NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2004-00222-RB **Panel**: J. Brassington **Decision Date**: January 16, 2004

Employment insurance payments – Section 33(3.2) of the Workers Compensation Act - Item #68.40 of the Rehabilitation Services and Claims Manual, Volume II

The worker sustained a right knee injury on January 20, 1978. His claim was accepted and the injury and subsequent surgery were found to be compensable. One of two issues being appealed by the worker is the October 8, 2002 decision letter of a case manager in which the worker was advised that his earnings from his employment in the previous year would be used to set the long-term wage rate, but employment insurance benefits would not be counted. The worker appeals on the basis that golf course work in the area is seasonal and therefore his employment insurance benefits should have been included when calculating his average earnings.

The panel noted that both section 33(3.2) of the *Workers' Compensation Act* (Act) and policy item #68.40 of the *Rehabilitation Services and Claims Manual, Volume II* authorize the inclusion of employment insurance benefits if the worker's employment was in an occupation or industry that results in "recurring seasonal or recurring temporary interruptions of employment". The case manager did not count employment insurance benefits in this case because the occupation was not on the list of seasonal industries set out in the policy. The panel found that as there may be factual circumstances which clearly fit the intent of section 33(3.2) of the Act, but which do not involve sufficient numbers of workers to have come to the attention of the Board for consideration of listing, section 33(3.2) of the Act should not be read as stating that inclusion on the list is a prerequisite to consideration under section 33(3.2). The panel concluded that, exercising the discretion contained in section 33(3.2) of the Act, the worker's employment insurance benefits should have been included in the calculation of his average earnings. Alternatively, if a "listing" is required for an industry or occupation to be considered seasonal, then Practice Directive #35 leaves open for consideration on a case by case basis whether there were recurring temporary interruptions in employment to support the inclusion of employment insurance benefits in the calculation of the worker's average earnings. In this case there were such recurring temporary interruptions so employment insurance benefits should be included in the calculation of the worker's average earnings.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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Panel: Julie A. Brassington, Vice Chair

Introduction

The worker sustained a right knee injury on January 20, 1978. His claim was accepted and the injury and subsequent surgery were found to be compensable.

In the February 22, 2001 decision letter from a case manager at the Worker's Compensation Board (Board) the worker was advised that his left knee complaints were not accepted as being related to his right knee injury of 1978. His left knee had a diagnosis of osteoarthritis, which was not accepted under the claim. The case manager found that this condition is one that could affect the general population. The worker was advised that there had been no objective medical evidence supplied to his claim file since March 13, 1998 when he was provided with a decision regarding the non-acceptance of his left knee complaints. The worker appeals the decision on two counts; one on the basis that he believes his left knee problems are directly related to his right knee injury of 1978 and two, that the medical evidence he submitted was new and objective evidence. This is Appeal B.

In Appeal C the worker is appealing the October 8, 2002 decision letter of a case manager in which he was advised that policy dictated that the case worker was required to use only the worker's earnings from his employment in the previous year to set the long-term wage rate. The case manager stated that when calculating the wage rate, he was not allowed to include the employment insurance benefits the worker had collected during that time period. The case manager noted that even though the industry of working in a golf course was clearly seasonal in nature, since there was no golfing in the region in the wintertime, this had not been recognized by Board policy. The worker appeals on the basis that golf course work in the area is seasonal and therefore his employment insurance benefits should have been included when calculating his average earnings.

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Issue(s)

Appeal B

Did the worker submit the new evidence in 2001 that was significant enough to warrant a reconsideration of the March 13, 1998 decision? For example, were there new medical findings or was there a new opinion on previous findings, or did the worker call the Board's attention to critical evidence which had earlier been overlooked?

Appeal C

Was the worker's long-term wage rate correctly set? Is the worker a seasonal worker or a worker in a seasonal occupation; and if yes, should his employment insurance benefits have been included when the Board calculated his long-term wage rate?

Jurisdiction

These appeals were filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Workers' Compensation Appeal Tribunal (WCAT) replaced the Appeal Division and Review Board. As a Review Board panel had not considered these appeals before that date, they have been decided as WCAT appeals. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

Under sections 250(1) and (2) of the *Workers Compensation Act* (Act) (effective March 3, 2003) WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. It must make its decision on the merits and justice of the case. It must apply policies of the Board's board of directors, which apply, to the case, except in exceptional circumstances outlined in section 251 of the Act.

Under section 254 of the Act (effective March 3, 2003), WCAT has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined in an appeal before it. Thus, this appeal is a rehearing.

Background and Evidence

The worker was employed as a heavy duty mechanic when in January of 1978 he stepped in a hole and wrenched his right knee. He had a tear of the medial meniscus and had a medial meniscectomy performed in 1978. Subsequent investigations have revealed osteoarthritis of the medial compartment, which has been accepted under the claim as being secondary to the injuries and surgeries sustained.

The worker subsequently found employment as a small engine mechanic on a local golf course where he primarily works on domestic sized equipment. He is in receipt of a permanent functional impairment pension for the right leg and knee assessed at 15 percent impairment equalling 7.5 percent total disability.

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In 1996 the worker was examined by the disability awards medical advisor who in memo #42 recorded that the worker had moderately severe degenerative changes involving the medial compartment of the right knee, some anterior cruciate ligamentous laxity, some muscle atrophy of the right quadriceps complex with no loss of power of the flexors and extensors of the knees. There was a reduced range of motion in the right knee. On examination the medical advisor noted the worker walked with an antalgic gait, favouring his right leg.

In 1999 a disability awards medical advisor re-examined the worker for pension purposes. He found that the worker had evidence of ongoing active arthritis with acute and chronic synovitis. He noted that objectively there had been a further decrease in the range of movement of the right knee, and the range of movement in the left, non-compensable side had remained essentially the same.

The employability assessment completed in April of 1999 stated that:

> "In relation to attempting to locate full-time employment as a golf course maintenance mechanic, this would only be available in the lower mainland (weather) and his physical restrictions would, in my opinion, prevent him from securing such employment in a highly competitive job market."

In memo #50, dated February 25, 1998 the Board medical advisor addressed the issue of the development of pain impairment in the left knee as a result of favouring a joint that had been injured in the past. He indicated that this was difficult to sort out, as there was no scientific support one way or the other. He felt it came down to speculation, along with taking into account all the aspects of each individual case. He noted:

> Certainly, if someone has got a significantly impaired gait or altered walking pattern and relies on the opposite leg for weight bearing then there is a potential for increased wear and tear, thus degeneration.
>
> In this particular case, that detailed information is not available and therefore, one would have to state that it's equivocal that he has developed some of his left knee problems as a result of favouring. It is also possible that he has developed a degenerative tear. This can occur with age, regardless of injury to the other knee. Even considering this factor; however, it still leave his current situation unbalanced in terms of possibilities.

In memo #63, dated June 27, 2000 the case manager noted that Dr. Gouws had conducted a PFI examination on August 16, 1999 and had indicated:

> ….is experiencing more problems with his left knee because of the extra effort required in trying to save and take the weight off his right knee as much as possible.

The case manager indicated she was not clear whether this was Dr. Gouws' opinion or a statement provided by the worker or his wife and requested the Board medical advisor comment further on this matter.

Memo #64, dated September 12, 2000 outlines the Board medical advisor's response. He noted that Dr. Buchko's report of January 13, 1998 stated:

> [The worker] has a degenerative medial meniscus tear of the left knee. There is a possibility that this has developed through wear and tear over the years because he has been favouring his right knee. However, there is no way to prove or disprove this idea.

The Board medical advisor agreed with Dr. Buchko's comment that there was no way of stating whether the left knee problems would have arisen if the worker had not had a previous right knee surgery. He felt it would not be unreasonable to conclude that the degenerative changes that had occurred in the left knee had probably been accelerated by overuse and favouring of this knee as a result of his injury to the right knee.

The worker eventually had surgery on the left knee. The operative report of November 5, 1998 noted extensive Grade III chondromalacia patella involving the weight bearing area of the medial femoral condyle. The surgeon noted that the medial meniscus was normal and there was Grade II chondromalacia involving medial tibial plateau. It appeared that there was relatively advanced osteoarthritis of the left knee.

In support of his belief that his left knee problems are the result of the problems with his right knee, the worker has submitted a letter from Dr. O'Brien dated August 13, 2003. Dr. O'Brien stated the worker now has osteoarthritis of the left knee that has been attributed to the over-compensation due to his right knee injury. She stated this could be so and it has been suggested by at least four other specialists that this could be so and she could not disagree.

In August of 2002 the worker's claim was reopened, as he was found to be temporarily totally disabled while awaiting a total right knee replacement. The worker had the total right knee replacement surgery on February 4, 2003.

The September 27, 2002 expedited consultation report completed by Dr. Driedger indicated that he felt that in the absence of a significant event or surgery of that side, that any arthritis in the left knee was aggravated if not directly secondary to the problems with the worker's right knee.

In the September 12, 2002 claim log the case manager noted that the reopening date was August 16, 2002. The log entry indicated that he asked the worker for information substantiating one year's prior earnings. The case manager noted that the reopening would fall under the current provisions and would therefore be subject to the new 90 percent rule. The worker advised the case manager he had been on employment insurance in January and February of that year.

In the September 16, 2002 claim log the case manager indicated that the worker's last day worked was July 12, 2002 and this date would be used as the reopening date. The case manager spoke to the employer's accounting department and was advised that the worker earned $15.00 per hour plus 4 percent vacation pay. He worked eight hours per day.

In calculating the initial wage rate the case manager determined that the worker was a regular worker and this was a reopening over three years of date of injury. The initial wage rate was calculated using hourly earnings. This wage rate was in effect for ten weeks after which the long term wage rate was set.

In calculating the long term wage rate, the case manger determined that this was a recurrence over three years from the date of injury; therefore the wage rate on reopening was based on current earnings. He determined that the worker was a regular worker with employment insurance, and noted the worker's job was actually seasonal in nature. Earnings of $20,312.92 as indicated by the employer, for the previous year, were used to calculate the long term wage rate. The worker had been in receipt of employment insurance in the amount of $5,360.00 from November 18, 2001 to March 30, 2002. This amount was not considered in the calculation.

At the hearing the worker testified that the problems with his left knee started approximately ten years ago. He stated that due to the problems with his right knee, he used his left knee for everything. Over the years, he stated the more he used his left knee, the worse it became.

The worker testified that for the past 12 years he has worked on a local golf course repairing small equipment. He stated there was no hoist to lift the equipment onto a bench, so he was required to kneel down to do the repairs on the heavier equipment.

At the hearing the worker's representative submitted that in calculating the worker's wage rate, his employment insurance earnings should have been included. He submitted a copy of the worker's T4 slips indicating that from 1997 through to 2001 the worker was laid off by the employer in the fall and rehired in the spring.

The worker's representative noted that the Board's policy directive #35 indicated that employment insurance earnings could be included provided that the worker was employed in a seasonal industry or seasonal occupation and they have been with the employer more than two years. He submitted that the worker had worked for his

employer for over ten years and that each year he was laid off in the winter when the golf course closed and was rehired in the spring when the golf course reopened. He indicated that Board policy provided a list of seasonal industries and occupations and that golf courses in the area were not on either list. However, he noted that agricultural workers were on the list. He stated that if you went to the National Occupational Classification put out by Human Resources Development Canada (on which the Board relies to determine work related duties and classifications), that landscaping and grounds maintenance labourers and managers included workers on golf courses. Accordingly, he submits that the worker is a seasonal worker and as such should have had his employment earnings included in the calculation of his long term wage rates.

Reasons and Findings

Appeal B

Was the new evidence submitted by the worker significant enough to warrant a reconsideration of the March 13, 1998 decision, i.e., were there new medical findings or was there a new opinion on previous findings, or did the worker call the Board's attention to critical evidence which had earlier been overlooked?

Section 96 of the Act allows the Board to reconsider an earlier decision, in this case, their decision being March 13, 1998.

Relevant Board policy in affect at the time of the February 22, 2001 decision was rendered as outlined in #108.11 of the RSCM (volume 1). It provided for two grounds for which a reconsideration could be undertaken, being significant new evidence or a mistake of evidence or law. In this case, the Board case manager concluded that there was no new medical evidence of a significant nature to change the decision.

The Board officer determined that the worker's left knee complaints were not related to his right knee injury of 1978. She stated that there had been no new objective medical evidence supplied to his claim file since March 13, 1998.

In reviewing the medical evidence supplied by the various physicians since 1998, I disagree with the Board officer. Dr. Gouws in the August 16, 1999 PFI examination indicated that the worker was experiencing more problems with his left knee because of the extra effort required in trying to save and take the weight off his right knee as much as possible. Dr. Buchko in his report of January 13, 1998 indicated that the worker had a degenerative medial meniscus tear of the left knee. He opined that there was a possibility that this had developed through wear and tear over the years because he was favouring his right knee. He noted there was no way to prove or disprove this idea. The Board medical advisor agreed and went on to state that he felt it would not be unreasonable to conclude that the degenerative changes that had occurred in the left knee had probably been accelerated by overuse and favouring of this knee as a result of the injury to the right knee.

In a paper published by the Ontario Workers' Compensation system titled, "Symptoms in the opposite or uninjured leg", Dr. W. Robert Harris, orthopaedic surgeon with supplemental information provided by Dr. Ian J. Harrington, orthopaedic surgeon indicated that to make a decision as to whether limping is or was affecting the normal leg, one needs to know:

a) Whether limping was or is present.

b) Was the limp mild or severe? A mild limp probably does not have a significant affect on the opposite leg.

c) What was the duration of the limp? If it was a few months, say up to a year, it probably did not significantly affect the opposite leg.

d) What sort of limp was it? A prolonged antalgic gait is more likely to affect the opposite leg than a paralytic limp. A short leg limp probably does not affect the opposite leg.

Dr. Harris stated that the easiest way to picture an antalgic gait is to imagine a stone in your shoe or a nail sticking through its sole. It hurts when you take weight on that foot and you lessen the discomfort by getting off it as quickly as you can. In other words, you shorten the duration of the stance phase on this side. This also produces a characteristic gait with uneven strides of different duration.

In reviewing all the medical information, I have determined that the worker's limping has and is affecting the other (left) leg. In the worker's situation, there is clear documentation that he does walk with a limp. The documentation goes back to 1996. In memo #42 the medical advisor described the worker's limp as an antalgic gait. Several of the specialists have indicated that it is possible that the worker's left knee problems could be a result of his right knee problems. The evidence is compelling and leads to the conclusion that the worker's left knee complaints are related to his right knee injury of 1978.

I allow the worker's appeal.

Appeal C

Was the worker's long term wage rate correctly set? Was he a seasonal worker or a worker in a seasonal occupation and if yes, should his employment insurance benefits have been included when the Board calculated his long term wage rate?

As the worker's claim was reopened effective July 15, 2002, *Rehabilitation Services and Claims Manual, Volume 2* (RSCM) is in effect and has therefore been referred to in determining this appeal.

37.30 Reopening Claims (RSCM)

Where a claim involving a permanent total disability is reopened, no payments of wage loss can be made. Wage loss may, however, be payable where a worker receiving a permanent total disability award of less than the current maximum suffers a new injury at work. The amount payable would be the difference between the periodic payment being paid on the old claim and 90 percent of the long term average net earnings on the new claim, limited by the current maximum.

Item #68.40 Employment Insurance Payments (RSCM)

Section 33(3.2) of the Act provides:

> The Board may include, in determining the amount of average earnings of a worker, income from employment benefits payable to the worker under the *Employment Insurance Act* (Canada) during the period for which average earnings are determined only if, in the Board's opinion, the worker's employment during that period was in an occupation or industry that results in recurring seasonal or recurring temporary interruptions of employment.

This is a discretionary provision and will be applied only where there is verified evidence from an independent source that the worker received employment insurance benefits due to the worker's employment in an occupation or industry that results in recurring seasonal or temporary interruptions of employment.

The Board may collect the necessary data to compile a list of industries and occupations that result in recurring seasonal or temporary interruptions of employment. The list must give regard to regional considerations and may adopt information from sources such as British Columbia Statistics, Statistics Canada or Human Resources Development Canada.

In determining the long term wage rate the case manager indicated that even though the industry of working in a golf course was clearly seasonal in nature, since there was no golfing in the winter in the area, this had not been recognized in Board policy. He quoted Practice Directive #35 and indicated that in order to determine whether an industry or occupation is seasonal, the policy provided lists of applicable industries and occupations that resulted in recurring seasonal interruptions of employment. In reviewing the lists, the case manager noted that neither golf courses nor mechanic work were included in either of the lists. Neither the industry nor the occupation were on the list, the Employment Insurance benefits could not be considered in determining the long term wage rate.

The case manager explains that he consulted with the "policy group" and that it was explained to him that if the industry or occupation was not on the list of seasonal occupations listed by the Board, employment insurance benefits could not be added in the calculation of the worker's average earnings.

I find that the case manager was in error in describing the practice directive as part of Board policy. The establishment of lists of industries and occupations that result in recurring seasonal or temporary interruptions of employment is authorized by the policy, but the practice directive itself is not part of the policy. Item #2.20 of the RSCM concerns the application of the Act and policies, and concludes by noting:

> This policy item is not intended to comment on the application of practice directives, guidelines and other documents issued under the authority of the President/Chief Executive Officer of the Board. The application of those documents is a matter for the President/CEO to address.

Practice directives do not constitute policy - policy can only be provided by the board of directors under section 82 of the Act (see also #96.10 of the RSCM).

Policy must be applied by WCAT, as set out in section 250(2) of the Act. As stated in section 251(1), WCAT may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. However, if the policy is ambiguous or unclear, it becomes necessary to interpret the policy under the Act.

The second paragraph of #68.40 indicates that section 33(3.2) is a discretionary provision. It states, as a mandatory requirement, that there be verified evidence from an independent source that the worker received employment insurance benefits due to the worker's employment in an occupation or industry that results in recurring seasonal or temporary interruptions of employment.

The third paragraph of #68.40 authorizes the Board to collect data to compile lists of industries and occupations that result in recurring seasonal or temporary interruptions of employment.

I attach no particular significance to the phrases in section 33(3.2) concerning "The Board may include" and "in the Board's opinion". These are points within the exclusive jurisdiction of the Board as set out in section 96(1) of the Act. However, the Act must be read as a whole. The Act has also created WCAT as an appeal body to hear appeals from such determinations. Section 254 similarly provides WCAT with exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under part 4. I do not read section 33(3.2) as giving the Board an authority which is insulated from scrutiny by way of appeal (in connection with WCAT's substitutional jurisdiction).

There is an ambiguity, in respect of the relationship between the second and third paragraphs of #68.40. One interpretation might be that the second paragraph concerns the discretionary authority of section 33(3.2) and the manner in which it is to be exercised. On this interpretation, the compilation of lists under the third paragraph may be viewed simply as a guide which would facilitate the exercise of this discretion. In other words, inclusion of an occupation or industry on a list of industries or occupations subject to seasonal or temporary interruptions would facilitate, but not be a pre-requisite to, the exercise of discretion under the second paragraph.

An alternative interpretation is that a listing under the third paragraph is a pre-requisite to the exercise of discretion under the second paragraph. The difficulty with this interpretation is that the literal wording of the policy does not support such an interpretation. There is nothing in the actual wording of the policy to impose such a restriction. In fact, the Board has chosen to only create a listing of seasonal occupations, and has left industries or occupations that result in temporary interruptions of employment to be addressed on a case by case basis.

In my opinion, the exercise of the statutory discretion provided by section 33(3.2) should not be read as being so limited (i.e. as making listing of a seasonal occupation a prerequisite to consideration under section 33(3.2)), in the absence of clear wording in the policy to such an effect. In the absence of such clear wording, it is not necessary to address the issue as to whether such an interpretation would constitute an unlawful fettering of discretion.

Both the Act and policy authorize the inclusion of employment insurance benefits if the worker's employment was in an occupation or industry that results in "recurring seasonal **or recurring temporary** interruptions of employment" [emphasis added]. However, the Board has only created lists of "seasonal industries" and "seasonal occupations". Practice Directive #35 specifies:

> 2. A Board officer will determine on a case by case basis if a worker's employment is in an industry that results in recurring temporary interruptions of employment. (see "c" under "Eligibility".) Recurring temporary interruptions in employment show a repeating pattern but are not seasonal in nature. For example, workers employed in the field of education who are laid off and receive EI benefits on a regular annual basis.

It is evident from the different treatment of seasonal and temporary interruptions, with the creation of a list for the former and case by case consideration for the latter, that there is nothing in the wording of #68.40 which would require only one approach.

There is nothing in the literal wording of either the policy at #68.40, or Practice Directive #35, to indicate that a "listing" is a pre-requisite to consideration of a seasonal occupation or industry. Practice Directive #35 simply states:

1. With respect to determining whether an industry or occupation is seasonal (see "a" and "b" under "Eligibility"), policy provides for lists of applicable industries and occupations that result in recurring seasonal interruptions of employment. These lists will be available on BoardNet on the Policy and Practice homepage and will be amended periodically by the Board's Statistical Services Department.

There may be factual circumstances which clearly fit the intent of section 33(3.2), but which do not involve sufficient numbers of workers to have come to the attention of the Board for consideration of listing. The imperative of section 99 and section 250(2), that the Board and WCAT make decisions based on the merits and justice of the case, would seem to require consideration of such situations.

In my opinion, I am open to exercise the discretion contained in section 33(3.2) of the Act, and I am satisfied that there is "verified evidence from an independent source that the worker received employment insurance benefits due to the worker's employment in an occupation or industry that results in recurring seasonal interruptions of employment". Accordingly, I find that the worker's employment insurance benefits should have been included in the calculation of his average earnings.

Alternatively, if the approach that a "listing" is required for an industry or occupation to be considered seasonal, then Practice Directive #35 leaves open for consideration on a case by case basis whether there were recurring temporary interruptions in employment to support the inclusion of employment insurance benefits in the calculation of the worker's average earnings. In the alternative I find that there were recurring temporary interruptions in the worker's employment that support the inclusion of employment insurance benefits in the calculation of the worker's average earnings.

Conclusion

Appeal B is granted. I vary the February 22, 2001 decision letter and find that there was new significant medical information that, when read with the prior medical information on file, leads to the conclusion that the worker's left knee complaints are related to his right knee injury of 1978 and therefore compensable.

Appeal C is granted. I vary the October 8, 2002 decision of an officer of the Board and I find that that the worker's employment insurance benefits should have been included in the calculation of his average earnings and return the file to the Board to implement this finding.

No costs were requested and none are awarded.

Julie A. Brassington
Vice Chair

JAB/hba