

Noteworthy Decision Summary

Decision: WCAT-2004-05624 **Panel:** Susan Marten **Decision Date:** October 24, 2004

WCB Reconsideration – Section 96(5) of the Workers Compensation Act (Act) – Reopening Inappropriate - Section 96(2) of the Act – Termination of Benefits - Deactivation of Claim – Retroactive Compensation – Practices and Procedures Manual (Review Division) item #A3.6 – Policy Items #C14-102.1 and #C14-103.01 of the Rehabilitation Services and Claims Manual, Volume II – Practice Directive #38B

The Workers' Compensation Board (Board) should terminate benefits cautiously when a worker is in a graduated return-to-work program or employed in temporary light duties because if it is later determined that the worker has an ongoing temporary disability it will generally not be open to the Board to reopen the worker's claim. The Board may reconsider the termination decision but only if no more than 75 days has passed since the decision was made. Retroactive benefits can be paid on reconsideration but not on reopening. Where appropriate, a failure by the Board to use the appropriate procedure can be rectified by the Review Division.

The worker sustained a low back injury, was paid wage loss benefits, and completed a work conditioning program. Upon completion of the program the Board determined that the worker was no longer disabled, terminated the worker's benefits, and deactivated the worker's claim (the "Termination Decision"). One week later, the worker's physician provided a medical report to the Board advising that the worker continued to be disabled. The Board reopened the worker's case under section 96(2) of the *Workers Compensation Act* and stated that there was medical evidence "to support recurrence of the compensable injury while awaiting further investigation" (the "Reopening Decision"). The worker was provided retroactive and continuing partial wage loss benefits. The subsequent investigation found nothing abnormal and the worker's benefits were terminated.

The employer requested a review of the Reopening Decision, arguing that the worker's claim should not be reopened as the physician's report did not contain new evidence and that no additional wage loss benefits should be paid. The Review Division first determined that the Board erred in choosing to reopen the claim. A reopening under the Act requires a finding of either a significant change to the worker's condition or a recurrence. Neither applied to the worker. Given the physician's report and her opinion challenging the Board's earlier conclusion that the worker remained disabled, the appropriate course was to reconsider the Termination Decision and determine whether the benefits should be paid on that basis. The review officer did so and found that the worker's benefits had been prematurely terminated. The decision to pay further benefits was upheld. The employer appealed to WCAT.

The WCAT panel first determined that the review officer, pursuant to Practices and Procedures Manual (Review Division) item #A3.6, had the authority to consider whether the reopening procedure was properly used even though it was not raised by the employer. It was essential to deal with that issue in order to resolve the original issue under review, which was the employer's objection to the payment of wage loss benefits.

Secondly, the WCAT panel agreed with the Review Division that there were grounds for reconsideration of the Termination Decision but not for reopening, and also that the Board had no authority under the reopening provisions to provide the worker with retroactive compensation

(referring to policy item #C14-102.01 of the *Rehabilitation Services and Claims Manual, Volume I*) Board policy provides that the reopening of a claim is to be done on a prospective basis, meaning that benefits could only be paid for the time period beginning with the reopening, not prior to it.

Lastly, in relation to the termination of benefits, the WCAT panel found useful the guidance provided by adjudicative guidelines #G-7 and #G-8 of Practice Directive #38B (“Reopenings and “Recurrences – Bill 63”). These guidelines emphasize that reopenings are generally not appropriate where it is evident that the worker did in fact have an ongoing disability, even where the worker’s claim had been earlier terminated. For this reason, the Board cautions against officers making hasty decisions to terminate benefits and deactivate a worker’s claim prior to or immediately following the worker’s completion of a graduated return-to-work program or their involvement in a temporary light duties.

Note: Practice Directive #38B (“Reopenings and “Recurrences – Bill 63”) has been replaced by Best Practices Information #6, issued March 31, 2005. It does not contain adjudicative guidelines #G-7 or #G-8.

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WCAT Decision Date: October 27, 2004
Panel: Susan Marten, Vice Chair

Introduction

The worker was employed as a helper in a machine shop on December 10, 2002 when he reported a low back injury after pulling an electric motor with his right hand. The Workers' Compensation Board (Board) accepted his claim for a low back strain. Wage loss and health care benefits were paid. On May 22, 2003, the Board reopened the worker's claim for further investigation and paid wage loss benefits retroactive to the date they were last concluded on April 27, 2003.

Review Decision #13814, dated March 12, 2004, denied the employer's appeal of the decision to reopen the worker's claim. The review officer agreed with the decision to extend wage loss benefits; however, disagreed that the reopening provisions of section 96(2) of the *Workers Compensation Act* (Act) applied. The proper course was to reconsider a May 1, 2003 decision to terminate wage loss benefits. Grounds existed for reconsideration. The review officer concluded the Board prematurely terminated the worker's benefits and he remained partially disabled between April 27 and July 3, 2003.

The employer appeals the review officer's decision.

Issue(s)

Whether the worker is entitled to the payment of wage loss benefits between April 27 and July 3, 2003.

Jurisdiction

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

The Workers' Compensation Appeal Tribunal (WCAT) may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (see section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board 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 of the Act).

The worker's injury occurred after June 30, 2002, the transition date for relevant changes to the Act. Entitlement under his claim is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. Policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

The employer is represented by a private consultant. The worker is not participating in the appeal, although invited to do so. No oral hearing was requested. After reviewing the evidence and the policy for considering an oral hearing in item #8.70 of the WCAT's *Manual of Rules, Practices and Procedures* (MRPP), I conclude that an oral hearing is not required to ensure a full and fair consideration of the issues.

Background and Evidence

I have read and considered all the information on the claim file and that presented on appeal. I find that *Review Division Decision #13814* contains an accurate summation of the applicable law and policy as well as the facts and evidence. To that summary, the following brief review of additional information is relevant to the issue identified above.

The worker undertook light duties and then returned to work. He stopped working in February 2003, reporting continuing pain in his back and right leg. The Board reopened his claim (February 17, 2003 log entry).

The worker attended a work-conditioning program from March 10 to April 11, 2003. The intake assessment report described that his symptoms included right-sided low back pain that extended into the right hip/buttock area as well as the whole right leg. The pain was intermittent and increased with prolonged walking, standing, bending, or changing from sitting to standing quickly. He had no complaints of paresthesia.

The April 15, 2003 discharge summary report described that the worker's active range of motion of the lumbar spine was limited by pain to one-half of normal into extension. All other movements were full and painful throughout movement. Key muscle testing, reflexes, and slump test were negative. Straight leg raising showed hamstring muscle tightness that was greater on the right. The worker reported he became extremely sore with bending and walking at work. He felt he had regressed by returning to work and was unable to complete his gradual return to work hours due to pain. He reported a sharp pain with stepping forward with the right leg. He had pain on the right side of his back, with intermittent shooting pain into the Achilles' tendon. The worker was considered able to meet his critical job demands. Objectively, there were very limited physical findings. The physical therapist noted he saw his doctor for the first time in five weeks and requested a bone scan. There was nothing on assessment that prevented a return to work. The worker was discharged as fit to return to work with no limitations.

In response to an April 11, 2003 report from an attending physician (Dr. Turchen) that the worker needed a bone scan, Dr. P, Board medical advisor, advised the scan was

intended to rule out a possible sacroiliitis. It was a reasonable investigation; however, the condition was not usually related to trauma. It tended to be related to an inflammatory rheumatoid disorder and was rather uncommon. It was reasonable to pay for the bone scan on an investigative basis. The request was not in contradiction with the work-conditioning program's recommendation that the worker return to work to full duties (April 28, 2003 log entry).

The Board understood that the worker returned to work on April 7, 2003. He initially worked four hours. He then did not work on April 10 or 11, because of a sore back. He then worked between 2 and 4.25 hours per day. He did not work on April 21, but worked for four hours on April 22. He was unable to work on April 23, 24, and 25, 2003. He worked 1.5 hours on April 28 and 3 hours on May 5, 2003. He did not work between May 6 and 9, 2003 (April 25, April 30, and May 28, 2003 log entries).

On May 9, 2003, an attending physician (Dr. Wong) reported the worker's graduated return to work had failed, due to persistent pain. The worker reported right lower back pain that radiated to the right buttock and upper leg on an occasional basis. He was tender over the left lower back, with a reduced range of motion in all directions. A diagnosis of a slipped disc was queried.

An x-ray of the worker's lumbar spine, taken on May 12, 2003, reported no significant interval change, on comparison with a previous study of February 3, 2003. Minimal disc space loss at L3-4 was again noted. A diagnosis of a disc herniation would require cross-sectional imaging.

On May 14, 2003, another attending physician (Dr. Singhal) reported the worker's low back pain radiated down the right leg. The worker reported extreme low back pain.

The case manager requested a medical opinion on whether the new medical information represented any significant changes in the worker's medical condition, as described in the work-conditioning discharge report.

Dr. N, Board medical advisor, replied that the worker complained of pain radiating down the right leg, although the initial diagnosis was a strain and there were no neurological deficits noted on examination. The attending physician questioned a lumbar disc herniation and requested a CT scan. In view of the possible new diagnosis, it may be reasonable to accept some partial disability at this time, until the diagnosis was confirmed or ruled out (May 22, 2003 log entry).

The case manager reopened the worker's claim. No decision letter was issued to the worker. Her May 22, 2003 log entry stated the worker remained partially disabled after the discharge from the work-conditioning program. The worker's drive to work was too much for him to drive that distance for light duties. The medical evidence supported recurrence of the compensable injury, while awaiting further investigation.

A June 19, 2003 CT scan of the worker's lumbar spine reported normal findings. The L3-4, L4-5 and L5-S1 discs were normal, with no signs of disc bulging or focal disc herniation. The central canal and intervertebral foramina were well maintained in the lower lumbar region. No osseous or articular abnormality was demonstrated.

On June 25, 2003, Dr. Singhal reported the worker would be able to return to light duties in one to six days.

The employer's representative requested relief of the costs incurred as a result of an investigation where the result was unfavourable to the worker. If relief was not granted, she requested a decision letter on the reopening of the claim for wage loss benefits.

Review Division Decision #8169 upheld the Board's decision to deny the request for relief of costs. The employer's representative again requested a decision about the reopening of the worker's claim. The chief review officer provided an extension of time to begin a new review of the case manager's May 22, 2003 decision, as set out in her claim log entry of that date. *Review Decision #13814* was the result of that review.

In a submission dated May 27, 2004, the employer's representative submitted there was an abundance of available evidence to support the employer's position. Whether the worker's entitlement to wage loss benefits between April 27 and July 3, 2003 was considered as a reopening or reconsideration, the same evidence was relevant. The employer's representative disagreed with the review officer that Dr. Wong's May 9, 2003 report constituted sufficient new evidence. The report offered no new evidence, only a different opinion about the worker's ability to continue working. The review officer disregarded the discharge recommendation. The discharge report did not record significant ongoing problems. There was no evidence the worker was not capable of a return to work, despite his subjective complaints. The recommendations in the discharge report were based upon four weeks of daily observations and functional testing. Dr. Wong's May 9, 2003 recommendation was based on one visit and the worker's subjective presentation and complaints. Dr. Singhal's May 14, 2003 report did not support further disability. There was an absence of further treatment after the worker's failure to return to work and an absence of medical attention between May 14 and June 25, 2003. The worker's recovery from the back strain injury was protracted.

The employer's representative also requested that the November 7, 2003 submission to the Review Division be considered. In that submission, the employer's representative contended that Dr. N's opinion illustrated the investigative nature of the reopening decision. Dr. P's opinion that a request for a bone scan did not contradict the discharge report's recommendation for a return to work should be accepted. The employer preferred the evidence provided by the work-conditioning program reports.

Reasons and Findings

On March 3, 2003, the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) amended section 96 of the Act, with respect to matters that included the reopening of claims and the reconsideration of previous decisions.

Section 96(2) of the Act states that a matter that has been previously decided by the Board may be reopened, if one of two conditions exists. There must be a significant change in the worker's medical condition that the Board has previously decided was compensable, or there must be a recurrence of the worker's injury.

Section 96(4) gives the Board the authority to reconsider a decision that it has made. Section 96(5) states, however, that the Board may not reconsider a decision under section 96(4) if over 75 days have passed since that decision was made.

Section 1 of the Act defines "reconsider" as to make a new decision in a matter previously decided, where the new decision confirms, varies or cancels the previous decision.

The Board did not issue a decision letter to the worker or the employer when the claim was reopened in May 2003. The chief review officer's memo and the review officer's decision accepted that the case manager's log entry constituted a decision. The case manager's log entry indicated she would call the employer directly to confirm time loss and pay wage loss accordingly.

The review officer confirmed the payment of wage loss benefits between April and July 2003, but did so as a reconsideration of the May 1, 2003 decision. He disagreed that an analysis under the reopening provisions of the Act was appropriate.

The Review Division's *Practices and Procedures Manual* (Manual) explains at item #A3.6 that a review officer may become aware of an issue that was not raised in the initial decision under review or the review request. In considering whether to deal with the issue, the factors to be considered include whether it is essential to deal with the new issue in order to resolve the original issue under review, or, if not essential, how incidental the new issue is to the original issue. Other factors include the difficulty or complexity of the new issue, whether all the necessary information is available or easily obtainable, and the views of the parties, if known. I consider the review officer's decision was in keeping with item #A3.6, in that it was essential to deal with the issue in order to resolve the original issue under review, which was the employer's objection to the payment of wage loss benefits between April and July 2003.

Item #14.30 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP) provides that WCAT has jurisdiction to address any issue determined in either the Review Division decision or the prior Board decision.

RSCM II item #C14-102.01 provides that the reopening of a previous decision does not affect the application of the decision to the period prior to the significant change in the worker's medical condition or the recurrence of the worker's injury. Rather, it allows

compensation or rehabilitation to be varied subsequent to, and as a result of, the significant medical change or recurrence.

RSCM II policy item #C14-103.01 states that a reconsideration occurs when the Board considers the matters addressed in a previous decision anew to determine whether the conclusions reached were valid. Where the reconsideration varies or cancels the prior decision, it constitutes a redetermination of those matters. The policy goes on to address the purpose of sections 96(4) and (5) as well as the grounds that have to be met for the Board to reconsider a decision within the 75 day time period.

The case manager reopened the worker's claim and paid wage loss benefits on a retroactive basis. Board policy provides that the reopening of a claim is to be done on a prospective basis. I therefore agree with the review officer that the case manager's decision did not fall within the scope of matters to be dealt with under section 96(2) of the Act and the provisions concerning the reopening of claims.

The review officer considered the worker's situation in May 2003 is similar to the examples provided in the adjudicative guidelines set out in *Practice directive #38B, "reopenings and recurrences – Bill 63"*. That practice directive was amended on July 18, 2003 and effective March 3, 2003. Practice directives are publicly accessible on the Board's Internet web site at: www.worksafebc.ca. The directives, unlike policy, are not subject to a statutory requirement that they must be applied. However, they can provide useful guidance in certain cases. I note the adjudicative guidelines #G-7 and G-8 that the review officer referred to discuss the deactivation of a claim rather than reconsideration. Those items state:

7. Ongoing Temporary Disability – Selective Light Employment

Many employers are able to accommodate workers in full-time selective light/modified employment in spite of objective signs of disablement with respect to a worker's pre-injury job. For administrative purposes, the Board officer may have deactivated the claim, as there was no outstanding case management action required in the near future. However, if a worker is no longer able to continue with the modified work (or it is no longer available), the reopening provisions would not apply. This is because there is ongoing temporary disablement from the pre-injury job.

8. Ongoing Temporary Disability – Graduated Return-to-Work

Board officers must exercise caution in making a decision to terminate benefits following, or prior to, the completion of a graduated return-to-work program. In particular, where the return-to-work date was based on an estimated date. Where a return-to-work is unsuccessful within a very short period of time, there is normally ongoing disability. Therefore, the reopening provisions of section 96(2) would generally not apply. Board officers must ensure to monitor the durability of a return-to-work prior to deactivating a claim.

I agree that the worker's circumstances in May 2003 appear similar to the examples provided in the adjudicative guidelines, which would mean that another possibility is that his situation would be considered as one of ongoing temporary disability. The review officer noted that option, in that he referred to adjudicating these situations in the context of the duration of the worker's disability. That said, as also noted by the review officer, the May 1, 2003 decision had been issued. It terminated the worker's wage loss benefits and 75 days had not passed before the case manager determined the worker had further entitlement to wage loss benefits as of April 27, 2003. She had the jurisdiction under the Act to embark upon a reconsideration. Adjudicative guideline #3 provides that the legislative provisions for reconsideration, reopening, or recurrence must be met if a legal decision is made to terminate benefits.

The review officer concluded that grounds for reconsideration existed, in that new evidence existed as set out in Dr. Wong's May 9, 2003 report. On balance, I agree with the review officer's assessment and determination that grounds for a reconsideration existed. Dr. Wong provided new information that there was a possible slipped disc and a CT scan would be done. She reported the worker was not fit for full-time duties.

After careful consideration of the whole of the evidence, I conclude the weight of the evidence supports the payment of wage loss benefits to the worker. My reasons include that I agree with the review officer that the weight of the evidence supports the work-conditioning program discharge report recorded significant ongoing problems. The report noted that the worker considered he had regressed since returning to work. The worker reported he could not complete his graduated return to work hours.

The work-conditioning intake report similarly noted the worker had subjective complaints of pain which were, at that time, considered the primary barrier to meeting his critical job demands. The examination findings in that report included limitations of 50% of normal in flexion and extension and pain at the end range of full right rotation. All other movements were full and pain-free. The discharge report described the worker's functional tolerances were such that he could meet his critical job demands; however, objective findings were noted that included a range of motion in extension at one half of normal. All other movements were full, but painful throughout movement.

The employer's representative submitted the worker's demonstrated functional abilities and subjective reports of disability did not change significantly. I note the worker followed the recommendations of the work-conditioning program and again undertook or continued with a graduated return to work. There is insufficient evidence of concerns about his credibility or cooperation in that regard. Shortly after his discharge, Dr. Wong's May 9, 2003 report clearly stated the graduated return to work had failed, due to the worker's persistent pain. The review officer noted that he managed only 1.5 hours on the first day of his return, which I read as a reference to the worker's hours of work on April 28, 2003, as reported to the Board. On May 14, 2003, Dr. Singhal recorded the worker reported extreme pain with symptoms that included radiation down the right leg.

The worker's physician considered the worker's symptoms after his discharge from the work-conditioning program indicated a disc problem. Dr. Wong reported that possibility in her May 9, 2003 report and indicated the worker was not medically capable of working on a full-time basis. She reported findings that were different from the work-conditioning discharge report. She described a reduced range of motion in all directions. I accept that Dr. Wong has both the qualifications and knowledge of the worker's symptoms at that time to provide that opinion, which was provided after a clinical assessment of the worker on that date. Dr. N's opinion was similarly based upon the possibility of a disc problem. I acknowledge Dr. P's opinion; however, a disc problem is distinct from sacroiliitis considered to be associated with rheumatoid arthritis. Dr. N's opinion was specific to the diagnosis queried in Dr. Wong's report. The work-conditioning discharge recommendations were not made with reference to a diagnosis of a possible disc herniation. Dr. N agreed that a CT scan was indicated. He also stated the worker should be considered partially disabled. That opinion generally accords with Dr. Wong's opinion. I acknowledge the CT scan results eventually indicated there was no such problem; however, the opinions provided were based upon the evidence available at the time.

In May 2003, the worker's attending physicians (Dr. Wong and Dr. Singhal) considered the worker's ongoing and persistent symptoms sufficient to question whether a disc herniation occurred and arrange for a CT scan examination. The Board accepted the information in their reports and acted upon it. The worker was considered partially disabled and entitled to benefits on an investigative basis. The employer's representative contends wage loss benefits should not be paid as the worker did not see his doctors regularly while awaiting the CT scan. However, I accept the worker was following the advice of his physicians at that time. I also note that Dr. Singhal then considered the worker's symptoms improved and cleared the worker for a return to light duties shortly after June 25, 2003. The Board agreed with his recommendation for a return to work. The case manager's July 2, 2003 log entry recorded the worker reported improvement, in that he stated he was feeling much better.

Finally, I have noted a difference in that the review officer confirmed the payment of wage loss benefits to July 3, 2003. The summary section of the claim file indicates that

wage loss benefits were paid to July 1, 2003. The case manager's July 2, 2003 log entry reported the worker returned to work that day. I therefore vary the review officer's conclusions to the extent that I find that wage loss benefits should continue as already paid, that is, to July 1, 2003.

Conclusion

I vary the Review Division decision. I confirm the payment of wage loss benefits, but only to the extent already paid by the Board, that is, to July 1, 2003.

No expenses were apparent or requested and none are awarded.

Susan Marten
Vice Chair

SM/gw