

NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2005-01826**Panel:** Elaine Murray**Decision Date:** April 13, 2005***Meaning of “Disability First Occurs” in section 35.1(4) of the Workers Compensation Act – Effective Date and Termination Dates of Permanent Partial Disability Award – Transition Provisions for Permanent Disability Awards - Workers Compensation Amendment Act (Bill 49) – Policy Item #1.03 of the Rehabilitation Services Claims Manual, Volumes I & II (RSCM I & II) Item #41.00 of RSCM I –Item #42.10 of RSCM II***

This decision is noteworthy as an example of an analysis of when permanent disability “first occurs” under section 35.1(4) of the *Workers Compensation Act*.

In this case, the worker sustained a compensable injury in 1974 to his right knee. In 2001, he injured his left hip and wrist. In 2003, his right knee injury began to degenerate which resulted in a permanent functional impairment (PFI). The Board granted the worker a permanent partial disability (PPD) award effective June 2, 2003, which was the date when the worker first sought medical advice for the right knee degeneration. The termination date of the award was the worker’s 70th birthday, as the evidence showed that the worker intended to continue to work until then. The worker argued that his PPD award should be effective as of the date of his 1974 injury and continue for life. He argued that he had problems with his right knee since the injury in 1974 and the permanent nature of the injury would have been discovered sooner if the PFI evaluation had been done earlier. The Review Division confirmed the Board’s choice of the effective date and the termination date of the worker’s PPD award. The worker appealed the Review Division decision to WCAT.

The transition provisions in section 35.1(4) of the *Workers Compensation Amendment Act, 2002* (Bill 49) require that if a worker’s permanent disability “first occurs” on or after the transition date of June 30, 2002 as a result of an injury that occurred before the transition date, the amended *Workers Compensation Act* (Act) applies to the permanent disability. Under item #1.03(b)(3) of the *Rehabilitation Services Claims Manual, Volumes I & II* (RSCM I & II) the date an injury “first occurs” means “the first indication that it is permanently disabling”.

The WCAT panel found that in this case, the determination of which law and policy is applicable assists in the determination of the effective date of the worker’s PPD award. Item #41.10 of the RSCM I and item #42.10 of RSCM II provides the general rule that a permanent disability award commences when a worker’s temporary disability ceases and his condition stabilizes or is “first considered to be permanent”. This is consistent with item #1.03(b)(3).

The WCAT panel found that the worker’s injuries were first permanently disabling after the transition date of June 30, 2002 because the medical evidence showed that his 1974 injury healed well and did not cause any further problems until 2003. The WCAT panel also found that the worker’s argument that an earlier PFI evaluation would have revealed impairment was speculative and was not sufficient to alter the Board finding that the permanent disability arose in 2003.

For these reasons, section 23.1 of the current Act applies, which permits the Board to pay benefits beyond age 65 if the Board is satisfied that the worker would have continued to work



beyond that age. Here, there is no evidence to indicate that the worker would have worked past age 70, and so his benefits will terminate on his 70th birthday.

**This decision has been published in the *Workers' Compensation Reporter*:
21 WCR 173, #2005-01826, When Disability First Occurs - Section 35.1(4)**

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Panel: Elaine Murray, Vice Chair

Introduction

In an April 27, 2004 decision, the Workers' Compensation Board (Board) granted the worker a permanent partial disability (PPD) award of 8.60% of total for right knee and hip impairment stemming from injuries that he sustained on March 7, 1974. The effective date of this award is June 2, 2003 and the termination date is September 19, 2008 (the worker's 70th birthday).

The worker requested a review of the April 27, 2004 decision by the Board's Review Division. He took issue with the effective and termination dates of his PPD award. By decision dated October 14, 2004, a review officer confirmed the Board's decision.

The worker now appeals the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). He asks that his PPD award be effective as of the date of his injury and continue for life. The worker did not request an oral hearing. I am satisfied that an oral hearing is not required in this appeal, since there are no serious factual disputes or issues of credibility. The employer is no longer registered with the Board.

Issue(s)

Did the Board correctly determine the effective and termination dates of the worker's PPD award?

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act).

Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its 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. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

Background and Evidence

On March 7, 1974, the then 35-year-old worker fell 65 feet to the ground, while in the course of his duties as a lineman. He sustained a number of injuries, which included a grossly comminuted oblique fracture of the right femur about 11 to 14 centimetres from the lesser trochanter, and an undisplaced fracture of the right fibula. He underwent closed reduction surgery for the femur fracture. During recovery, the worker developed swelling and stiffness of his right knee.

An October 7, 1974 x-ray showed that the right femur had not yet completely healed. Two months later, the worker's orthopaedic surgeon, Dr. Lee, reported that the fracture was clinically solid, and the worker had no shortening of his right leg. The worker continued, however, to complain of right knee pain and right leg weakness. Dr. Lee noted in all of his reports to the Board that he did not anticipate that the worker would be left with any permanent disability.

On January 31, 1975, Dr. Lee reported that the worker's right femur was getting stronger. On examination, he had slight limitation of right knee movement with some clicking sounds.

Dr. Lee approved the worker returning to light duties on March 10, 1975. The worker then progressed to his full duties shortly thereafter.

On March 20, 2001, the worker fell 16 to 18 feet and fractured his left hip and wrist. The Board accepted that claim, paid the worker temporary disability benefits until June 9, 2002, and granted him a PPD award.

The Board heard nothing further from the worker concerning his 1974 claim until his wife told a Board officer on June 11, 2003 that her husband had been having problems with his right knee "over the past six weeks".

A June 2, 2003 x-ray of the worker's right knee showed an old united fracture of the femur, with very slight narrowing of the medial joint within the knee. No other abnormalities were noted. A left knee x-ray taken on June 9, 2003 for comparison purposes did not show any abnormalities.

On July 2, 2003, the worker told a Board officer that his right knee had bothered him off and on over the years, but had recently begun to swell for no apparent reason. He said that he sought treatment from his current family physician, Dr. Morry, who requested the June 2003 x-rays.

The Board asked Dr. Morry for any records relating to the worker's right knee complaints since 1974. Dr. Morry had treated the worker for a number of years; however, his clinical notes and records reveal that the worker only complained about his right knee on and after June 2, 2003.

In a July 3, 2003 letter to his employer, the worker asked to continue his employment beyond his 65th birthday. The employer agreed. It informed the Board that workers have the option of continuing their employment until they turn 70 provided that they pass an annual medical examination.

An October 17, 2003 right knee x-ray showed "quite marked narrowing" of the medial joint compartment consistent with medial meniscus degeneration. There was also early spurring on the medial aspect of the joint and very minimal narrowing of the patellofemoral joint space. In addition, the radiologist noted periosteal new bone about the proximal tibial shaft, which was more obvious than in June 2003. He thought that it probably resulted from the previous injury.

On October 17, 2003, Dr. Morry diagnosed the worker as having degenerative post-traumatic right knee arthritis, which he attributed to the worker's 1974 right femur fracture.

An October 30, 2003 bone scan revealed mild increased uptake at the right femur just proximal to the midshaft, which the radiologist thought was in keeping with the worker's previous trauma. The radiologist also noted increased uptake in the worker's right knee, which he thought likely represented osteoarthritis and possibly synovitis.

In a November 18, 2003 claim log entry, Dr. H, a Board medical advisor, offered his opinion that the worker's right knee degenerative changes were probably related to his 1974 injury, and would result in him having a permanent functional impairment (PFI).

In a January 8, 2004 memo (amended on January 12, 2004) to the Board's Disability Awards Department, the Board officer explained that the effective date of any PPD award would be June 2, 2003, since that was when medical evidence first demonstrated a significant change in the worker's condition.

The worker attended an evaluation on March 4, 2004 (the report reads 2003 in error) with Dr. W, a disability awards medical advisor, to assess any PFI arising from his 1974 injury. In addition, Dr. W was asked to determine if there had been any increase in the worker's PFI stemming from his 2001 claim injury, for which he had been granted a 10.27% of total award for permanent impairment of his left hip and wrist (effective June 2002).

The worker told Dr. W that he had recovered well from his 1974 injuries, and that his problems really began with his 2001 injury. With respect to his right knee, he said that it clicks and hyperextends.

On examination, the worker had reduced right knee flexion (equivalent to 4.29% of total) and right hip flexion (equivalent to 0.57% of total) for a total of 4.86%. Dr. W did not observe any significant increase in the worker's PFI on his 2001 claim.

The disability awards officer (DAO) accepted Dr. W's PFI assessment. Given that the worker now had two disabilities in the same part of his body (right hip and knee), the DAO decided that a downward adjustment, known as devaluation, was required. Devaluation reduced the worker's award to 4.82% of total. Furthermore, the DAO considered that the combined effect of two separate disabilities (left hip and right hip/knee) was greater than the separate effect of each, and decided to apply an enhancement factor to the overall impairment of 4.82%, which increased the worker's award to 7.23% of total. Finally, the DAO added a further 1.37% for age adaptability to bring the worker's PFI to 8.60% of total.

The DAO then rendered the April 27, 2004 decision, in which he granted the worker a PPD award of 8.60% of total, effective June 2, 2003. He also accepted that the worker would continue to work until age 70, which would be the termination date of his PPD award. This meant that the worker would receive a lump sum retirement benefit at age 70.

The worker was not satisfied with the effective and termination dates of his PPD award and requested a review of the DAO's decision by the Board's Review Division.

The review officer found no basis to disturb the effective and termination dates of the worker's PPD award.

In support of this appeal, the worker contends that he had problems with his right knee from the outset of his injury. He contends that the permanent nature of his injury would have been discovered sooner if a PFI evaluation had been done much earlier. He also states that he had right knee discomfort since 1974, but was able to rely on his left side to compensate. Following his 2001 injury, however, he could no longer rely on his left side, which he believes increased his right-sided problems.

Reasons and Findings

Effective date

The *Workers Compensation Amendment Act, 2002* (Bill 49) resulted in significant changes to the law and policy concerning permanent disability awards. Subsection 35.1(4) of the transitional provisions of Bill 49 provide that if a worker's permanent disability "first occurs" on or after the transition date (June 30, 2002), as a result of an injury that occurred before the transition date, the Act, as amended by Bill 49, applies to the permanent disability, subject to subsections (5) to (8).

Policy item #1.03 of the *Rehabilitation Services Claims Manual, Volume I* (RSCM I) and *Volume II* (RSCM II) provides rules for determining whether the former provisions (pre-Bill 49 and RSCM I) or the current provisions (post-Bill 49 and RSCM II) apply to permanent disability awards. The policy (see item #1.03(b)(3)) provides that if an injury occurred before June 30, 2002, but “the first indication that it is permanently disabling” occurs after June 30, 2002, the current provisions apply, as follows:

Under this rule, for an injury that occurred before June 30, 2002, where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of permanent disability is on or after June 30, 2002, the award will be adjudicated under the current provisions, using the modified formula described in (i) and (ii) above. The determination of when permanent disability first occurs will be based on available medical evidence.

An example of when this rule applies is where a worker, injured before June 30, 2002, shows no signs of permanent disability before that date. However, on or after June 30, 2002, the worker has surgery, which first causes permanent disability. The permanent disability award will be adjudicated under the current provisions, using the modified formula.

In this case, the determination of which law and policy is applicable assists in the determination of the effective date of the worker’s PPD award. Policy item #41.10 of the RSCM I provides the general rule that a pension commences when a worker’s temporary disability ceases and his condition stabilizes or is “first considered to be permanent”. This is consistent with policy item #1.03(b)(3). I note that policy item #42.10 in the RSCM II is identical to RSCM I policy item #41.10, except for references to the percentage of wage loss benefits payable.

The question then is when did the worker’s permanent right knee and hip disability first occur? Policy item #1.03(b)(3) provides that in answering that question the Board must rely on the “available medical evidence” to ascertain the first indication of permanent disability.

The worker submits that his right knee and hip conditions were first permanently disabling on the date of injury. With respect, I do not agree. His injuries first resulted in temporary total disability. It was uncertain on March 7, 1974 whether he would be left with any permanent impairment. The medical evidence establishes that he had significant injuries; however, it also shows that they healed well. At no time did Dr. Lee anticipate that the worker’s injuries would lead to a permanent disability. X-rays taken in 1974 did not reveal any of the degenerative changes noted in June 2003.

No doubt these degenerative changes did not suddenly develop on June 2, 2003; however, there is no medical evidence prior to June 2, 2003 that reveals when those

changes first commenced. Moreover, there is no medical evidence prior to June 2, 2003 that suggests that any degenerative changes impaired the worker's function. The available evidence suggests that the worker did not experience any significant right knee symptoms, which impaired him in any significant way, until approximately June 2, 2003.

I do not accept the worker's submission that an earlier PFI examination would have revealed impairment. This is speculation on his part, and I must rely on the available medical evidence to determine the first indication of permanent disability. I find that June 2, 2003 is the first indication of the worker having a permanent disability, and agree that it should be the effective date of the worker's PPD award. I deny the worker's appeal on this issue.

Termination date

Given my finding concerning the first occurrence of permanent disability, the Act, as amended by Bill 49, and RSCM II, apply to the worker's PPD award. Bill 49 resulted in significant changes to the duration of PPD awards.

Section 23.1 of the amended Act permits the Board to pay benefits beyond age 65 if the Board is satisfied that the worker would have continued to work beyond that age. Benefits will be paid to the date that the Board determines the worker would retire.

RSCM II policy item #41.00 provides that independent verifiable evidence (not just the worker's statements regarding his intention to work past 65 and to what date) is required to pay benefits beyond age 65 and to establish the date of retirement.

In this case, the employer provided independent verifiable evidence that the worker could work and was working beyond age 65. In addition, the employer confirmed that the worker could continue to work until age 70. The worker has not provided any evidence that establishes he intended to work beyond age 70.

In my view, the evidence supports that the worker would have continued to work until age 70, with employment being available to him until that time. Accordingly, I find that his 70th birthday was correctly set as the termination date of his PPD award, in accordance with section 23.1 of the amended Act and RSCM II policy item #41.00. I deny the worker's appeal on this issue.

Although the worker only questioned the effective and termination dates of his PPD award, I have also reviewed the other aspects of that award, which include the percentage of impairment, the devaluation and enhancement factors, the age adaptability factor, the wage rate, and the lump sum retirement benefit, and find no error in the DAO's calculations.

Conclusion

I confirm the October 14, 2004 Review Division decision.

No expenses were requested and none are awarded.

Elaine Murray
Vice Chair

EM/ml