

Noteworthy Decision Summary

Decision: WCAT-2005-00135 **Panel:** Debbie Sigurdson **Decision Date:** January 12, 2005

Recurrence of disability – Transitional provisions – Average earnings – Section 35.1(8) of the Workers Compensation Act – Policy items #1.03(b)4 and #34.54 of the Rehabilitation Services and Claims Manual, Volume II

The worker injured his shoulder prior to June 30, 2002, the transition date for changes to the *Workers Compensation Act* (Act). He received temporary wage loss benefits and subsequently had surgery to his shoulder after the transition date. The Workers' Compensation Board (Board) concluded the worker's injury had recurred on the date of the surgery. The worker's appeal was allowed. The worker's disability had not recurred after the transition date, as his medical condition had never resolved or stabilized. Therefore, the worker's average earnings (used in calculating his wage loss benefits) should have been determined under the former version of the Act.

The worker injured his right shoulder in 2000. He received wage loss benefits from the Board until February 2003. On July 31, 2003, the Board concluded the worker's right shoulder injury had recurred on July 25, 2003 when he underwent surgery to his shoulder. The Board reopened his claim for further temporary wage loss benefits. The Board determined that as the worker's disability had recurred after June 30, 2002, the transition date for changes to the Act, his average earnings should be determined under the current version of the Act, resulting in a decrease to the worker's average earnings. The worker requested a review by the Review Division of the Board, which upheld the Board decision. The worker appealed to the Workers' Compensation Appeal Tribunal.

The panel noted that section 35.1(8) of the Act provides that if a worker has, on or after the transition date, a recurrence of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the recurrence based on the current version of the Act. The requirement that the worker experience a recurrence of his disability is in contrast with the requirement in section 96(2) that the worker experience a recurrence of his injury, or a significant change to his compensable condition (on a request for reopening of a claim).

The Board had not provided the worker with a permanent disability award when he received further temporary wage loss benefits following his surgery. In order for a disability to "recur" and the transition provisions in policy item #1.03(b)4 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) to apply, the worker must have experienced an "additional" period of temporary disability. A period of temporary disability terminates, under item #34.54 RSCM II, when a worker's medical condition has resolved or has stabilized. In this case, the medical evidence indicated the worker's injury had not resolved when his wage loss benefits were terminated. Although the worker had likely sustained a permanent functional impairment, his condition was not stable in February 2003.

As the worker's disability did not recur, the transition provisions were not applicable. The worker's average earnings for temporary wage loss benefits in July 2003 were determined under the former Act.

WCAT Decision Number : WCAT-2005-00135
WCAT Decision Date: January 12, 2005
Panel: Debbie Sigurdson, Vice Chair

Introduction

The Workers' Compensation Board (Board) accepted the worker's claim for injury to his right shoulder following his work activities on July 3, 2000. The worker received wage loss benefits from September 6, 2000 to February 2, 2003. He commenced participation in a vocational rehabilitation program on conclusion of his temporary wage loss benefits. On July 31, 2003 a Board officer concluded that the worker's right shoulder injury had recurred on July 25, 2003 when he underwent surgery to his shoulder and his claim was reopened for further temporary wage loss benefits. The Board officer determined that as the worker's disability had recurred after June 30, 2002, the transition date for changes to the *Workers Compensation Act* (Act), the worker's wage rate would be set pursuant to the current provisions of the legislation. This resulted in a decrease to the worker's weekly wage rate.

The worker requested a review of that decision. On March 29, 2004 a review officer at the Review Division concluded the Board had correctly applied the current provisions of the legislation to set the worker's wage rate on the reopening of his claim. The worker has appealed that decision. He seeks a finding that the applicable policy is patently unreasonable, as the provisions are applied retroactively to benefits that have already been determined. The worker seeks a finding that his disability did not recur in July 2003 such that he is entitled to payment of wage loss benefits pursuant to the former provisions of the Act.

Issue(s)

Did the worker experience a recurrence of his disability in July 2003 such that the reopening of his claim is subject to the current provisions of the Act?

Jurisdiction

Section 239(1) of the Act, as amended, provides that a decision made by a review officer under section 96.2 may be appealed to the Workers' Compensation Appeal Tribunal (WCAT). Section 250(1) of the Act allows WCAT to consider all questions of law and fact arising in an appeal, subject to section 250(2), which requires that WCAT apply the relevant Board policy, and make its decision based on the merits and justice of the case.

At issue in this appeal is whether the worker's disability in this case recurred after June 30, 2002, the transition date for relevant changes to the Act. Entitlement related to a recurrence is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. WCAT panels are bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63).

This appeal has proceeded without an oral hearing. I am satisfied that the matter can be decided without the necessity of an oral hearing, based on consideration of the submissions from the worker's representative to the Review Division and WCAT, and a review of the evidence on the Board file. The employer is not participating in this appeal although advised of its right to do so.

Background and Evidence

The employer operates a concrete reinforcing business. This 42-year-old right-hand dominant worker was employed as an ironworker since April 17, 2000.

On July 3, 2000 the worker was attempting to straighten ties for a beam when he experienced pain to his right shoulder. The worker continued to perform his regular job duties and received physiotherapy treatment. His symptoms did not subside. The worker discontinued work and received wage loss benefits.

The Board has accepted the worker's claim for a right shoulder strain, SLAP lesion distal clavicle resection surgery performed on March 30, 2001, arthroscopic debridement and repair performed on April 30, 2002, arthroscopic surgery performed on July 25, 2003, and chronic pain.

On May 30, 2001 the Board officer determined that the worker's long term loss of earnings arising from the work injury was best represented by consideration of his earnings three years preceding the date of his injury. The Board officer calculated the worker's three year pre-injury earnings to total \$71,104.47, which was equal to a gross weekly wage rate of \$853.74.

Dr. Day, orthopaedic surgeon, examined the worker at the Visiting Specialists' Clinic on December 18, 2002. He reported that the worker had extensive degeneration of his right shoulder joint and that he would experience a protracted period of recovery because of the synovitis. An MRI of the worker's right shoulder taken on January 16, 2003 did not reveal obvious loose bodies, but the radiologist noted that the posterior labrum had an unusual appearance, in that it was enlarged and had a deep sub labral recess. He was not able to diagnose a definite tear, and noted that the worker had a moderate Hill Sachs lesion. On January 22, 2003 the worker's physiotherapist advised the Board officer that the worker would not benefit from further treatment.

On February 5, 2003 the worker told the Board officer that he was experiencing numbness to his right thumb, index and middle finger, and that his symptoms had worsened over the past 1.5 months. The worker was scheduled to have nerve conduction studies and to be re-assessed by Dr. Day. The Board officer advised the worker that his condition was at medical plateau and that it was not anticipated that his symptoms would significantly improve or worsen. Temporary wage loss benefits were concluded February 2, 2003.

Dr. Sadowski, neurologist, performed nerve conduction studies and EMG testing on February 10, 2003 and reported that the results were normal. Dr. Day reported on February 14, 2003 that the worker presented with persistent stiffness. He noted that the MRI revealed ceptic lesions and possible debris in the worker's right shoulder joint. Dr. Day recommended that the worker undergo arthroscopy and manipulation of the shoulder to attempt to regain further shoulder movement. Again on April 2, 2003 Dr. Day provided an opinion that the worker should proceed with an arthroscopy and artholysis with manipulation of his shoulder joint. The Board initially refused to authorize the proposed surgery, but later reconsidered that decision.

The worker received wage loss equivalent benefits from February 5, 2003 to July 25, 2003 and participated in a vocational rehabilitation program. On May 6, 2003 the Board officer referred the worker to Disability Awards for a permanent functional impairment assessment. On May 20, 2003 the Board officer approved the further surgery to the worker's right shoulder as recommended by Dr. Day. The disability awards officer suspended the request for an assessment pending the worker's surgery and recovery from the surgery.

Dr. Day reported that the surgery of July 25, 2003 revealed significant damage to the worker's glenoid with patchy grade III and IV changes over most of the articular surface. There were several fragments of articular cartilage that were prominent, and debrided back to a smooth surface. Dr. Day also removed two non-absorbable sutures. On August 14, 2003 Dr. Day reported that the worker's right shoulder felt better post-operatively, and that he had good range of motion below 90 degrees. The Board officer determined the worker had reached medical plateau by March 14, 2004 and referred the worker back to Disability Awards for a permanent functional impairment assessment.

On July 31, 2003 the Board officer determined that the worker's claim was reopened more than three years following the date of his injury. As a result, his wage rate would be set pursuant to the current provisions of the Act, and that the previous long term average earnings set on the claim would be used with a cost of living adjustment. This resulted in a new net weekly wage rate of \$595.88 effective July 25, 2003.

The worker's representative submitted to the Review Division on December 17, 2003 that the Board's decision was patently unreasonable as it is not reasonable that by redefining "reopening" the Board can cut back benefits that were established long

before the legislative changes. The worker's representative indicated that the policy has the effect of making new legislative amendments apply retroactively to an injury that occurred prior to the changes. She noted that the worker had not been provided with a permanent partial disability award and submitted that his need for further surgery in July 2003 was not a recurrence of his disability. The worker's representative submitted that worker had never recovered from his original injury such that his entitlement to wage loss benefits should be determined pursuant to the former provisions of the Act.

On March 29, 2004 the review officer concluded the worker's right shoulder condition was at medical plateau in February 2003, such that his condition was not expected to improve or worsen. The review officer determined that the worker's condition had changed from a permanent partial disability to a temporary total disability in July 2003, such that his injury had recurred and the claim was reopened for the further surgery. The review officer confirmed the Board's decision to set the worker's wage rate pursuant to the current legislative provisions.

The worker's representative submitted on August 5, 2004 that the Review Division decision relied on a patently unreasonable interpretation of Board policy. She noted that there is a general presumption against retroactive operation of subordinate legislation, such that the Board's policy cannot operate retroactively to have an adverse effect on existing rights. The worker's representative asked the panel to find that RSCM II item #1.03(b)4 is patently unreasonable because it violates the general presumption against retroactivity.

The worker's representative submitted that for the transition provisions to apply there must be a recurrence of a disability, which did not occur in this case. She noted that the worker had not recovered from his compensable injury prior to his need for surgery in July 2003. The worker's representative noted that the Board officer in her memorandum to the Board file on February 5, 2003 had only *anticipated* a plateau in the worker's condition, yet she concluded his temporary wage loss benefits effective February 2, 2003. She noted that at that time the worker was undergoing further medical investigations for his ongoing symptoms, including nerve conduction studies. Additionally, at the time the Board officer had terminated wage loss benefits, Dr. Day was recommending further surgery. The worker's representative submitted that in these circumstances, the worker's condition was clearly not at plateau and that he had not recovered from his injury, such that the Board's decision that the worker's condition was near plateau was in error.

The worker's representative submitted that the review officer's finding that the worker's July 25, 2003 surgery constituted a recurrence of his injury is unfair and illogical. She submitted that the interpretation conflicts with the plain meaning of the word recurrence. The worker's representative requested that the panel find the worker is entitled to payment of wage loss benefits pursuant to the former provisions of the Act.

Reasons and Findings

The first issue to determine in this appeal is what version of the Act and *Rehabilitation Services and Claims Manual* (RSCM) apply in the circumstances of this case to set the worker's long term wage rate at the time of his surgery in July 2003.

Section 35.1(8) of the Act provides as follows:

If a worker has, on or after the transition date, a recurrence of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the recurrence based on this Act, as amended by the *Workers Compensation Amendment Act, 2002*.

The Amendment Act provides that the former provisions apply to an injury that occurred before June 30, 2002 except in limited circumstances. The exceptions include when a worker's disability recurs on or after June 30, 2002, and in such circumstances, the current provisions apply. The RSCM, Volume II at item #1.03(b)4 states that a recurrence, for the purpose of this policy, includes any claim that is reopened for:

- Any additional period of temporary disability where no permanent disability award was previously provided in respect of the compensable injury or disease;
- Any additional period of temporary disability where a permanent disability award was previously provided in respect of the compensable injury or disease; and
- Any permanent changes in the nature and degree of a worker's permanent disability.

As an example of a recurrence, the policy item provides:

- A worker totally recovers from a temporary disability resulting in the termination of wage-loss payments. Subsequently, there is a recurrence of the disability and the claim is re-opened for compensation.

I note that in order for the transition provisions to apply, the worker must have experienced a recurrence of his **disability**, in contrast with the requirement in section 96(2) of the Act that the worker experience a recurrence of his injury or a significant change to his compensable condition on a request for reopening of a claim.

In this appeal, the Board had not provided the worker with a permanent disability award when he received further temporary wage loss benefits following his surgery. In order for a disability to "recur" and the transition provisions in RSCM II item #1.03(b)4 to apply, the worker must have experienced an "additional" period of temporary disability. A period of temporary disability terminates, in accordance with the provisions set out in

RSCM II item #34.54, when a worker's medical condition has resolved or has stabilized. I find that neither had occurred in this case. The medical evidence indicated that the worker's injury had not resolved by February 2, 2003 when wage loss benefits were terminated. Although the medical evidence suggested the worker had likely sustained a permanent functional impairment, I find that his condition was not stable in February 2003.

I do not agree with the review officer's characterization of the worker's condition as being at medical plateau by February 2003. I agree with the worker's representative's submission that the worker's right shoulder condition had not totally recovered prior to the surgery and additionally that his condition was not stable.

I accept the worker's evidence in February 2003 that his symptoms at that time had worsened. I rely on the medical evidence from Dr. Day to find that the worker's shoulder condition was not stable and that in February 2003 further medical treatment and investigations were anticipated, including nerve conduction studies, EMG testing, and orthopaedic assessment. I note that at the time the Board officer concluded the worker's wage loss benefits, Dr. Day was recommending further surgery. Additionally, in December 2002 Dr. Day was reporting that the worker would require a protracted period of recovery. The medical evidence is not consistent with a finding that the worker's compensable condition was stable and at medical plateau, with no further changes to the condition likely. I find that the worker's disability did not "recur" on July 25, 2003 when he underwent further surgery, as prior to that date he was temporarily disabled such that he did not experience an additional period of temporary disability.

As a recurrence of the worker's disability as provided for in RSCM II item #1.03(b)4 did not occur, I find that the transition provisions are not applicable and that the worker's wage rate for temporary wage loss benefits in July 2003 is set pursuant to the former provisions of the Act. I note that the Board did not provide the worker with a decision letter with respect to the determination that his compensable injuries had reached medical plateau by February 2, 2003. The worker may request that the Board provide him with a decision, which will provide the worker with rights of review and appeal from that decision.

The worker's representative had requested that the panel consider whether RSCM II item #1.03(b)4 was patently unreasonable. I find that in the facts of this case, I need not consider the reasonableness of that policy item, as the transition provisions are not applicable and the former provisions apply. I decline to consider the reasonableness of the policy.

Conclusion

In accordance with the above reasons and findings, I allow the worker's appeal and vary the Review Division and Board decisions. No expenses were requested and none are ordered.

Debbie Sigurdson
Vice Chair

DS/jd