

NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2004-04731 **Panel:** Jane MacFadgen **Decision Date:** September 8, 2004

Whether Wage Loss Benefits after Recurrence Should be Paid – Employment Status Prior to Recurrence – Recurrence More than Three Years after Injury – Section 32 of the Workers Compensation Act – Policy Item #70.20.2(b) of the Rehabilitation Services and Claims Manual, Volume II – Reopening Claim

This decision is noteworthy as an example of the application of section 32 of the *Workers Compensation Act* and policy item #70.20.2(b) of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) to the issue of whether a worker who is unemployed prior to a recurrence of disability is entitled to wage loss benefits arising out of the recurrence, where the recurrence occurs more than three years after injury.

Item #70.20.2(b) of the RSCM II provides that wage loss benefits are not paid if the worker's unemployed status prior to the recurrence of temporary disability is not due to the effects of the claim injury, unless the disability following the recurrence will produce a potential for loss of income by removing the worker as a viable entity in the labour force.

In this case, the Workers' Compensation Board (Board) accepted a claim by the worker for a right ankle injury. Six years later the worker had surgery on his ankle to relieve continued pain. The Board reopened the worker's claim for medical expenses relating to the surgery but did not pay wage loss benefits for the period after the surgery since the worker had not been working prior to the surgery. The Board applied the criteria in item #70.20.2(b) of the RSCM II and determined that the worker's unemployment was not due to the effects of the worker's injury. The Review Division confirmed the Board decision. The worker appealed the Board decision to WCAT.

The WCAT panel denied the worker's appeal and concluded that the Board appropriately refused to pay the worker wage loss benefits. Applying the guidelines set out in item #70.20.2(b), the panel concluded that the worker's unemployed status prior to the reopening was not due to the effects of the claim injury. The panel said that to find otherwise would be inconsistent with the prior pension decisions which determined that the worker had not sustained a loss of earnings as a result of his right ankle disability. The Board had concluded that suitable work, which would avoid a loss of earnings, was reasonably available to the worker. The panel also found that the worker's temporary disability following the reopening of the claim was unlikely to produce a potential loss of income by removing him as a viable entity in the labour force as the worker had a very sporadic history of minimal employment and had not shown a concerted effort to find employment prior to the recurrence of his injury.

WCAT Decision Number :

WCAT-2004-04731

WCAT Decision Date:

September 08, 2004

Panel:Jane MacFadgen, Vice Chair

Introduction

The worker sustained compensable right ankle injuries in 1983 and 1995. In the May 28, 2003 decision under appeal, the Workers' Compensation Board (Board) reopened the worker's 1995 claim for medical expenses, but not wage loss benefits, related to his surgery in May 2003. The worker was denied wage loss benefits because the Board concluded his unemployed state prior to the reopening was not due to his claim injury.

The worker requested a review of this decision by the Review Division of the Board. The review officer's November 21, 2003 decision confirmed the Board's decision. The worker now appeals the Review Division decision.

The worker's request for an oral hearing was declined on a preliminary basis. Following my review of the file, I am satisfied that an oral hearing is not required as there is no material dispute about the underlying facts, and the issue under appeal involves the interpretation and application of law and policy to these facts. There is no employer participating in the appeal as the employer of record is no longer registered with the Board. The office of the employers' advisers was invited to participate in the appeal in its stead, but declined to do so.

Issue(s)

Whether the worker is entitled to wage loss benefits related to the reopening of his 1995 claim for his surgery in May 2003.

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). Section 250 of the Act provides that WCAT must make its decision based on the merits and justice of the case but, in so doing, must apply relevant policies of the board of directors of the Board. Section 254 gives WCAT exclusive jurisdiction to inquire into, hear and determine all matters of fact and law arising or required to be determined in an appeal before it.

Background and Evidence

The worker is now 43 years old. He sustained compensable right ankle injuries in 1983, and again in May and September 1995.

In a February 1999 decision the Board awarded the worker a permanent partial disability pension totalling 4.41% of a totally disabled person, for his right ankle impairment under the May 1995 claim. The pension was effective June 1997. Based on the findings of an employability assessment, the Board concluded the worker would not sustain a loss of earnings as a result of his ankle impairment.

The worker appealed the February 1999 pension decision. He submitted that he should have been awarded a loss of earnings pension, as well as further vocational rehabilitation benefits in the form of academic retraining. The October 2001 Appeal Division decision (*Decision #2001-2041*) confirmed the Board's decision that the worker was not entitled to a loss of earnings pension. The panel concluded that the primary reason for his current unemployed state was his negative attitude and unwillingness to look for jobs that he perceived as beneath his dignity. The panel noted that the worker provided very little evidence of an active job search in the six-year period since his injury. The Appeal Division allowed the worker's appeal to the limited extent that it directed the Board to provide him with further short-term vocational rehabilitation benefits in the form of a job search assistance program.

The worker appealed the Appeal Division decision to a Medical Review Panel (MRP). The medical issue in dispute was defined as the cause, nature and extent of the worker's right ankle disability and its effect on his physical capabilities for employment.

The July 23, 2002 MRP certificate stated that the worker had a mild to moderate right ankle disability that limited his ability to climb, walk on uneven surfaces and/or hills, lift significant weight, or stand or walk for prolonged periods. The disability worsened with cold or damp weather. The MRP certified that the 1983 claim injury was 50% responsible for the worker's current ankle disability, and the two 1995 injuries were each 25% responsible for his disability. The worker's ankle condition had not changed significantly since his recovery from surgery in 1996, and no significant change was expected in the next 12 months unless the worker had further surgery.

The Board's March 31, 2003 decision implemented the MRP certificate by apportioning the worker's 4.41% pension award as follows: 2.21% allocated to the 1983 claim (effective March 1984), and the balance of 2.2% split between the May and September 1995 claims (as of the original June 1997 effective date). The Board did not change its decision that the worker was not entitled to a loss of earnings pension. The August 21, 2003 Review Division decision confirmed the March 31, 2003 decision.

As recommended by the MRP, the Board referred the worker for an orthopaedic consultation. Dr. Moran's May 1, 2003 consultation report recommended arthrotomy

and debridement of his ankle to address his symptoms of osteoarthritis. If the worker decided not to have surgery, Dr. Moran advised it was safe for him to do virtually any activities as tolerated, although he would likely have continued pain. The worker elected to have the surgery, which took place on May 29, 2003.

A May 27, 2003 telephone memo noted that the worker advised that he was unemployed and in receipt of social assistance benefits. He had been employed from November 2001 to March 2002, from May to August 2002, and from October to November 2002. The Board had provided the worker with training-on-the-job allowances from December 10, 2001 until March 3, 2002.

In the May 28, 2003 decision under appeal, the case manager advised the worker that his 1995 claim would be reopened for medical expenses only related to his surgery on May 29, 2003. The decision noted the worker was not currently working and was not eligible for employment insurance benefits, but was receiving social assistance benefits. In the last year, he had worked for several employers, most recently a telemarketing company. The case manager noted the worker advised that he had quit the telemarketing job because he could not endure the verbal abuse from customers. As Dr. Moran had reported that the worker could do virtually any activities, the case manager concluded that his reasons for not working were not related to his ankle injury but were instead a result of personal choice/economic circumstances. Applying the guidelines in *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) policy #70.20 to the worker's circumstances, the case manager decided he was not entitled to wage loss associated with the reopening of his claim for further surgery.

The worker requested a review of this decision by the Review Division. The November 21, 2003 Review Division decision upheld the Board's decision that the worker was not entitled to wage loss benefits related to the reopening of his claim for surgery. The review officer referred to the 1998 employability assessment, the MRP certificate, and the fact that the worker had quit his job in November 2002 and was not actively seeking employment at the time of the reopening. Based on this evidence and RSCM I policy #70.20, the review officer found that the worker was not unemployed as a result of his compensable injury and that he had not incurred an actual or potential loss of earnings as a result of his surgery which would entitle him to wage loss benefits.

The worker has appealed the Review Division decision. He submitted that his unemployment at the time of the reopening was related to his 1995 claim injuries and that he should be compensated for the time he was recovering from surgery because he was unable to work or look for work. In his submissions to WCAT and the Review Division he wrote that he had quit his telemarketing job prior to the surgery because he did not have the right mental disposition to do this job. He would have been dismissed in any event as he was not meeting the required quotas. The worker stated that he should not be expected to be satisfied with a minimum wage job like this with no future prospects for promotion or financial security, instead of trying to restore his pre-injury earnings.

He had been accepted for a bit part in a movie and assumed he would be employed for a couple of months, but the movie had been cancelled about a month before his surgery. With surgery pending, he did not think it would be a good idea to start a job, only to take time off for an operation. The fact that the surgery had significantly improved his ankle condition was evidence that his ankle problem prior to surgery interfered with his ability to find physical employment. He had no skills other than as a labourer. He requested training assistance in order to restore his pre-injury earnings level in the logging industry. Prior to his 1996 surgery he had never had a problem finding work. He was now unable to return to these types of jobs and had no skills to compete for other jobs given his age, physical disability and lack of a qualifying trade.

Reasons and Findings

I find that the current provisions of the Act and the Board's published policy apply to the provision of benefits associated with the recurrence of temporary disability related to the worker's surgery in May 2003.

Section 35.1(8) of the Act provides that the current provisions of the Act apply to a recurrence of a disability after June 30, 2002 that results from an injury that occurred before June 30, 2002. The *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) policy #1.03 discusses the application of the transitional provisions in section 35.1, and states that a recurrence includes any additional period of temporary disability where a permanent disability award was previously provided in respect of the claim injury.

Section 32 of the Act addresses the recurrence of temporary disability or the occurrence of (or increase in) permanent disability from employment more than three years after the original injury. Section 32 gives the Board a discretion to choose the date of the recurrence of disability as the time of injury for average earnings purposes if, by doing so, the compensation payable to the worker would better reflect his actual loss of earnings suffered by reason of the recurrence of disability.

RSCM II policy #70.20 outlines the guidelines which the Board uses in applying section 32 of the Act to various categories of reopened claims. The two main categories relate to whether the worker was employed or unemployed at the time of the reopening. Where the worker is unemployed at the time of the reopening, the Board must determine the reasons for this. As the worker was unemployed at the time of the reopening of his claim in May 2003, I have considered the facts of this case in light of the following guidelines.

Policy #70.20.2(a) states that if the worker's unemployed status prior to the recurrence of temporary disability is due to the effects of the claim injury, the discretion in section 32 is not exercised and the original claim rate (or review rate) plus cost of living adjustments is used for the reopening. The policy cautions that care must be exercised

to ensure that consistency is maintained with prior decisions on the claim, such as a pension decision which is premised on the worker's capacity to undertake certain jobs.

Policy #70.20.2(b) states that wage loss benefits are not paid if it is determined that the worker's unemployed status prior to the recurrence of temporary disability is not due to the effects of the claim injury, unless the disability following reopening will produce a potential for loss of income by removing the worker as a viable entity in the labour force. In the latter case, benefits are paid on the basis of the original wage rate (or review rate) plus cost of living adjustments. In determining whether there is a "potential loss" the Board must consider such questions as whether the worker's unemployment was a matter of personal choice; whether his lifestyle renders it unlikely that he will in practice obtain employment; whether he was being paid employment insurance benefits; whether he was making an active, ongoing job search; etc.

Applying these guidelines to the facts of this case, I conclude that the worker's unemployed status prior to the reopening was not due to the effects of the claim injury. To find otherwise would be inconsistent with the prior pension decisions which determined that the worker had not sustained a loss of earnings as a result of his right ankle disability. The Board concluded that suitable work, which would avoid a loss of earnings, was reasonably available to the worker. I recognize that the worker disputes that decision, but the loss of earnings decision is not before me in this appeal. That decision was upheld by the Appeal Division, and the MRP certificate did not result in a change in that decision.

I have considered, in light of the factors in policy #70.20.2(b), the evidence before me about the worker's employment efforts prior to his surgery in 2003. He was on social assistance (not EI benefits) at the time of the recurrence of disability related to his surgery. The file documents a very sporadic history of minimal employment in the years since mid-1997, when the worker's pension took effect. The worker has not provided persuasive evidence of a concerted job search between the time he quit his telemarketing job in November 2002 and Dr. Moran's May 2003 assessment in which he recommended the option of surgery. He only referred to the prospect of a bit part in a movie, which failed to materialize. He has not submitted evidence of an active job search in the months prior to his surgery.

Weighing the evidence before me, I find that the worker's temporary disability following the reopening of the claim was unlikely to produce a potential loss of income by removing him as a viable entity in the labour force. I therefore conclude that the Board appropriately declined to pay the worker wage loss benefits associated with the reopening of his claim in May 2003.

Conclusion

I deny the worker's appeal and confirm the November 21, 2003 decision of the Review Division. It does not appear that the worker incurred any costs in mounting this appeal, so I make no award as to costs.

Jane MacFadgen
Vice Chair

JM/jkw/lc