of the coccyx revealed no motion whatsoever of the coccygeal segment from standing to sitting position and not on hard pressure against the coccyx. He indicated that the worker did not meet the requirements for surgical management of his problem and he would refer the worker to Dr. P1, an orthopaedic surgeon, for possible manipulation of his coccyx.

In his March 16, 2001 report Dr. P1 noted the worker's report of a very significant ongoing pain since his injury. He indicated that he would leave it up to Dr. S as to whether he wanted to try manipulation. In his March 16, 2001 report Dr. S indicated that the worker did not meet the indications for surgical management of his problem. He recommended that the worker be referred to a physiatrist and a pain clinic for management of his pain syndrome.

In his March 27, 2001 progress report Dr. H, the worker's family physician, noted numbness in addition to pain. An April 12, 2001 progress report Dr. H noted increased numbness and the worker's advice that his left lateral thigh felt hot.

An April 19, 2001 bone scan of the worker's pelvis and hips indicated that the previously described focus of increased uptake in the distal coccyx consistent with fracture had resolved.

In his May 1, 2001 report Dr. M1, a neurologist, noted the worker's report of ongoing pain which might actually have progressed over the year. He noted that approximately three or four months earlier the worker began to experience a subtle numbness in the anterior aspect of the left thigh and over the past two months there had been a painful “pins and needles” burning numbness spreading from the buttock around into the anterior aspect of the thigh. Dr. M1 found no evidence of a left lower extremity radiculopathy and considered the worker's coccyx pain did not have a neurological origin. He stated that the pain and numbness into the anteriolateral aspect of the thigh sounded neuropathic; he thought the worker might have a disc herniation at the L2 level. He thought that the left lateral thigh pain and coccyx pain were separate problems.

Dr. H's September 5, 2001 progress report noted increased low back pain and numbness in the worker’s legs. His September 20, 2001 progress report noted constant numbness in both thighs, anterior and lateral. He also indicated that the worker had positive straight leg raising. He observed that there was no change on clinical examination. While the electronic version of his progress report indicated the worker could return to his pre-accident work, his hand-written report on file indicates it was uncertain.
A September 25, 2001 CT scan was interpreted as indicating the anterior cortex of the coccyx was mildly irregular which could be developmental or represent residua of the fracture suggested on the bone scan in July 2000. The author of the report indicated it

was not felt likely to be significant, as the subsequent bone scan in April 2001 was normal.

In his September 28, 2001 claim log entry Dr. D, a Board medical advisor, noted Dr. H's reports beginning in March 2001 of pain radiating into the left buttock and thigh and later numbness in the anterior/lateral thigh. He indicated that he did not see any evidence that there was an injury to the lumbar spine. He considered that the worker's condition had stabilised with no permanent functional impairment when Dr. S discharged him from treatment in March 2001.

In his October 4, 2001 report Dr. H noted persistent pain and numbness of the anterior and lateral thigh. He considered there was no change on clinical examination. He noted the CT scan revealed no disc herniation or stenosis.

In his October 16, 2001 report Dr. M1 indicated that he was at a loss to explain the worker's symptoms purely on a neurologic basis. He considered the coccyx pain seemed to be separate but felt that the left thigh pain could be related to meralgia paraesthetica or an upper lumbar radiculopathy. He noted the results of the CT scan and did not consider that there were any findings that could explain the worker's symptoms

In his October 17, 2001 report Dr. S noted the worker's advice that his pain was actually worsening. He advised the worker that he did not meet the criteria to warrant excision of the coccyx. He commented the worker was well aware of the problems with regard to surgery as well as the higher rate of infection and difficulty in eradicating pain when the coccyx was not grossly mobile and the pain source could not been localised. Dr. S indicated the worker's recovery had plateaued. He considered the worker was not likely to improve any further and was likely to live with the chronic disability caused by ongoing constant coccydynia.

In his November 1, 2001 report Dr. H noted the worker's report of increased pain in his coccyx. Dr. H indicated clinical examination revealed no change. While in his electronic report he indicated the worker could return to his pre-accident work, his hand-written report on file for the visit indicates it was uncertain.

In his November 8, 2001 medical-legal report prepared for the worker's appeal to the Review Board, Dr. H indicated that the worker continued to be affected by severe, intractable coccygeal pain. He observed the worker was taking regular narcotic medication to control his pain and even with that his pain was inadequately controlled. He noted the worker continued to be disabled as a result of his injury.

In his January 9, 2002 report Dr. P2, an orthopaedic surgeon, noted that the worker came to see him regarding the advisability of removing his coccyx. He noted the worker's belief that there was "luxation of the coccyx between the $1^{st}$ and $2^{nd}$ coccygeal segment." Dr. P2 indicated that it would not be in the worker's best interest to have the

coccyx removed, as the surgical trauma was likely to increase his chronic pain syndrome.

In his April 23, 2002 report Dr. P3, an orthopaedic surgeon, noted the worker's advice that he had trouble standing, sitting, laying, walking, and bending. The worker localised the bulk of his symptoms at the coccyx but had a band of symptoms across the low back that went down the back of his leg. He also suffered a cold feeling in his legs. Dr. P3 considered the worker had a "hot" bone scan, pain on examination, and did not think it was unreasonable to consider a coccygectomy. He indicated one would expect about a 70 percent good outcome but the worker should not expect to be pain free. He noted the worker would be placed on the surgical list.

In a September 11, 2002 claim log entry the case manager noted that she had advised the worker coccyx surgery would not be approved as the worker's previous specialists did not expect he would benefit from surgery.

In his September 18, 2002 report Dr. P3 indicated that the worker had exhausted non-operative management and had ongoing pain and clicking. He thought a coccygectomy was reasonable.

In her October 2, 2002 claim log entry Dr. P4, a Board medical advisor, reviewed the medical information on file and advised that the worker plateaued in his recovery as of October 17, 2001 when he last saw Dr. S.

In his operative report documenting the worker's October 23, 2002 surgery Dr. P3 indicated that the most distal coccyx segment was grossly mobile. He also noted a section of the coccyx had fractured "through the cartilage joining the next segment." In a follow-up report of December 17, 2002 Dr. P3 noted the worker was more comfortable but not pain free. He commented that he thought the worker would find improvement over the next several months and the pain would settle over the next six months to a year.

In her January 8, 2003 claim log entry, authenticated by the case manager and Dr. P4, a Board officer documented a meeting at which a plateau date and the appropriateness of further surgery was reviewed. She indicated Dr. P4 considered the surgery could be viewed as having a potential for reduction in the worker's coccygeal pain. The surgery was not expected to change the worker's level of functioning and therefore the previous plateau date of October 17, 2001 would not change.

In her January 8, 2003 claim log entry Dr. P4 indicated that the worker had plateaued in his recovery in November 2001 and would likely return to his plateaued status six months post-coccygectomy.

In his February 18, 2003 report Dr. P3 indicated that he expected the worker to improve further up to about a year although he was disappointed in the amount of symptom relief the worker had to that point.

In his March 10, 2003 medical assessment report, Dr. M2, an orthopaedic surgeon who was the medical director of a pain clinic, noted that the surgical procedure had not resulted in benefit. The worker attended a pain clinic on a two-week trial period. The March 27, 2003 discharge summary indicated that the worker had made some physical progress over the time he attended the clinic which should continue with a general exercise program. The author of that report, Dr. M3, a psychologist, commented that from a psychological prospective there was not enough progress during the trial period to warrant continuation of the program.

In his May 20, 2003 report Dr. P3 noted the worker's report of ongoing symptoms. He indicated that the worker would find the symptoms improved over the next year. Dr. P3's August 26, 2003 report noted that he "hasn't seen a big difference having the coccyx out." The worker felt that he had too much pain to return to work as a truck driver.

By decision of October 16, 2003 the worker was awarded a pension of 2.5 percent total disability effective October 18, 2001. He was paid this in a lump sum amount of approximately $17,500.00.

In his November 4, 2003 report Dr. P3 commented that the worker had pain and limited standing, sitting, and walking tolerance. Dr. P3 indicated the pain had plateaued; it was no longer progressing. He indicated the worker could return to activities as his symptoms permitted. He commented the worker could benefit from referral to a chronic pain clinic but he would not recommend any further intervention.

In his notice of appeal the worker indicates that the Review Division decision should be changed because wage loss benefits should have been paid for a longer period, the plateau date was not correctly stated, he never had a pension or an assessment for a pensionable condition, and the wage rate was set using 90 percent of net earnings. He requests payment of wage loss from October 17, 2001 to October 23, 2002, a plateau date set using the recovery period after the October 23, 2002 surgery, and his wage rate be based on 75 percent of gross earnings as the surgery was based on ongoing symptoms pre-dating legislative changes. He indicates a pension assessment was never determined since the plateau date in October 2001.

In his accompanying submission the worker reviews the progress of his condition. He indicates that information was disregarded and a decision was made that he was "fine" and could return to work in October 2001. He comments that his condition was worsening to the point where he was becoming less able to function normally with regard to walking, dressing, sitting or bathroom functions. He indicates that he consulted a surgeon who agreed that his coccyx should have long since been removed. He indicates Dr. P3 confirmed that the coccyx was grossly mobile and had caused

extensive internal damage which meant that he was unlikely to fully recover and would be left with a permanent disability.

The worker discusses his interaction with a rehabilitation consultant and indicates he was shocked by what he considered was the consultant's ignorance of the worker's profession.

He concludes his submission by requesting that he be paid temporary disability wage loss benefits from October 17, 2001 to date at 75 percent of gross earnings as there should never been a time when his file was closed. He indicates that he should be provided with a permanent total disability award based on 75 percent of gross wages as it has become evident he cannot return to his profession and he is not young enough or physically capable of being retrained for a profession of comparable earning potential.

**Reasons and Findings**

Whether the worker's pension entitlement has been properly calculated is not before me. The appeal before me concerns a July 25, 2003 Review Division decision which predates the October 16, 2003 pension decision. Further, whether the worker's eligibility for vocational rehabilitation was properly assessed is also not before me.

Plateau date of October 17, 2001 and temporary
disability benefits between October 2001 and October 2002.

There are at least three items in *Rehabilitation Services and Claims Manual*, *Volume I* (RSCM I) that are of assistance with this issue. Item #34.10 provides that a temporary physical impairment is one which is likely to improve or become worse and is therefore not stable. It remains temporary only when a change can reasonably be foreseen in the immediate future. Item #34.50 provides that temporary disability wage loss benefits will be terminated when a worker's physical impairment resulting from the injury ceases to be temporary total, that is, becomes partial, disappears entirely or stabilises.

Item #34.54 deals with whether a worker's condition is permanent to the extent that a pension should be assessed. If a condition has definitely stabilised it is considered permanent. If a condition has definitely not stabilized a worker will be maintained on temporary disability wage loss benefits. If there is a likelihood of minimal change, the condition will be considered permanent. If there is a likelihood of significant change, the condition will be considered temporary if the potential change is likely to resolve relatively quickly (generally within 12 months); the condition will be considered permanent if the potential change is likely to be protracted (generally over 12 months).

The reports of Dr. H around October 2001 indicated that there was no change in the worker's clinical examination results. Dr. S, a specialist who examined the worker, expressly indicated in October 2001 that the worker had plateaued. When he saw the worker in April 2002 Dr. P3 considered that the worker had a "hot" bone scan, yet it

appears that he was commenting on the 2000 bone scan not the more recent 2001 scan (which was interpreted as not showing an increased uptake and was referred to as normal in a report concerning a September 2001 CT scan). Dr. P3's report does not refer to the second bone scan. Thus I question whether Dr. P3's opinion as to an improvement in the worker's condition ("about 70% good outcome from this") was based on all the relevant testing results.

I note that Dr. P4 considered that while the worker's pain might improve she considered his level of functioning would not. I consider her opinion finds some support in the reports of Dr. S and P2 who did not favour surgery. I stress that I am not rendering a decision on whether the Board should have accepted the surgery but addressing whether, as of October 2001, there was a likelihood of significant change in the worker's condition.

I find that there was not a likelihood of significant change as the evidence establishes that the worker's condition had plateaued as of October 2001. I have considered the office chart entries of the worker's attending physician but they do not persuasively point to a later plateau date.

I appreciate that the worker eventually underwent surgery in October 2002 and gross mobility of a coccyx segment was found at surgery. Yet that does not alter the fact that as of October 2001 surgical intervention was not considered medically appropriate and there was no expectation of a change in his condition. That the worker was again seen as temporarily disabled as of October 2002 does not mean that he had a temporary disability between October 2002 and his last period of temporary disability which ended in October 2001. I do not doubt that the worker had a disability after October 17, 2001; the Board has awarded a pension to recognise that disability. Rather, I consider that the disability as of October 17, 2001 was permanent.

I agree with the review officer that given the worker's plateau in October 2001, he was not entitled to temporary disability wage loss benefits from October 2001 to October 2002.

Reopening wage rate

Had the worker been paid wage loss benefits continuously from October 17, 2001 onward his benefits would not have changed from 75 percent of gross earnings to 90 percent of net earnings. However the worker's temporary disability benefits concluded prior to June 30, 2002 and his temporary disability recurred after June 30, 2002, the transition date for relevant changes to the Act. Entitlement related to the recurrence is adjudicated under the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002*, which came into effect on June 30, 2002. The policies relevant to this aspect of the appeal are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). I understand the worker's observation that his claim was reopened in October 2002 in connection with problems that had commenced with an

injury before June 30, 2002. However the key consideration is that while the symptoms may have been continuous, temporary disability benefits were not.

Item #1.03(b)(4) of RSCM II provides that if an injury occurred before June 30, 2002 and a disability recurred after that date the current provisions of the Act as amended by *Workers Compensation Amendment Act, 2002* are applicable. As noted above, I am required to apply Board policy. Further, I consider that the policy is an accurate interpretation of the law. The worker's entitlement to temporary disability wage loss benefits for the October 2002 reopening properly used the 90 percent of net earnings figure rather than the 75 percent of gross earnings figure used in connection with his benefits paid from June 2000 to October 2001.

Termination of temporary disability wage loss benefits as of April 22, 2003

I note that a case manager issued an April 24, 2003 letter in which she referred to the January 10, 2003 letter of a prior case manager which advised the worker that wage loss benefits would continue while he was recovering from the surgery but would not be paid beyond six months from the date of surgery. The worker disagreed and expressed that concern to a case manager who advised the worker in a May 22, 2003 letter that it was not open to her to reconsider the January 10, 2003 decision under subsection 96(4) of the Act as more than 75 days had elapsed since the January 10, 2003 decision.

The July 25, 2003 letter of the review officer appealed to me confirmed three decisions of the case manager found in the January 10, 2003 decision. The issue as to the duration of temporary disability wage loss benefits post-surgery was not addressed by the review officer. It does not appear that it was raised in the materials filed in connection with the worker's request for a review. The request was filed in February 2003, before wage loss benefits were terminated effective April 22, 2003.

Item #14.30 of the WCAT's *Manual of Rules, Practices and Procedures* provides that WCAT has jurisdiction to address any issue determined in either the Review Division decision or prior decision by the Board officer which was the subject of the request for review by the Review Division. Thus, as the worker has raised the issue of the duration of post-surgery wage loss benefits, it is open to me to address it regardless of the contents of the review officer's decision.

The January 10, 2003 decision is somewhat troublesome given that it advises the worker that his temporary disability wage loss benefits will be terminated approximately three and a half months later. I appreciate that the case manager was relying on a January 8, 2003 opinion from Dr. P4 that the worker "will likely have returned to his plateau state as of six months post coccygectomy." Yet, a decision in January that a worker will cease to be temporarily disabled in April involves little adjudication of the actual state of the worker's disability in April.

I consider it might have been appropriate for the case manager to have indicated that it would be "expected" that the worker would have six months of temporary disability post-surgery. However, she clearly issued a decision letter advising that wage loss benefits "will not be paid beyond six months from the date of surgery." Such a decision might not accord with general policy expectations. Policy does provide for exceptional cases but item #34.53 of the RSCM II provides that "a termination date should not normally be set for the future."

While I have concerns as to the process followed in this case, I consider that the medical evidence supports a decision that the worker's disability plateaued in April 2003.

Dr. H indicated in his April 14, 2003 letter that the worker's recovery had not progressed as well as expected and he remained unable to return to work. He considered the worker continued to suffer from severe protracted chronic daily pain. He noted the worker was unable to sit and required daily use of regular potent chronic medication which might affect his alertness and impair his ability to drive safely and work at other occupations. He urged a reconsideration of the worker's eligibility for disability benefits.

The Board's clinical care plan includes Dr. D's documentation of the results of an April 22, 2003 conversation with Dr. H. Dr. D indicates that he and Dr. H agreed that "it was unlikely that the symptoms or findings would change very much over the next 6-12 months." Earlier in this decision, I noted Dr. P3's May 20, 2003 and August 26, 2003 reports. I do not consider that those reports suggest that the worker's disability underwent any significant changes following April 2003. Dr. P's November 2003 report noted above also does not suggest that there were any significant changes following April 2003. I find that the worker's disability plateaued as of April 2003 and wage loss benefits were properly terminated.

**Conclusion**

The worker's appeal is denied and I confirm the decisions of the review officer and the case manager. The worker had plateaued in his recovery by October 17, 2001. He is not entitled to temporary disability wage loss benefits for the period from October 17, 2001 to October 22, 2002. His temporary disability wage loss benefits as of October 23, 2002 were properly calculated using 90 percent of his average net earnings. Temporary disability wage loss benefits were properly terminated as of April 22, 2003.

Randy Lane
Vice Chair

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