

Noteworthy Decision Summary

Decision: WCAT 2004-00110 **Panel:** S. Polsky Shamash **Decision Date:** January 13, 2004

Reopening - Bill 49 reopening wage rate – Example of an application of the Bill 49 wage rate as it applies to a reopening for a recurrence of temporary disability after June 30, 2002 that resulted from an injury before that date

The worker injured his arm in September 2000, and the Workers' Compensation Board (Board) paid him wage loss benefits until December 2001 when he returned to modified work. His claim was subsequently reopened for surgery in November 2002. The Board decided that because the reopening was after the June 30, 2002 transition date set out in the *Workers Compensation Amendment Act, 2002* (Bill 49), the current provisions for calculating his wage rate applied. The worker appealed. He submitted that he was only able to return to work because modified duties were available, and if modified work not been available he would have received ongoing wage loss benefits. He also continued to undergo treatment and be investigated during the December 2001 to November 2002 period. Prior to June 30, 2002, the effective date of the Bill 49, wage loss benefits were based on 75 percent of gross wage rate, and under the current provisions, workers' benefits are paid on the basis of 90 percent of their net wage rate. The issue was whether his wage loss benefits as of November 2002 ought to be calculated on the basis of 90 percent of his net earnings prior to the original date of injury, or using 75 percent of his gross earnings.

The appeal was denied. Section 35.1(8) of the *Workers' Compensation Act* (Act) provides that if, on or after the transition date (June 30, 2002), a worker has a recurrence of disability resulting from an injury that occurred before the transition date, the Board must determine compensation based on the current provisions. The panel also referred to policy item #1.03. The worker's temporary disability benefits concluded prior to June 30, 2002 and his temporary disability recurred after that date. The fact that the worker was able to return to work at modified duties did not necessarily lead to a conclusion that he would otherwise have remained on wage loss benefits until his surgery. Pursuant to section 29 and section 30 of the Act, wage loss benefits are paid while a worker's condition remains temporary. They cease when he recovers from his temporary disability, when his condition stabilizes or when he returns to work. Even had modified duties not been available, it was very possible that the Board would have considered the worker's condition stable throughout this almost one year period and he would not have been entitled to wage loss benefits in any event. Undergoing investigations and treatment do not necessarily lead to a conclusion that a worker is temporarily disabled. What might have happened had modified duties not be available was not determinative. The key consideration was that while the worker's symptoms, investigations and treatment may have been continuous, his temporary disability benefits were not. The worker's entitlement to temporary disability wage loss benefits for the November 2002 reopening for surgery properly used the 90 percent of net earnings figure rather than the 75 percent of gross earnings figure previously used as the basis for his benefits paid from September 2000 to December 2001.

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Panel: Susan L. Polsky Shamash, Vice Chair

Introduction

The worker, a 43 year-old logger, injured his right arm/shoulder on September 22, 2000. The Workers' Compensation Board (Board) accepted his claim for compensation and paid him wage loss and health care benefits until December 9, 2001 when he returned to work at modified duties. The worker's claim was subsequently reopened for surgery on November 28, 2002.

In a January 30, 2003 decision a case manager informed the worker that, because this reopening was less than three years from his date of injury, the reopening wage rate would be the same as initially established on his claim – the statutory maximum at the time of the injury plus applicable consumer price index increases. However, since this reopening was after the June 30, 2002 transition date, the current provisions for calculating his wage rate applied.

Effective June 30, 2002 the *Workers Compensation Amendment Act, 2002* (Amendment Act, 2002) changed the provisions on calculating workers' average earnings or wage rates. Under the former provisions, workers' wage loss benefits were based on 75 percent of their gross wage rate. Under the current provisions, their benefits are paid on the basis of 90 percent of their net wage rate.

The worker now appeals from a July 9, 2003 decision of the Review Division which denied his appeal.

The worker did not request an oral hearing. I am satisfied that this appeal can be determined on the basis of the claim file and the submission of the worker's representative without the necessity of an oral hearing. The issue is primarily a legal one. The worker's representative has provided written submissions dated November 14 and December 11, 2003 to this panel.

The employer is participating in this appeal and provided a November 25, 2003 written submission.

Issue(s)

The issue to be determined on this appeal is whether the worker's wage loss benefits as of November 28, 2002 ought to be calculated on the basis of 90 percent of his net earnings prior to the original date of injury or by using 75 percent of his gross earnings.

Jurisdiction

This appeal is brought under section 239(1) of the *Workers Compensation Act* (Act) which permits appeals from Review Division findings to the Workers' Compensation Appeal Tribunal (WCAT).

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 a 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).

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

The worker injured his right arm/shoulder when he fell down a steep slope. He underwent a bursectomy and partial acromioplasty on May 17, 2001 which did not relieve his symptoms. He returned to work on modified duties, initially part-time, in November 2001, full-time in December 2001. These modified duties were arranged privately between the worker and the employer without the assistance of a Board vocational rehabilitation consultant.

Because of the worker's ongoing symptoms, on November 19, 2001 Dr. R. Anderson, orthopaedic surgeon, recommended he undergo another MRI. This was performed on December 9, 2001 and showed supraspinatous and infraspinatous tendonitis with minimal impingement. On February 1, 2002 Dr. Anderson recommended that the worker have further surgery and that it be performed by Dr. R. Hawkins. Dr. Hawkins examined the worker on April 23, 2002 and concurred with Dr. Anderson's analysis but was unavailable to operate until October 2002. To avoid delay, the Board tentatively scheduled the worker to be seen by another orthopaedic surgeon. The worker declined this opportunity preferring to wait until Dr. Hawkins was available. The surgery eventually took place on November 28, 2002 and the worker's claim was reopened for wage loss benefits as of that date.

Submissions

The worker's representative has argued that the worker did not totally recover from his compensable injury and subsequent surgery before he returned to work at modified duties in December 2001. Had modified duties not been available he would have received ongoing wage loss benefits. The worker continued to be disabled from his regular job as a hooktender and to receive medical treatments and undergo medical

investigations. These established continuity of the ongoing disability. Surgery was recommended well-before June 30, 2002 but for reasons outside of the worker's control it was not performed until after that date. The representative argued that the worker's claim was never formally closed and therefore this was not a reopening. He should therefore be entitled to payment of his wage loss benefits under the former provisions.

The employer's representative submitted that the Review Division decision was correct and should be confirmed.

Reasons and Findings

The Review Division denied the worker's appeal on the basis that there was a lack of medical evidence indicating that he had any ongoing temporary disability beyond December 9, 2001 since he had returned to work at modified duties while undergoing further assessment and treatment. The review officer noted that the second surgery was not contemplated at the time the worker's wage loss benefits were concluded and there was a significant period of time before it was determined that he required further surgery.

Entitlement for the recurrence of the worker's temporary disability is adjudicated under the Act as amended by the Amendment Act, which came into effect on June 30, 2002. The relevant policies are set out in the *Rehabilitation Services and Claims Manual, Volume 2* (RSCM).

Section 35.1(8) of the Act provides that if, on or after the transition date (June 30, 2002), a worker has a recurrence of disability resulting from an injury that occurred before the transition date, the Board must determine compensation based on the current provisions. Recurrence is not defined in the Act. Item #1.03 of the RSCM provides that it is similar in concept to one of the grounds for reopening which, pursuant to section 96(2) of the Act, are a significant change in the worker's compensable medical condition or a recurrence of the worker's injury.

Paragraph #4 of item #1.03 states that a recurrence includes any claim that is reopened for any additional period of temporary disability where no permanent partial disability award was previously provided. An example of a recurrence is a worker who totally recovered from a temporary disability and whose wage loss payments were concluded. The worker has a subsequent recurrence of the disability and the claim is reopened for compensation.

Had the worker been paid wage loss benefits continuously from September 22, 2000, the amount of 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 that date. I appreciate his representative's contention that the worker was only able to return to work because modified duties were available to him and that he continued to undergo

treatment and be investigated during the December 2001 to November 2002 period. I also appreciate that the surgery had originally been scheduled prior to June 30, 2002 but was postponed until after that date for reasons that were beyond the worker's control.

The fact that the worker was able to return to work at modified duties does not necessarily lead to a conclusion that he would otherwise have remained on wage loss benefits until his second surgery. Pursuant to sections 29 and 30 of the Act, wage loss benefits are paid while a worker's condition remains temporary. They cease when he recovers from his temporary disability, when his condition stabilizes or when he returns to work. Even had modified duties not been available, it is very possible that the Board would have considered the worker's condition stable throughout this almost one year period and he would not have been entitled to wage loss benefits in any event. Undergoing investigations and treatment do not necessarily lead to a conclusion that a worker is temporarily disabled.

What might have happened had modified duties not be available is not determinative. The key consideration is that while the worker's symptoms, investigations and treatment may have been continuous, his temporary disability benefits were not. His representative is correct that his claim was not "closed", but his wage loss benefits had been concluded. I am most sympathetic to the worker and his representative's concern. I note the reliance on the example in policy of a worker who had totally recovered from a temporary disability when arguing that in this case the worker had not totally recovered. However, that is an example provided by policy and not exhaustive of the possibilities. Legislative change always has an effective date. Through no fault of their own people are (sometimes) adversely affected by such changes. It is unfortunate but unavoidable.

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 November 28, 2002 reopening for surgery properly used the 90 percent of net earnings figure rather than the 75 percent of gross earnings figure previously used as the basis for his benefits paid from September 2000 to December 2001.

Conclusion

The worker's appeal is denied. I confirm the decisions of the review officer and the case manager. The worker's wage loss benefits as of November 28, 2002 were properly calculated using 90 percent of his average net earnings.

No costs or expenses were requested.

Susan L. Polsky Shamash
Vice Chair

SLPS/jda/dcw