

Noteworthy Decision Summary

Decision: WCAT-2004-05616 **Panel:** Susan Polsky Shamash **Decision Date:** October 7, 2004

Applicability of Section 57.1 of the Workers' Compensation Act (Act) – Effective Date of section 57.1 of the Act – Transition Provisions - Obligation to Provide Information to the Workers' Compensation Board (Board) - Failure to attend meeting with the Board – Failure to Provide Information – Section 35.1(3) of the Act – Policy Item #93.26 of the Rehabilitation Services and Claims Manual, Volume II – Suspension of Worker's Claim

Pursuant to the transition provisions of the *Workers Compensation Act* (Act), specifically section 35.1(3) which provides that the Act as it read before the transition date (June 30, 2002) applies to an injury that occurred before the transition date, section 57.1 of the Act does not apply to workers injured before June 30, 2002.

Section 57.1 of the Act requires a worker to provide information to the Workers' Compensation Board (Board) that the Board considers necessary for the administration of the worker's claim, and provides that the Board may suspend benefits if a worker fails to provide the requested information. The issue on appeal was whether section 57.1 applied to injuries occurring before June 30, 2002.

In this case, the worker was injured prior to June 30, 2002 and was given a pension award. As a result of video surveillance obtained by the Board, the worker was asked to meet with the Board in person to discuss the claim. The worker did not comply and the Board suspended the worker's pension benefits. The Board relied on section 57.1 as its authority to do so. The employer appealed.

The WCAT panel decided, as did the Review Division, that the Board had not such authority as section 57.1 does not apply to injuries that occurred before June 30, 2002. The panel stated that even if the section did apply to the worker, the Board did not have the authority to suspend the worker's benefits because it failed to follow the proper procedure, as set out in Board policy item #93.26 of the *Rehabilitation Services and Claims Manual, Volume ii*, which required, among other things, that the Board notify the worker in writing and advise the worker that a failure to respond may lead to a suspension of benefits.

WCAT Decision Number: WCAT-2004-05616
WCAT Decision Date: October 27, 2004
Panel: Susan L. Polsky Shamash, Vice Chair

Introduction

The employer appeals from a decision of the Review Division dated December 1, 2003 (*Review Decision #5634*) allowing the worker's appeal from the June 26, 2003 decision of a Workers Compensation Board (Board) disability awards adjudicator to suspend the worker's pension benefits. An investigator had informed the worker that his claim was under investigation and an in-person meeting was imperative as soon as possible. The disability awards adjudicator advised the worker that, pursuant to section 57.1 of the *Workers Compensation Act* (Act), his benefits were suspended until he attended the meeting.

The review officer allowed the worker's request for review on the basis that section 57.1 is one of the changes to the law introduced by the *Workers Compensation Amendment Act, 2002* (Amendment Act) and does not apply to the worker because he was injured before June 30, 2002, the date the Amendment Act came into force. The employer has appealed this decision on the ground that the disability awards adjudicator's decision was correct because there was evidence of the worker's misrepresentation.

The employer did not request an oral hearing. I am satisfied that this appeal can be determined on the basis of the material on the claim file. The issue is primarily one of the application of policy.

The employer did not provide a submission to this panel beyond their notice of appeal form explanation. The worker provided the same documentation he provided on his request for review of a January 21, 2004 decision of a disability awards adjudicator. This was disclosed to the employer who did not provide a final submission.

Issue(s)

The issue is whether section 57.1 of the Act as amended by the Amendment Act is applicable to the worker.

Jurisdiction

This appeal is brought under section 239(1) of the Act which permits appeals from Review Division decisions 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 relevant background and evidence to the date of the Review Division decision have been summarized by the review officer and need not be reiterated here. Briefly, these are:

- the worker injured his lower back on May 1, 2001 in the course of his duties as a mechanic's helper;
- the Board accepted his claim for an L5-S1 disc protrusion which resulted in an L5-S1 discectomy on June 13, 2001;
- the Board paid the worker temporary disability benefits from May 21, 2001 to July 28, 2002 and vocational rehabilitation benefits until February 28, 2003;
- the Board's Disability Awards Department assessed the worker with a 45% permanent functional impairment but paid him a total loss of earnings because he was not competitively employable;
- the Board became suspicious of the worker's actual level of impairment and arranged for video surveillance between May 13 and 22, 2003 in Mexico, where the worker was living temporarily;
- on June 5 and 6, 2003, an investigator advised the worker to return immediately to Canada to discuss his claim;
- on June 26, 2003, the disability awards adjudicator advised the worker that his benefits were suspended immediately pursuant to section 57.1 of the Act;
- in subsequent decisions the Board readjudicated the worker's pension and vocational rehabilitation entitlements and declared over payments.

Submissions

In his notice of appeal the employer argued that the claims manager made the correct decision to terminate the worker's benefits because of evidence gathered through video surveillance in May 2003. He also submitted that there has been a longstanding policy at the Board to terminate a worker's benefits and seek repayment when there is evidence of misrepresentation.

In response, the worker said that he did not understand section 57.1. He was in Mexico while the Board was renovating his house when he was asked to attend an in-person meeting. He agreed but could not return to Vancouver if his pension was not paid to him. After his return he was never asked for the in-person meeting again. It was only later that he learned of the surveillance and investigation of him. The balance of his submission addresses the misrepresentation allegations.

Law and Policy

Section 57.1 of the Act provides:

- (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.

Item 93.26 of the *Rehabilitation Services and Claims Manual*, Volume II (RSCM II) sets out the Board's policy with respect to section 57.1. The adjudicator is expected to make reasonable efforts to obtain the information needed directly from the source. If that is not successful or possible, the Board must notify the worker in writing, identify the information that is required, advise the worker of his obligation to provide it, give a 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. This policy does not restrict the Board from pursuing all available courses of action in response to fraud or misrepresentation.

Item 93.26 was established by board of directors' resolution 2002/06/18-02, dated June 11, 2002, and applies to all injuries occurring on or after June 30, 2002, permanent disabilities where the permanent disability first occurs on or after June 30,

2002, irrespective of the date of the injury, and recurrences, where the recurrence occurs on or after June 30, 2002, irrespective of the date of injury.

Section 35.1(3) of the Act provides that the Act as it read before the transition date (June 30, 2002) applies to an injury that occurred before the transition date.

Reasons and Findings

The employer has brought this appeal apparently because it has interpreted the Review Division decision to mean that the Board cannot declare and collect an overpayment in the face of fraud or misrepresentation by the worker. However, the Board's ability to declare and collect an overpayment was not the subject of the June 26, 2003 decision appealed to the Review Division. The disability awards adjudicator simply advised the worker that his pension benefits would be suspended under section 57.1 until he attended an in-person meeting at the Board office in Richmond. This was the only issue before the review officer.

In her December 1, 2003 decision, the review officer concluded that section 57.1 did not apply to the worker because he was injured before June 30, 2002. She did not consider the Board's decisions to readjudicate and declare the overpayment. Those decisions are currently before the Review Division on other requests for review and the employer has been invited to participate in them. The Review Division decisions remain outstanding at this time.

The Board's urge to mitigate its loss in the face of apparent misrepresentation is understandable. However, section 57.1 of the Act and item 93.26 of the RSCM II were not the appropriate vehicles in this case. I agree with the review officer that section 57.1 does not apply to the worker since his compensable injury occurred before June 30, 2002 because of the wording in section 35.1(3). Section 57.1 is a new provision and was not part of the Act as it read before it was amended. Even if it did apply, I would find that the Board could not suspend the worker's benefits under that provision because the disability awards adjudicator did not follow Board policy requiring written notification, including a time frame, advising of the obligation and the consequences of not complying, and giving the worker an opportunity to explain his failure to comply.

As a result, I confirm the decision of the review officer and deny the employer's appeal. However, this finding can have no effect on the worker's benefit entitlement, because of the subsequent readjudication decisions, unless and until they are overturned on review or appeal.

No costs or expenses were requested.

Conclusion

I deny the employer's appeal and confirm the review officer's decision in accordance with the above findings and reasons.

Susan L. Polsky Shamash
Vice Chair

SLPS/dlh