

Noteworthy Decision Summary

Decision: WCAT-2004-01698-RB **Panel:** Tim Skagen **Decision Date:** March 31, 2004

***Obligation to provide information - Section 57.1 of the Workers Compensation Act (Act) –
Transitional provisions - Section 35.1 of the Act – Suspension of worker's claim***

The worker, a timber faller, appeals the August 26, 2002 decision letter from an officer of the Workers' Compensation Board (Board). That letter advised the worker that the implementation of a Review Board finding was suspended pending receipt of certain information pursuant to section 57.1 of the *Workers Compensation Act* (Act). The officer requested the information in order to administer the claim and specifically to calculate the long term wage rate by determining what periods of time the worker was unable to work due to illness or injury.

Section 57.1 of the Act provides that a worker who applies for or is receiving compensation must provide the Board with the information that the Board considers necessary to administer the worker's claim. The Board may reduce or suspend payments to the worker if the worker does not comply with the request. The panel concluded that section 57.1 is applicable to post June 30, 2002 adjudications, regardless of the injury date, because the transitional provisions in section 35.1 do not apply to section 57.1 of the Act. This determination was based on the placement of the transitional provisions and a consideration of the reason for the transitional provisions. While section 57.1 is applicable, once the worker advised the officer that there were no periods of disability, or to ignore them, then the request for information was not necessary and the suspension was not appropriate. Further, the notification requirements in section 57.1 were not met. Therefore, the suspension of the worker's claim is set aside and the appeal is allowed.

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WCAT-2004-01698-RB

WCAT Decision Date:**March 31, 2004****Panel:**Timothy B. Skagen, Vice Chair

Introduction

The worker, a timber faller, appeals the August 26, 2002 decision letter from an officer of the Workers' Compensation Board (Board). That letter advised the worker that the implementation of the May 9, 2002 Workers' Compensation Review Board (Review Board) finding was suspended pending receipt of the names, addresses and telephone numbers of all doctors that the worker saw between January 1995 and October 3, 1997 pursuant to section 57.1 of the *Workers Compensation Act* (Act) as amended by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 49) which was effective June 30, 2002.

The Review Board decision of May 9, 2002 set the wage rate based on the worker's earnings from the three-year period prior to the injury. Additionally, the Board was directed to deduct any substantiated period of time the worker was disabled due to illness or injury in the calculation of the long term wage rate.

The officer requested the information to administer the claim and specifically to calculate the long term wage rate by determining what periods of time the worker was unable to work due to illness or injury.

The decision letter also refers to an August 6, 2002 letter from the officer to the worker that stated that if the long term rate was calculated, without deducting any period of disability, the worker would have an overpayment declared.

Issue(s)

Is section 57.1 of the Act applicable to the decision before the panel?

If section 57.1 of the Act is applicable, then was it properly applied by the case manager in this case?

Was the suspension of the worker's claim appropriate pursuant to the requirements of law and policy?

Was the Review Board finding of May 9, 2002 properly implemented?

Jurisdiction

This appeal was filed with the Review Board pursuant to section 90(1) of the Act. 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 this appeal before that date, I have decided it 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. WCAT must make its decision on the justice and merits of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case (section 250). WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising in an appeal before it (section 254).

The adjudication of the worker's entitlement in this case is determined under the Act as it was before the June 30, 2002 amendments as the injury occurred before the changes contained in Bill 49. The relevant policy for that Act was set out in *Rehabilitation and Claims Services Manual, Volume 1* (RSCM 1). However, the decision before the panel was made subsequent to the Act. The policy relevant to Bill 49 is set out in the *Rehabilitation and Claims Services Manual, Volume 2* (RSCM 2).

Background Information

The Review Board finding of May 9, 2002 sets out the claim history and the rationale for the determination of the appropriate period for the long-term wage rate calculation, the implementation of which forms the basis of this appeal. I need not repeat the full particulars contained therein as I accept that they are an accurate recitation of the facts in this case. Briefly, the Review Board issued a finding on May 9, 2002 that allowed the worker's appeal of a February 23, 2000 decision by a Board officer that set the worker's long term wage rate for his October 3, 1997 injury as of January 10, 2000. The officer had based the long term wage rate on the earnings one year prior to the date of injury. The Review Board found that the best representation of the worker's long term earnings would be the earnings of the three years prior to the date of injury.

Pursuant to policy item #66.11 of the RSCM 1, the Review Board directed the matter back to the Board for recalculation of the long term wage rate which was to include the deduction of any substantiated periods of disability due to injury or illness.

Review Board Implementation

The officer, in the August 6, 2002 letter, requested that the worker provide the names, addresses and telephone numbers of all doctors that the worker saw between January 1995 and October 1997. This was ostensibly to fulfill the direction of the Review Board in determining any substantiated period of disability, due to injury or illness. The case

manager also requested information respecting the worker's November 29, 1996 claim that had been suspended due to the worker's failure to provide further information requested.

The worker, in an August 15, 2002 letter, that was vitriolic in nature, advised the case manager that, while he had filed a claim on November 29, 1996, he had no intention of proceeding with that claim as he had not incurred either health care or wage loss as a result of the injury. The worker also requested that the officer disregard any time that he was unable to work due to illness or injury as it would not justify any changes to the wage rate.

The case manager responded with the August 26, 2003 letter that acknowledged receipt of the worker's August 15, 2003 correspondence. The officer also suspended the worker's claim pursuant to section 57.1 of the Act pending receipt of the information requested in the August 6, 2002 letter.

The worker appealed that August 26, 2003 suspension to the Review Board.

Relevant Law and Policy

Section 57.1 of the Act was introduced as part of the Bill 49 amendments to the Act. The application of section 57.1 is guided by policy item #93.26 of the RSCM 2. Since these policy provisions were new at the time of the decision, they are reproduced in their entirety.

Section 57.1 of the Act provides as follows:

- (1) A worker who applies for or is receiving compensation must provide the Board with the information that the Board considers necessary to administer the worker's claim.
- (2) If a worker fails to comply with subsection (1) the Board may reduce or suspend payments to the worker until the worker complies.

Policy item #93.26 of the RSCM 2 provides:

The Board operates under an inquiry system and as such, reasonable efforts are made to obtain information directly from the source. However, it is recognized that, in the course of administering a claim, the Board may have to rely on a worker to obtain relevant information.

A worker's obligation to provide information may arise at any time during the claim cycle. Necessary information includes, but is not limited to, information related to the worker's compensable disability, pre and post-injury earnings, tax status and Canada Pension Plan disability benefits.

The Board will set a timeframe for the worker to provide the necessary information. The timeframe may vary depending upon the nature of the information requested. However, it should not extend past 30 days, except where the Board is satisfied that the worker is making best efforts to obtain the necessary information.

Where the Board requires information from a worker that it considers necessary to administer the worker's claim, notification must be provided in writing. Notification to the worker must specify:

- what information is required;
- the worker's obligation to provide the information;
- the timeframe for compliance; and
- the consequences for failing to comply.

The Board may reduce or suspend a worker's payments if, after providing written notification of the obligation to provide necessary information and the consequences of failing to comply, the worker:

- fails or refuses to supply the information within the specified timeframe;
- and does not have a valid reason for failing to comply.

If a worker has to obtain the information from a third party (e.g., Human Resources Development Canada or Canada Customs and Revenue Agency), the Board must be satisfied that the worker failed to take all reasonable steps to acquire the information before determining that a worker has failed to comply.

The Board recognizes that, in the course of obtaining requested information from third parties, certain fees may be levied. In these cases, the Board will provide reimbursement for necessary and reasonable costs incurred by the worker.

When a worker fails to fulfill the obligation to provide information, the Board will determine whether there was a valid reason. Payments will not be reduced or suspended for non-compliance if there is a valid reason acceptable to the Board, such as a sudden illness or a death in the family.

Once the worker has fulfilled his or her obligation to provide information, the Board will restore payments for any period for which they were reduced or suspended.

This policy does not restrict the Board from pursuing all available courses of action in response to fraud or misrepresentation.

Practice directive #40 from the Compensation and Rehabilitation Services Division, sets out that the provision of section 57.1 of the Act and associated policy contained in item #93.26 of the RSCM 2 are applicable only to those cases where the date of injury is on or after June 30, 2002.

Practice directive #40 is based on an application of the transition provisions contained in section 35.1 to section 57.1 of the Act.

However while policy is binding on the WCAT panel pursuant to section 250 of the Act, practice directives are not considered policy binding on WCAT.

In order to determine the scope of section 57.1 of the Act, the transition provisions of Bill 49, contained in section 35.1 of the Act must be reviewed.

Section 35.1 of the Act states in part:

(1) In this section, “**transition date**” means the date that this section comes into force.

(2) Subject to subsection (7), this Act, as amended by the Workers Compensation Amendment Act, 2002, applies to an injury that occurs on or after the transition date.

(7) Subject to section 19 (2.1) of this Act, sections 25 and 25.1 of this Act, as those sections read on the transition date, apply to compensation paid on or after the transition date to a worker or as a result of the death of a worker, irrespective of the time the worker was injured or died.

Analysis of Scope of Transition legislation

The interpretation of statutory transitional provisions is determined by legal convention. This is discussed by R. Sullivan in *Statutory Interpretation* (Ontario: Irwin Law, 1997). At page 18 he states:

Transitional provisions tell interpreters which law should be applied to facts that are in progress when the new legislation comes into force. Since these provisions cease to be important once the transitional problems are dealt with, they are put to an end.

The placement of the transitional provisions in the amending legislation is, by convention, indicative of the scope of application. Where the transitional provisions are placed at the end of a bill they relate to the bill as a whole, or if they are limited in scope, they will appear at the end of the part or division to which they apply. See *Sullivan and*

Driedger on the Construction of Statutes, 4th edition (Ontario: Butterworths, 2002) at 616.

Where the scope of the transitional provisions is not clear, the courts have looked to the provisions of substantive law that the provision accompanies, and the specific situation which parliament sought to alleviate by its introduction. This concept is set out *Canada v. Trade Inv. Shopping Centre Ltd.* [1993] 2 C.T.C. 333 (F.C.T.D.)

The intent of Bill 49 appears primarily to be the variation of the compensation benefits payable under the provision of the Act. The transition provisions of section 35.1 are added to Division 3 of Part 1 of the Act which is the division that sets out the scope of compensation benefits payable. The provisions of Bill 49 that follow the inclusion of section 35.1 of the Act, in addition to section 57.1, include amendments concerning the powers and responsibilities of the board of directors and various substitution language dictated by the amendments changing the Board governance.

Therefore the argument is that the transitional provisions of section 35.1 of the Act apply only to the determination of the scope of compensation benefits and not to the administrative provisions such as section 57.1 of the Act in the same way that they do not apply to subsequent amendments concerning Board governance.

If the transitional provisions of section 35.1 do not apply to section 57.1 of the Act then, contrary to policy directive #40, section 57.1 would be applicable to the post June 30, 2002 adjudication of all claims regardless of the injury date.

Decision and Analysis

I find that the evidence supports the worker's appeal.

Application of section 57.1 of the Act

I find that the transition provisions contained in section 35.1 of the Act do not limit the application of section 57.1 of the Act to those claims where the injuries occur after June 30, 2002. Contrary to policy directive #40, I find that the provisions of section 57.1 are applicable to the administration of claims considered subsequent to the effective date of June 30, 2002.

I find that section 57.1 of the Act is applicable in the implementation of the Review Board finding in that the administration of that decision was completed subsequent to June 30, 2002. The case manager was correct in applying section 57.1 although that was contrary to the policy directive.

Process of Application of policy item #93.26 of the RSCM 2

I acknowledge that the policy considerations set out in policy item #93.26 of the RSCM 2 were relatively new at the time of the case manager's implementation of the Review Board finding.

Policy item #93.26 of RSCM 2 sets out that the information requested must be necessary for the administration of the claim. Therefore, an element that must be considered is whether the requested information was reasonably necessary.

Was the requested information necessary?

In determining if the information was necessary, I note that the worker was not questioned as to whether there were any periods of disability due to illness or injury that should be deducted from the earnings period in the calculation of average earnings pursuant to policy item #66.11 of RSCM 1. If there were periods, then did the Board already have, in the file materials, substantiation for those periods of disability? In this case, the only evidence of a period of disability was related to the prior claim by the worker. It was reasonable for the officer to request specifics of that period from the worker.

However, once the worker advised the officer, in his August 10, 2001 letter, that there were no periods of disability, or to ignore them, then there is no further substantiation required. Therefore, in the absence of necessary information, the suspension pursuant to section 57.1 was not appropriate.

Notice Requirements

Further, policy item #93.26 of the RSCM 2 sets out specific criteria that must be met prior to either reduction or suspension of a worker's claim pursuant to section 57.1(2) of the Act. Those requirements are that the notification be in writing and specify the information required; the obligation to provide the information; the timeframe for compliance and the consequences of failure to comply. In this case, the case manager did not provide a written notification to the worker that met these requirements, and on that basis, the suspension of the claim by the case manager was improper.

Therefore, the suspension of the worker's claim as set out in the August 26, 2002 decision letter is set aside and the appeal is allowed as the information requested was not necessary. Further, the worker was not provided written notice as set out in policy item #93.26 of the RSCM 2.

Implementation of Review Board Finding

The Board failed to properly implement the Review Board May 9, 2002 finding as required by section 92(1) of the Act that requires that where a claim is allowed by the Review Board, periodic payments must commence and a lump sum under section 17(13) of the Act must be paid. The worker was entitled to the recalculation of his long term wage rate and therefore entitled to the benefits that flow from that decision. The worker was entitled to a retroactive payment of wage loss as a result of the Review Board finding. Those benefits were at a minimum equal to 75 percent of the long term wage rate as determined by the Review Board. If there had been any substantiated periods of disability due to illness or injury, then the long term wage rate would have been increased.

Payment of Interest

Item #50.00 of the RSCM 1 deals with the payment of interest on retroactive wage loss payments. On October 15, 2001, the Board's governing body amended this policy effective November 1, 2001 and that amendment is therefore applicable to this appeal. Board policy outlines that interest will only be paid on such payments if there has been a "blatant Board error". The policy defines "blatant Board error" as:

For an error to be "blatant" it must be an obvious and overriding error. For example, the error must be one that had Board officer known that he or she was making the error at the time, it would have caused the officer to change the course of reasoning and the outcome. A "blatant" error cannot be characterized as an understandable error based on misjudgment. Rather, it describes a glaring error that no reasonable person should make.

Policy item #50.00 of the RSCM 1 also requires that the error be glaring. The term "glaring" is defined by the *Oxford Dictionary* as "highly obvious or conspicuous" and by the *Encarta World Dictionary, North American Edition* as "easily seen or detected".

The officer in the application of section 57.1 of the Act is bound by both the statute and the policy. Section 57.1 of the Act specifies that the information requested must be considered by the Board to be "necessary to administer the worker's claim". The information requested was not necessary as of the worker's response on August 15, 2002. Further the policy states that the worker must be provided specific written notice prior to section 57.1 of the Act being applied. The officer failed to provide this necessary notice.

Since the implementation of the Review Board finding was only dependent upon the substantiation of any alleged periods of disability, once the worker had advised that he did not want any such periods considered, there was nothing further for the case manager to do that required an exercise of judgment or a reweighing of evidence. If the

worker had alleged any period of disability or submitted any evidence to substantiate such a period, the case manager would have been required to weigh that evidence. However, in the absence of such evidence the only task remaining was the implementation of the Review Board finding. Since there was no requirement for either an exercise of judgment or weighing of evidence, I believe that the failure to proceed with the implementation constituted an obvious error.

I find that the failure to implement the Review Board finding subsequent to the August 15, 2002 letter from the worker was sufficiently obvious that it constitutes a blatant error. The worker was entitled to a minimum benefit level as determined by the Review Board and barring an appeal to the Appeal Division, that minimum level should have been paid upon the worker advising that he would not be substantiating any periods of disability.

I further note that the August 26, 2002 letter references the case manager's prior letter of August 6, 2002. I have reviewed that letter and note that the case manager stated that, if the Review Board finding were to be implemented, there would be a declared overpayment. This would be contrary to policy item #48.41 of the RSCM 1. That policy specifies that no overpayment will result from a decision regarding entitlement which is modified or reversed by a later decision. These are referred to as decisional errors and include errors of policy. The policy specifically included missed wage rate change decisions as decisional errors and specifies the subsequent determination of the long term wage rate would not generate an overpayment.

Conclusion

Is section 57.1 of the Act applicable to the decision before the panel?

I find that section 57.1 of the Act is applicable to the officer's decision before the panel as it is applicable to decisions made after June 30, 2002. This would apply to injuries that occurred both before and after June 30, 2002.

Was section 57.1 of the Act properly applied by the case manager in this case?

I find that section 57.1 of the Act was not properly applied in this case as the information was not reasonably necessary for the adjudication of the claim. Further, even if the information had been reasonably necessary, the proper notification set out in policy item #93.26 of RSCM 2 was not provided to the worker prior to suspension of the claim.

Was the Review Board finding of May 9, 2002 properly implemented?

I find that the Review Board finding of May 9, 2002 was not properly implemented. Further I find that that improper implementation constituted a "blatant error" as defined by policy item #50.00 of the RSCM 1. Therefore, interest is payable on the retroactive wage loss benefits payable from January 10, 2000.

Therefore, I vary the decision letter of August 16, 2002 and find that the suspension of the worker's claim pursuant to section 57.1 of the Act was inappropriate. Further, the worker is entitled to interest on any retroactive wage loss benefits as a result of the adjustment in the long term wage rate as ordered by the Review Board on May 9, 2002.

Timothy B. Skagen
Vice Chair

TBS/mli