NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2005-01144 **Panel**: James Sheppard **Decision Date**: March 4, 2005

Requirement for Prior Written Approval from the Board Before Settling Legal Action under Section 10(5) of the Workers Compensation Act – No Exception where Error made by Worker's Representative - Policy Item #111.23 of the Rehabilitation Services and Claims Manual I

A worker who settles a legal claim without prior written approval from the Workers' Compensation Board (Board) is not entitled to seek compensation from the Board for the difference between the settlement amount and the compensation which the worker would otherwise be entitled to under section 10(5) of the *Workers Compensation Act* (Act). The worker is precluded from seeking compensation even where the failure to seek prior written approval from the Board is due to an error by the worker's representative. Moreover, under section 10(5) of the Act, it is irrelevant whether the worker's failure to seek prior written approval for the settlement from the Board actually resulted in a financial loss to the Board.

In this case, the worker was injured in a motor vehicle accident and commenced a lawsuit. The worker later applied to the Board for compensation but her claim was denied as the Board determined that the accident occurred outside the course of the worker's employment (Board Decision). After receiving the Board Decision, the worker both requested a review of the Board Decision by the Review Division and proceeded with her lawsuit, which she later settled. The terms of the settlement included a full and final release of all claims, and a Consent Dismissal Order without costs to any party. The worker received no monies from the settlement. On review, the Review Division confirmed the Board Decision. The worker then appealed the Board Decision to WCAT. After the oral hearing for the appeal, the WCAT panel identified the issue of whether the worker was precluded from claiming compensation because she settled her legal action without seeking prior written approval from the Board, as required under section 10(5) of the Act. The WCAT panel found that the worker was precluded from seeking compensation.

The worker argued that the settlement actually amounted to an abandonment of the claim, since the worker realized that her claim would not be successful. The worker argued that the Board would suffer no loss as a result of the settlement, since the defendant was a worker in the course of her employment who had already been compensated by the Board. In rejecting these arguments, the WCAT panel referred to Appeal Division Decision #95-0550 in which the appeal panel found that the purpose of section 10(5) of the Act is to put the Board in a position to either pursue legal action or determine in advance of a settlement whether the worker had obtained maximum recovery in the lawsuit. A settlement without notice to the Board and which releases the defendant from all claims achieves neither statutory objective. The WCAT panel found that the worker had had the opportunity to "protect" herself by simply seeking written approval from the Board before agreeing to the settlement.

The worker also argued that her failure to seek prior written approval for the settlement was due to an error on the part of her counsel, and this should operate as an exception to the requirements under section 10(5) of the Act. The WCAT panel found that the wording of

section 10(5) of the Act does not create any exceptions to the requirement for a worker to seek prior written approval of the Board before agreeing to a legal settlement. In the absence of this approval, the worker is not eligible to claim compensation from the Board.

WCAT Decision Number : WCAT-2005-01144
WCAT Decision Date: March 04, 2005
Panel: James Sheppard, Vice Chair

Introduction

On October 12, 2001 the worker was involved in a motor vehicle accident (MVA). As a result, she suffered some injuries.

A July 5, 2002 Workers' Compensation Board (Board) decision denied the worker's claim because her personal injury did not arise out of and in the course of her employment.

The worker requested a review of the July 5, 2002 decision by the Review Division. A February 23, 2004 *Review Division Decision #4432* confirmed the July 5, 2002 decision.

The worker has appealed the February 23, 2004 Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

Is the worker precluded from claiming compensation because she settled her legal action arising from the October 12, 2001 MVA without the prior written approval of the Board?

Did the worker suffer a personal injury arising out of and in the course of her employment on October 12, 2001?

Jurisdiction

On appeal WCAT can confirm, vary or cancel an appealed decision (section 253(1) of the *Workers Compensation Act* (Act)). WCAT may inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal (sections 250 and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing, must apply policy of the Board's board of directors that is applicable in the case.

Procedural Matters

I held an oral hearing on August 24, 2004 in Prince George, British Columbia, to hear the worker's appeal. In attendance were the worker and the employer's representative.

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Both the worker and the employer's representative were provided with full disclosure of the worker's claim file by the Board up to June 3, 2004.

Subsequent to the oral hearing, I identified the issue of whether the worker was barred from claiming compensation because she had settled her lawsuit arising from the October 12, 2001 MVA without the prior written approval of the Board. The worker and the employer's representative were invited to provide submissions on this issue. The worker retained legal counsel who provided a written submission dated November 16, 2004. The employer's representative provided a November 23, 2004 written reply. No final rebuttal to this reply was received from the worker's legal counsel within the time limits prescribed by the WCAT appeal liaison officer.

Reasons and Decision

The law and policy prior to June 30, 2002 applies to this appeal because the worker's personal injury occurred on October 12, 2001. The review officer set out the applicable law and policy in her decision. Policy relevant to this appeal is primarily set out in the *Rehabilitation Services and Claims Manual, Volume I (*RSCM I).

Settlement of MVA Lawsuit by Worker

The worker's legal counsel who had been retained in the worker's MVA lawsuit indicated, in his May 26, 2003 letter to the Board, that he commenced a lawsuit on December 5, 2001. The worker then filed an application for compensation dated July 3, 2002 (received by the Board on the same date). After the worker received the July 5, 2002 Board decision to deny her claim, she proceeded with her lawsuit. Counsel for the defendant brought an application under section 11 of the Act to the Appeal Division of the Board. Counsel for the defendant forwarded submissions dated December 2, 2002 to the Appeal Division with respect to a section 11 determination. Counsel for the defendant took the position that the worker's injuries did not arise out of and in the course of the worker's employment. Counsel for the employer provided a written submission, dated January 23, 2003, in which it took the position that the worker's injuries did not arise out of and in the course of her employment.

Because the section 11 application was not completed before March 3, 2003 when the Appeal Division ceased to exist, the matter was continued with WCAT. The section 11 (now section 257 under the Act) determination was not completed because counsel for the defendant indicated to WCAT that a determination was no longer required as the worker had settled her lawsuit. The worker's legal counsel, in his May 26, 2003 letter, indicated that on May 16, 2003 the worker had settled her lawsuit, the terms of which were a full and final release of all claims, and a Consent Dismissal Order without costs. The worker's legal counsel indicated that no monies were received by the worker from this lawsuit. At the August 24, 2004 hearing, the worker confirmed that she had received no monies from this lawsuit.

I sent both the worker and the employer's representative a copy of *Appeal Division Decision #95-0550* dated May 18, 1995 (*11 Workers' Compensation Reporter Series (WCR), No. 2*, page 247) which addressed a similar issue. The worker, a taxi driver, was injured in a February 1, 1992 MVA. The worker filed an application for compensation which the Board received on February 20, 1992. The Board sent him an Election to Claim form which he completed and returned to the Board. The claim was subsequently suspended when the worker did not contact the Board back to indicate he wanted to claim compensation. On May 5, 1994 the worker contacted the Board to advise he had received a settlement from ICBC but his lawyer had not given him any money. He requested compensation from the Board. The appeal commissioner summarized the general framework of the Act with respect to a worker choosing between claiming compensation or bringing a legal action (if one lies against a third party). He stated:

> In summary, therefore, if the worker elects to claim compensation, a legal action may only be pursued under the authority of the board; if the worker elects to sue, they cannot request further consideration from the board unless a court judgment is obtained in the legal action or written approval is obtained from the board of any proposal for settlement of the legal action.

The appeal commissioner found that, by his conduct, the worker in effect revoked his election to claim compensation. He elected to pursue a legal action rather than to claim compensation. He found that in choosing to sue, rather than to claim compensation, it was open to the worker to "protect" himself by requesting approval in writing from the Board of any proposed settlement of the legal action as required by section 10(5) of the Act and item #111.23 of the RSCM I. This written approval from the Board would have entitled the worker to request compensation from the Board if the amount of the settlement in the legal action was less than the amount of compensation to which he would have been entitled to under his workers' compensation claim. He found that there was no basis under section 10(5) of the Act upon which consideration could now be given to the worker's request for compensation. If the worker wished to be able to claim workers' compensation benefits, the Board had to either be in a position to pursue a legal action, or be in a position to determine, in advance of any settlement, that the maximum recovery had been obtained from the legal action.

The worker's legal counsel, in his November 16, 2004 written submission, states that the settlement, in reality, was an abandonment of the claim, having come to the realization that the Insurance Corporation of British Columbia claim would not be successful. This was not a situation whereby the Board was prejudiced because the other driver was a worker in the course of her employment and had already been paid her workers' compensation benefits. If the worker's injuries were compensable under the Act, then there was no election for the worker to make because the other driver was a worker in the course of her employment at the time of the MVA. In this case, the Writ of Summons would not operate as an election because no election was available.

He submitted that the worker should not be held responsible for the error of her former legal counsel where that error had not, actually, created or contributed to a loss to the Board.

The employer's representative, in his November 23, 2004 written reply, states that if WCAT makes a decision to accept this claim, which he indicated should not be the case, then there would be no action against the defendant because both the worker and the other driver (also a worker in the course of her employment) would be barred from suing each other. He agreed that the Board would not be prejudiced in that case as there would be no action to pursue.

Section 10(5) of the Act states:

> If after trial, or after settlement out of court with the written approval of the board, less is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the worker or dependent is entitled to compensation under this Part to the extent of the amount of the difference.

The facts in this case are slightly difference than those in *Appeal Division Decision #95-0550* in which the worker filed an election form with the Board indicating that he had elected to claim compensation. The appeal commissioner found that the worker's action in pursuing a legal action in effect revoked his election to claim compensation. In choosing to sue, rather than to claim compensation, it was open to the worker to "protect" himself by requesting approval in writing from the Board of any proposed settlement of the legal action under section 10(5) of the Act.

The evidence in this case does not show that the worker received, signed and returned to the Board an election form indicating that she wanted to claim compensation. The worker proceeded with a lawsuit in December of 2001. She then sought a decision from the Board in July of 2002 as to the compensability of her claim. The July 5, 2002 decision denied her claim for compensation. At this point, there would not have been any need for the worker to sign an election form. The worker subsequently proceeded with her lawsuit rather than appeal the July 5, 2002 decision denying her claim. She had the option, as did the worker in *Appeal Division Decision #95-0550*, to protect herself in seeking the difference between what she settled her lawsuit for and what she might received in compensation under Part 1 of the Act (provided her claim was compensable) by first obtaining written approval of the proposed settlement from the Board. However, the worker did not obtain this written approval from the Board prior to settling her lawsuit.

I acknowledge that the worker was represented by counsel at the time that she settled her lawsuit. However, I do not read the provisions of section 10(5) of the Act as making any exceptions to the need to obtain this written approval from the Board before settling

a lawsuit in order to be entitled to compensation under Part 1 of the Act. I read the words of section 10(5) of the Act as only providing entitlement to compensation under Part 1 of the Act (provided the worker's claim was compensable) if the worker had first obtained written approval of the settlement from the Board. Because this written approval was not obtained before the lawsuit was settled the worker is not entitled to compensation under the Act, even if her injury had arisen out of and in the course of her employment.

Even if I am wrong in my interpretation of section 10(5) of the Act, I would have found that the worker's October 12, 2001 MVA injuries did not arise out of and in the course of her employment. I find that it would be helpful to explain why I would not have found that the worker had suffered a personal injury arising out of and in the course of her employment on October 12, 2001 given the facts in this case.

Personal Injury Arising Out of and In the Course of Employment

Section 5(1) of the Act provides for compensation where a worker suffers a personal injury arising out of and in the course of her employment.

Item #14.00 of the RSCM I sets out a non-exhaustive list of indicators which are commonly used for guidance in determining whether a personal injury as arisen out of and in the course of a worker's employment. All of these indicators can be considered in making a judgment, but no one of them can be used as an exclusive test.

I would have found after considering these indicators, that the evidence establishes that the worker was not in the course of her employment at the time of the October 12, 2001 MVA. I have analyzed the issue of whether the worker's October 12, 2001 personal injury arose out of and in the course of her employment with reference to these indicators as follows:

(a) whether the injury occurred on the premises of the employer;

The location of the MVA was at least a couple of blocks away from the employer's premises. The transcript of the April 23, 2002 examination for discovery of the worker verifies the MVA occurred near an intersection on a public street on October 12, 2001 which was not on the employer's premises (question #4). The driver of the vehicle that struck the worker's vehicle verified in her October 15, 2001 written statement that the location of the MVA was not on the premises of the employer.

The worker was not on the premises of the employer at the time of the October 12, 2001 MVA.

(b) whether it occurred in the process of doing something for the benefit of the employer;

At the August 24, 2004 hearing the worker testified that on October 12, 2001 (a Friday) she had completed her worked for the employer at 8:45 a.m. She was employed by the employer as an on call causal home support work. She had one client on Friday. She would pick the client up with her child and drop them off at school and a daycare.

The worker indicated in her April 23, 2002 examination for discovery that she was not scheduled to work for any other clients on October 12, 2001 because she was in classes the rest of the day (question 244). She also indicated that when she had to drive a client somewhere, she was paid mileage by the employer, but not mileage from her home to the client's home (questions 280 and 283).

At the August 24, 2004 hearing, the worker confirmed she was paid mileage and an hourly rate of pay. She was not paid to go to work and she was not paid to leave work. When she was with a client, she was paid until the job was done. If she had to go from one job (client) to another, she got paid. The employer also reimbursed her for her business insurance for her vehicle. The employer required the worker to provide her own vehicle equipped with safety bolts to tie down the car seats. She acknowledged that she could have used her own car seats. She testified that she did not have her own car seat or booster seat. She testified that she never assumed she had to supply the car seats. She indicated that if she used her own car seats, they would have had to be inspected by the employer. However, she also indicated that no one had told her they would have to be inspected. She acknowledged that she might use the client's car seat (if they had one).

After completing her work on October 12, 2001, the worker confirmed that she attended courses at a local college as a student. She confirmed that she left the college at about 3 p.m. to go to the gym. She testified that she decided to go to the employer's premises before going to the gym to get car seats for the client she had early the next morning, on Saturday. She indicated that as she was going down the city street which led to the intersection where the accident occurred, she had moved from the right hand lane into the left hand lane. The worker reported that her vehicle was struck from behind while she was stopped in the center lane behind another vehicle which had stopped for a red light at an intersection on a public street.

The employer's representative submitted that the worker had told the client service representative that she was on her way to the gym when the MVA occurred. She had indicated that she had not deviated from the route from the college to the gym prior to the MVA (July 5, 2002 claim log entry).

The July 8, 2002 physician's first report of Dr. Gorman, the attending physician, states:

> PATIENT INVOLVED IN AN MVA ON OCT.12TH., 2001. WAS ON HER WAY TO THE Y BUT DECIDED TO STOP FOR SOME CAR SEATS WHICH SHE NEED FOR WORK THE NEXT DAY.NEVER MADE IT] WAS

INVOLVED IN THE MVA PRIOR TO OBTAINING THE CAR SEATS AND PRIOR TO GOING TO THE Y]

[reproduced as written]

The worker testified at the August 24, 2004 hearing that she had been told by her supervisor at a staff meeting that the availability of these car seats from the employer was limited and that she and others should not hold on to them for all week, but to pick them up the shift before they were needed. She testified that she had picked up the car seat the Friday before the MVA. She indicated that she had never picked the car seats up on a Saturday prior to the MVA. She also testified that the employer's premises were not open on Saturday and that it would never have occurred to her to ask her supervisor to come in on Saturday to open the building for her to get the car seats. She was not aware that some one could have arranged for her to come in on a Saturday to pick the car seats up.

The worker testified at the August 24, 2004 hearing that she did not remember being told to come in on Fridays and pick up the car seats. It was something that she just did. They were asked to pick them up just before the shift. She indicated that she was not being paid to pick up the car seats before her shift. As previously mentioned, she indicated that she recalled a staff meeting where the staff was asked not to hold on to the car seats all week because there was a shortage. She did not indicate that she was instructed by the employer to use their car seats.

The worker, in her December 4, 2001 written statement (also dated November 27, 2001), stated that at the time of the October 12, 2001 MVA she was on her way to the employer's to pick up car seats. She indicated that she was going to pick them up on Friday because the employer's premises were closed on Saturdays

The worker indicated at her April 23, 2002 examination for discovery that she needed a car seat and a booster seat for the children she would transport on Saturday (question 290). She indicated that she did not have her own car seat and booster seat (question 293). The worker had also stated during her April 23, 2002 examination for discovery that she could not pick the car seats up on the week-end because the employer's premises were closed (questions 301 and 306). She also indicated that it had been at a staff meeting that they were told not to hang onto the car seats for very long (question 312).

The worker's testimony at the August 24, 2004 hearing was consistent with her answers at the April 23, 2002 examination for discovery. She was asked at the examination for discovery if she ever discussed with the employer that there were a limited number of car seats and that she would be picking them up on the Friday. She answered no (question 298). She also indicated that coming into the office to pick up these car seats was just something the staff did (questions 299 and 301). She stated: "It wasn't like she [the worker's supervisor] said to me you come every Friday and pick up the seats. That

was never said." (question 305). She indicated that her supervisor told her the car seats were available but the supervisor never specifically told the worker when to come and get them (question 308 and 311). The worker also confirmed that there was never any discussion about paying the worker to attend the employer's premises to pick up the car seats (question 318). She indicated that the only time this was discussed was after the accident when she asked the supervisor if they got paid to pick up the car seats and the supervisor said no (question 322).

The client service representative recorded that the worker had told her that it was her choice to pick the car seats up and that it was not required by the work but was only to save her an extra trip in the morning (July 5, 2002 claim log entry).

The worker indicated to the entitlement officer that she had not really deviated from her route to the gym before the accident, but that she had changed from the right lane to the left lane before the MVA in order to pick up the car seats. She also indicated that she could not have picked the car seats up the next day because no one could have let her in the building unless she called them to do it specifically (July 17, 2002 claim log entry).

The employer's legal counsel, in his January 23, 2003 written submission to the Appeal Division, indicated that the worker could have picked up the car seats at any time, including on Saturday. Access was 24 hours per day. The employer's representative at the August 24, 2004 hearing could not verify this information. He believed that this was the correct information.

The employer's representative submitted that the employer did not require or instruct the worker to use the car seat or booster seat made available by the employer. The employer had provided the car seat or booster seat as a convenience for the workforce. It was open to the worker to use the client's car seat or provide her own.

Item #21.00 (Personal Acts) of the RSCM I states that the activities of workers are not neatly divisible into two clear categories, their employment functions and their personal lives. There is a broad area of intersection and overlap between work and personal affairs, and somewhere in that broad area the perimeter of workers' compensation must be mapped. The intrusion of some aspect of work into the personal life of a worker at the moment an injury is suffered will not entitle the worker to compensation. In the marginal cases, it is impossible to do better than weigh the employment features of the situation in balance with the personal features and reach a conclusion (which can never be devoid of intuitive judgment) about which should be treated as predominant.

On October 12, 2001, the worker was engaged in personal activity. She was not being paid by the employer after 8:45 am. She had gone to the college after completing her work duties for the employer on October 12, 2001. At the college she was engaged in personal activity. She was not scheduled to go to another client after she left the college. She was using her personal vehicle for her own personal use. She was not a

traveling worker at the time of the MVA. She was not traveling from her home to a client or between clients. She had planned on going to the gym (another personal activity).

At the time of the October 12, 2001 MVA, the worker had likely made up her mind to go to the employer's premises to pick up the car seats and that she had made a slight deviation from her personal activity of going from the college to the gym to go to the employer's premises to pick up child car seats for the next day. The accident did occur in the middle lane and not the right hand lane, which is the lane the worker would have had to be in to turn right to go to the gym at the intersection close to where the accident occurred. However, this slight deviation was not at the instruction or direction of the employer. Inasmuch as it could be argued that her decision to interrupt her personal activities to pick up the car seats from the employer was a benefit to the employer (e.g. to ensure their clients used appropriate car seats and booster seats where required), this was not at the instruction or direction of the employer. The employer made these car seats and booster seats available for convenience. The worker had the choice of using her own or the clients or the ones made available by the employer. The fact that she voluntarily chose to use the employer's car seats instead of supplying her own did not mean she was required as part of her employment to use the car seats or booster seats made available by the employer.

There is some inconsistency in the evidence as to whether the worker had deviated in the course of driving from the college to the gym to go and pick up the car seats from the employer's premises. There is some inconsistency in the evidence as to whether the worker was going to pick up the car seats on Friday to save herself a trip on Saturday, or because the employer's premises were not open on the Saturday. However, whether I accept either verse of events this does not result in the worker being in the course of her employment at the time of the MVA because the worker's decision to interrupt her personal activities was not at the instruction or direction of the employer.

(c) whether it occurred in the course of action taken in response to instructions by the employer;

As previously mentioned, the employer's representative submitted that the employer did not instruct or require the worker to pick up the car seat on Friday prior to the Saturday shift. It was open to the worker to use the car seat offered by the employer, the clients or her own. The worker acknowledged that her supervisor never told her she had to use these car seats nor did the supervisor instruct the worker to come in on Friday and pick them up for her Saturday work. The employer's representative submitted that how the worker transported the clients between different locations was the worker's responsibility.

(d) whether it occurred in the course of using equipment or materials supplied by the employer;

At the time of the October 12, 2001 MVA, she was not using equipment or materials supplied by the employer. She was driving her own vehicle at the time of the MVA.

(e) whether it occurred in the course of receiving payment or other consideration from the employer;

The worker was not receiving payment or other considerations from the employer at the time of the October 12, 2001 MVA.

(f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;

The worker's duties for the employer did require her to operate her vehicle and transport children to and from their parents and foster homes. The evidence does not establish whether the transportation routes taken by the worker to transport these children would have exposed her to the same risk as the route she was taking at the time of the October 12, 2001 MVA.

(g) whether the injury occurred during a time period for which the employee was being paid.

The worker was not being paid by the employer at the time of the October 12, 2001 MVA.

(h) whether the injury was caused by some activity of the employer or of a fellow employee.

The employer was not responsible for the October 12, 2001 MVA. Inasmuch as the driver of the vehicle that struck the worker's vehicle was also a worker employed by the employer and found to be in the course of her employment at the time of the October 12, 2001 MVA, this fact does not alone result in a finding that the worker was in the course of her employment at the time of the MVA.

The worker referred to *Appeal Division Decision #97-0191* dated *February 10, 1997 15 WCR 145* and, in particular, policy items #18.30 (Journey to Work Also Has Employment Purpose), 18.32 (Irregular Starting Points) of the RSCM I as being supportive of her claim. She also refers to item #16.11 from *Larson's Workmen's Compensation Law*.

The facts of *Appeal Division Decision #97-0191* were significantly different than the present one. *Appeal Division Decision #97-0191* dealt with the status of a defendant, a home care worker, whose duties involved traveling to the homes of disabled individuals who were clients of the employer, in order to provide care. At the time of the accident,

the defendant was traveling directly from home to her first, and only, client that day. She had been attending the same client at the same location as the first client of her day on a daily basis for approximately the preceding seven months. The appeal commissioner in this case found that the defendant's travel, in attending to the same client on a regular basis at the same time each day for seven months, was properly characterized as routine commuting, outside the scope of her employer, to a normal place of employment.

Items #18.30 and 18.32 of the RSCM I are not applicable in this case. The worker was not engaged in a journey to work which also had an employment purpose. She was engaged in personal activity and chose to attend the employer's premises to pick up car seats. The worker was not traveling between two working points on October 12, 2001. The worker was coming from college where she was engaged in personal activities and on her way to the gym, another personal activity, when she decided to deviate to attend the employer's premises to pick up car seats. Her deviation was not at the instruction or direction of the employer. Although item #16.11 from *Larson's* is not Board policy, the special errand rule expressed in this item is also not applicable, given the circumstances as outlined above.

Conclusion

I deny the worker's appeal. I confirm the February 23, 2004 Review Division decision for reasons other than those given by the review officer. I find that the worker was not entitled to compensation under Part 1 of the Act because she settled her lawsuit without first obtaining written approval of this settlement from the Board as required by section 10(5) of the Act. Even if I am wrong in my interpretation of section 10(5) of the Act, I would have found that the worker did not suffer a personal injury arising out of and in the course of employment on October 12, 2001. No expenses were requested and none are ordered.

James Sheppard
Vice Chair

JS/jkw/gw