

Noteworthy Decision Summary

Decision: WCAT 2003-04166-RB **Panel:** Anthony Stevens **Decision Date:** December 16, 2003

Example of a section 246(3) referral back to the Workers' Compensation Board (Board) – Whether it was necessary to refer a matter back to the Board

The worker appealed four decisions of the Workers' Compensation Board (Board) in relation to his 1996 work injury. The decisions concerned his entitlement to vocational rehabilitation benefits, wage loss benefits, health care benefits, and a permanent partial disability award. However, the worker's entitlements were only considered in relation to his physical disability and had no regard to the fact that the Board also accepted that the worker sustained a psychological injury as a compensable consequence of this claim. The preliminary issue in his appeal was whether there was a matter that should have been determined by the Board, but was not, and should be referred back to the Board for determination under section 246(3) of the *Workers Compensation Act* (Act).

The worker was diagnosed under the DSM-IV with Pain Disorder Associated with Both Psychological Factors and a General Medical Condition. A case manager documented that the worker had a permanent psychological condition, arising as a consequence of his accepted condition and surgeries. The worker's representative agreed that the four decisions of the Board concerned his potential entitlement in relation to his physical injury alone, and did not consider what entitlements might arise due to his accepted Pain Disorder. The worker's representative also agreed that it was appropriate to refer the general matter back to the Board, pursuant to section 246(3) of the Act. As such, the panel found that a section 246(3) referral was indicated in this case, and listed specific issues the referral was to address. The panel suspended the worker's WCAT appeals pending determinations of the Board on the referred matters. It further noted that, pursuant to section 246(4), the Board's determinations on the referral are not reviewable by the Review Division of the Board.

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Introduction

This is a summary decision on whether it is necessary to refer a matter back to the Board pursuant to section 246(3) of the *Workers Compensation Act* (Act).

The worker appealed four decisions of the Workers' Compensation Board (Board) that were undertaken in relation to his June 26, 1996 injury claim. The Board established that claim for a cervical injury and the necessary two surgeries that followed it. The appealed decisions were communicated by letters dated June 27, 2001, August 28, 2001, January 31, 2002, and June 7, 2002. Those decisions included issues surrounding the worker's entitlement to vocational rehabilitation benefits, wage loss benefits, health care benefits, and a permanent partial disability award. However, consideration of the worker's entitlements was only in relation to the worker's physical disability and had no regard to the fact that the Board also accepted that the worker sustained psychological injury as a compensable consequence under this claim.

Issue(s)

A preliminary issue arises in the worker's appeal as to whether there is a matter that should have been determined by the Board, but was not, and should be referred back to the Board for determination.

Background and Summary Decision

Section 246(3) of the Act provides:

If in an appeal, the appeal tribunal considers there to be a matter that should have been determined but that was not determined by the Board, the appeal tribunal may refer that matter back to the Board for determination and suspend the appeal proceedings until the Board provides the appeal tribunal with that determination.

The appealed decisions involved matters of entitlement arising from the worker's compensable injury and its residual consequences. The worker's return to employment was hindered by what was described on file as chronic pain and depression, in addition to his residual neck disability. As a result, the Board arranged for the worker to undergo a psychological assessment on June 16, 2001 to determine whether he met the criteria for a DSM-IV psychological diagnosis. That assessment was undertaken by

Dr. S. Turnbull, who concluded that the worker fit the DSM-IV criteria for Pain Disorder Associated with Both Psychological Factors and a General Medical Condition.

A Board psychologist, Dr. S. Schibler, reviewed Dr. Turnbull's assessment and opinion, and in an August 30, 2001 memorandum on file concluded:

I accept Dr. Turnbull's diagnosis of a Pain Disorder attributable to the 1996 work-injury. I agree with her opinion that [the worker] is highly focused on obtaining further medical intervention, and that his psychological status is unlikely to change until he views options in that regard as being exhausted. I am hoping that the upcoming MRI will be a significant step in that regard; either confirming his medical plateau status or providing direction for further medical management. Should the former be the case, I will consider [the worker] psychologically plateaued. Of note, he has already received the appropriate treatment for a Pain Disorder (i.e., participation in an IPP on two occasions).

[reproduced as written]

A Board medical advisor subsequently concluded that the worker's condition remained plateaued. Moreover, by memorandum dated September 21, 2001 a case manager documented that the worker had a permanent psychological condition, with that condition arising as a consequence of his accepted condition and surgeries.

The four decisions of the Board that the worker has appealed are all concerned with his potential entitlement in relation to his physical injury alone. They do not consider what entitlements might arise due to his accepted Pain Disorder.

Also, when undertaking the September 25, 2001 employability assessment on file, the vocational rehabilitation consultant believed there had been no psychological condition accepted under the worker's claim. In the result, the worker's diagnosed psychological condition was not factored into the conclusions respecting the worker's future employability.

It is also notable that the May 16, 2002 disability examination was specific to functional limitations and there was no directed assessment undertaken to determine if the worker was entitled to a further disability award in relation to his permanent compensable psychological condition.

The worker's representative agreed at the outset of the worker's oral hearing that the worker's entitlements were not considered with regard to the fact that the Board had accepted that the worker also had the diagnosed Pain Disorder. The worker's representative also agreed that it was appropriate to refer the general matter back to the Board, pursuant to section 246(3) of the Act.

As such, I find that a section 246(3) referral to the Board is indicated in this particular case. That referral is to address the following issues:

1. Whether the June 27, 2001 decision to terminate vocational rehabilitation assistance remained reasonable, given the Board's subsequent acceptance that the worker also had a compensable Pain Disorder Associated with Both Psychological Factors and a General Medical Condition.
2. In terms of the August 28, 2001 and January 31, 2002 decisions whether the worker was entitled to wage loss and/or health care benefits associated with his diagnosed Pain Disorder.
3. What percentage of functional disability, if any, would the worker's diagnosed Pain Disorder warrant?
4. What is the likely future employability of the worker given both his permanent cervical disability and his permanent Pain Disorder?

The worker's appeals before WCAT are suspended pending a determination by the Board of the above referred matters. I also note that pursuant to section 246(4) of the Act the further determinations of the Board become part of what is before me, and no review by the Review Division can be requested. The worker's representative was made aware of that fact, and nevertheless agreed with the referral that I now undertake. For clarity, bearing in mind that this is a relatively new process, I note that section 246(4) of the Act provides:

If the appeal tribunal refers a matter back to the Board for determination under subsection (3), the appeal tribunal must consider the Board's determination in the context of the appeal and no review of that determination may be requested under section 96.2.

Conclusion

I undertake the above referral pursuant to section 246(3) of the Act, the consequence of which is that the worker's appeals remain in suspense pending the Board providing WCAT with their determinations.

Anthony F. Stevens
Vice Chair

AFS/gl