

NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2005-02580 **Panel:** Joanne Kembel **Decision Date:** May 19, 2005

Pre-existing Conditions – Shoulder Dislocation – Wage Loss Benefits – Section 29(1) of the Workers Compensation Act – Section 30(1) of the Act – Policy Item #15.60 of the Rehabilitation Services and Claims Manual, Volume II (RSCM II)

This case is noteworthy as an example of the application of those portions of policy item #15.60 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) which provide rules for the payment of benefits in shoulder dislocation claims where the worker has previously experienced a non-compensable shoulder dislocation.

Item #15.60 of the RSCM II provides that if a worker has a prior non-compensable shoulder dislocation and suffers another dislocation at work, the later dislocation will only be compensable if there was a work incident of “sufficient causative significance to induce the further dislocation”. Once the claim is accepted the policy provides rules in respect of the payment of benefits. The policy provides, firstly, that temporary wage loss benefits will “normally endure no more than two weeks,” and secondly, that any surgery, after the injury, which is directed at repairing damage from the prior dislocation will not be compensable except in cases where: a) the shoulder has been stable for many years prior to the dislocation at work, or b) the dislocation at work was induced by “severe trauma.”

In this case, the worker dislocated his left shoulder. The worker had a long history of left shoulder dislocations, and had surgery on his left shoulder three years earlier. Despite the surgery, the dislocations continued until about a year before the worker’s injury. The Board accepted the shoulder dislocation on the claim as a temporary aggravation of a pre-existing symptomatic left shoulder condition. The worker received two weeks wage loss benefits. The worker underwent surgery on his left shoulder. The Board refused to cover the cost of the surgery, finding that it was primarily directed at repairing damage from the prior dislocations. The worker appealed the decision to terminate his wage loss benefits and the decision to refuse to pay benefits associated with the surgery.

In denying the worker’s appeal in respect of the termination of his wage loss benefits, the WCAT panel found that while item #15.60 does permit some discretion in allocating wage loss benefits, two weeks of wage loss benefits was sufficient in this case given that the worker’s delay in returning to work resulted in part from logistical problems with his employer, rather than the worker’s injury.

In denying the worker’s appeal in respect of the refusal to pay surgery benefits, the WCAT panel found that the worker’s shoulder condition was not stable for many years prior to the dislocation at work, and also found that the dislocation was not induced by “severe trauma”. On the stability test, the panel found that as late as a year before the injury the worker’s left shoulder was unstable and dislocating. On the severity of trauma test, the panel found that there was no “severe trauma” in light of the fact that the worker did not seem concerned about his shoulder “soreness” for several days after his injury, and at the time of the injury he had said he merely “tweaked” his shoulder.

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Panel: Joanne Kembel, Vice Chair

Introduction

The worker has appealed a July 19, 2004 Workers' Compensation Board (Board) review officer's decision, which confirmed two earlier Board decisions denying additional benefits for his left shoulder condition.

The worker requested an oral hearing. However, since this matter is primarily a medical issue as well as the application of law and policy, I am satisfied that no oral hearing is necessary. Both parties have presented written submissions.

Issue(s)

1. Is the worker entitled to wage loss benefits for more than two weeks?
2. Is the worker entitled to benefits related to surgery for his left shoulder?

Jurisdiction

Section 239 of the *Workers Compensation Act (Act)* authorizes an appeal from the Review Division on specific matters to the Workers' Compensation Appeal Tribunal (WCAT). WCAT was established on March 3, 2003 by the *Workers Compensation Amendment Act (No. 2), 2002 (Amendment Act)*.

Background and Evidence

Just days before his 26th birthday, the worker, a courier, reported to his employer at noon on September 18, 2003 that he had slipped and fallen on a wet driveway while doing a delivery one-half hour earlier.

On the employer's first report to the Board, dated that same day, the employer indicated that the worker had clenched his teeth when he fell and had chipped his tooth. The worker had been working with the employer for approximately seven years.

The worker saw his physician, Dr. E. Hamza, on September 22, 2003. Dr. Hamza reported that the worker had a fractured tooth and a left shoulder dislocation. The worker's tooth had been surgically extracted from his jaw. Dr. Hamza indicated the worker had a history of shoulder weakness. When he fell at work, the worker had landed on his left shoulder, which resulted in dislocation/relocation since. Dr. Hamza's

clinical examination revealed shoulder dislocation, crepitation, decreased range of motion (ROM), and “++ weakness”. The physician expected the worker would be off work for more than 20 days because of his left arm. That same day, Dr. Hamza wrote a note to the employer, and indicated that the worker would need to be off for three weeks due to “shoulder re-dislocations”, for which he would see a surgeon, and for tooth damage which would require repair.

On September 25, 2003, the employer reported again, stating that the worker had presented the doctor’s note saying he had also injured his left shoulder. The employer told the Board that the worker had a history of left shoulder dislocation and disputed acceptance of the left shoulder claim.

The worker submitted his application for compensation on September 26, 2003 and stated that he had put his left arm down to catch his fall. He had been off work for six working days and had a toothache for eight days. He stated his left shoulder was very sore and he was having a hard time doing daily tasks. He did not answer the form question which asked whether he had previously had pain or disability in the area of his present injury.

The worker spoke with the Board entitlement officer on October 7, 2003 and stated that he had surgery on his right shoulder in December 2002 but had not had a left shoulder problem for years. He explained he had surgery on his left shoulder five years earlier and only had pain with it when it rained, for which he took medication. The worker had agreed to return to work doing modified duties and would begin that day or the next. He said he had been waiting for the employer to provide him with the application forms for modified duties.

On October 9, 2003, the worker’s dentist reported that the worker had a temporary filling and would require the following: retentive post; composite build-up; and a crown.

The employer argued on October 10, 2003 that the worker’s chipped tooth would not have caused any time loss. The worker had agreed to work modified duties for his tooth but then later brought the doctor’s note regarding his shoulder.

On October 16, 2003, the worker reiterated that his left shoulder had not previously been dislocating. On October 21, 2003, the worker left a message and explained how he had injured his shoulder. It was raining that day and he was walking down a driveway when he slipped. He stated, “I slipped, pulled my right arm in because that’s the one I just had operated on and put my left arm down to brace my fall and that’s when my butt hit the ground and it tweaked my left shoulder....”

By October 23, 2003, Dr. Hamza reported the worker had limited use of his left arm and was working full time but with modified duties while waiting to see an orthopaedic specialist.

On October 30, 2003, the worker again described the incident and stated that his left hand hit the ground first, taking his weight and pushing his shoulder straight up. His shoulder “went pop” and then his buttocks hit the ground. After the incident, his shoulder did not need to be forced back in; it had just rolled back in. Since then, his shoulder had dislocated more in the past month than he could count. He described it as very unstable and stated it had not been like that before. He had previously been able to work with his left shoulder complaints but now the pain was constant. The worker informed the entitlement officer that he had also noticed some symptoms in his wrist.

The Board requested Dr. Hamza’s chart notes and medical reports for the past two years.

The medical file included a July 8, 1998 report from a sports medicine specialist in Ontario, who had reported that the worker had an MRI which showed abnormalities in his left shoulder consistent with his history of recurrent dislocations which had been a chronic problem since he was 15 years old. The report indicated that surgery was planned.

The next report was from Dr. R. McCormack, orthopaedic surgeon, dated October 10, 2001. Dr. McCormack recorded the worker’s history, including surgery on his left shoulder in 2000. However, the worker complained of recent increasing symptoms in his left shoulder, including pain and instability. The worker had rated his pain as 8/10 and the instability as 10/10 (the worst possible). Dr. McCormack had examined the worker and found multi-directional laxity in both shoulders and recommended physiotherapy.

Also on file was an attending physician’s insurance questionnaire dated April 30, 2002, on which the physician (unnamed) stated the worker’s primary condition was bilateral shoulder pain and partial dislocation. He also had numbness in his left hand and arm.

Dr. Hamza’s September 16, 2002 chart note indicated the worker’s left shoulder was, “still unstable – dislocates.”

A Board medical advisor (MA) reviewed the file and, on November 6, 2003, provided her opinion that the worker had pre-existing left shoulder recurrent dislocations dating back many years. Despite surgery, he had ongoing multi-directional instability/laxity. The Board MA could not tell from Dr. Hamza’s reports whether the work incident had resulted in a dislocation/relocation specifically at the time of the fall or whether this had occurred since. However, it was reasonable to suggest that an incident of significantly forceful jarring of the shoulder may have caused another subluxation/dislocation and would be a temporary aggravation of the worker’s already symptomatic pre-existing left shoulder condition.

On November 21, 2003, a Board entitlement officer accepted the worker’s claim for a tooth fracture and a left shoulder injury. She told the worker his left shoulder injury was

accepted as a temporary aggravation of a pre-existing active left shoulder condition. She noted that the worker had returned to work on October 7, 2003. However, Board policy allowed payment of a maximum of two weeks' wage loss benefits (September 19 to October 3, 2003). The worker requested a review.

On December 8, 2003, Dr. McCormack reported that he had difficulty examining the worker because of the worker's feelings of instability. However, he concluded that the worker had recurrent glenohumeral instability and wondered whether there might also be a component of multi-directional instability. Dr. McCormack recommended arthroscopic inspection to better define the problem, and possibly perform a repair.

On December 10, 2003, the Board received and arranged for payment of two invoices for dental work done on October 24 and 31, 2003.

On December 15, 2003, a Board case manager informed the worker that the Board would not pay for the surgery to his left shoulder. The worker requested a review.

On December 16, 2003, Dr. Hamza reported the worker was still working full time, modified duties.

On July 19, 2004, a Board review officer confirmed both of the two Board decisions. The worker has appealed.

In a January 6, 2005 letter, Dr. McCormack stated it was hard for him to say that the worker's left shoulder condition had been stable since the surgical repair of 2000, given his complaints of significant instability when assessed in October 2001. By the same token, he had no record in his chart of continuing complaints after that date. Dr. McCormack had no information as to whether the fall at work could be classified as "severe". He suspected the March 30, 2004 "revision surgery" was required in part because of the underlying shoulder condition, which was aggravated by a fall at work.

Submissions

The worker is represented by his union's legal counsel. The parties have had full disclosure and I need not reiterate their submissions in full. To give context, counsel argued that the Board entitlement officer had interpreted Board policy too rigidly and failed to exercise her discretion to allow more than two weeks' wage loss benefits. Furthermore, the worker's disability was associated with his tooth and wrist symptoms as well as his shoulder injury. With respect to the need for surgery, counsel argued that the compensable fall at work had constituted a severe trauma and there was no suggestion that the worker required surgery before September 2003. Although he had previously had problems with his left shoulder, including dislocations, the worker had reported a change to his condition after the work incident and even mild activities would cause his shoulder to dislocate. The operative report had disclosed a very large bucket handle tear of the labrum and partial thickness tear of the rotator cuff. While the report

suggested there was revision or repair of the original shoulder problem, there was certainly an indication that some of the findings may be related to the more recent fall at work. Along with the submission, counsel attached the January 6, 2005 letter from Dr. McCormack.

The employer submitted that the worker had fallen on his backside and the impact was not on the worker's shoulder. Such a minor incident would not have caused a severe trauma to the shoulder in the absence of a significant amount of pre-existing problem.

Findings and Reasons

The worker's injury occurred after June 30, 2002, the transition date for relevant changes to the Act. Entitlement under this claim is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. Section 250(2) of the Amendment Act requires that I apply the policies of the board of directors of the Board, found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Section 29(1) of the Act provides that the Board must pay compensation to a worker if temporary total disability results from his injury.

Section 30(1) of the Act provides for compensation to workers who are temporarily partially disabled.

The RSCM II item #15.60 addresses shoulder dislocations. Since the language of this policy will be examined in some detail in this decision, it bears quoting. The policy is as follows:

Where a worker has previously had a primary shoulder dislocation and suffers a further, or recurrent dislocation at work, if the original or primary dislocation was not sustained as a compensable injury, its acceptance as a new claim would depend upon whether there was a work incident of sufficient causative significance to induce a further dislocation. If there is a prompt reduction of the recurrent dislocation, there may be no disablement from work and consequently no need for wage-loss benefits. Where there is a disablement, this should not normally endure more than two weeks. Surgery, if directed at the pre-existing primary cause of the recurrent dislocation, would not normally be considered as an entitlement. An exception to this principle could arise where there was a non-compensable dislocation many years previously and evidence shows that the shoulder had been stable for many years without any recurrent dislocation or where the recurrent dislocation at work was induced by **severe** trauma [emphasis in original]. In such a case, entitlement might not be limited to the same extent and could include surgical repair.

1. Is the worker entitled to wage loss benefits for more than two weeks?

This first Board decision addressed the worker's period of disability from September 19, 2003 through October 7, 2003, when he returned to work full hours, but with modified duties. The Board allowed wage loss benefits only until October 3, 2003. The question of compensation for time off associated with the worker's surgery will be addressed in the second issue, below.

When speaking with the Board officers on October 7 and 16, 2003, the worker insisted that, for years, his left shoulder had not previously been dislocating and that he only had pain with it when it rained. However, only two years earlier, on October 10, 2001, Dr. McCormack recorded the worker had complained of recent increasing symptoms in his left shoulder, including pain and the worst possible instability. Dr. McCormack's examination confirmed multi-directional laxity in both shoulders.

Similarly, on April 30, 2002, the worker's attending physician reported to an insurance company that the worker's primary condition was bilateral shoulder pain, with numbness in his left hand and arm. As late as September 16, 2002, Dr. Hamza's chart note indicated the worker's left shoulder was, "still unstable – dislocates."

I find the medical evidence contradicts the worker's statements to the Board that his shoulder was not previously dislocating and was only causing him pain when it rained. In October 2001, the worker, himself, had rated his shoulder pain as eight out of ten, and instability as ten out of ten – the worst possible – and his symptoms were increasing. I find that as late as September 16, 2002, the worker's left shoulder was unstable and dislocating because of a pre-existing non-compensable condition.

The RSCM II item #15.60 provides that in such circumstances, acceptance of a new claim depends upon whether there was a work incident of sufficient causative significance to induce a further dislocation. On October 30, 2003, the worker told the Board that his shoulder "went pop" and then his buttocks hit the ground. The Board MA thought it was reasonable to suggest that an incident of significantly forceful jarring of the shoulder may have caused another subluxation/dislocation and, thus, the Board entitlement officer accepted the claim as a temporary aggravation of the worker's already symptomatic pre-existing left shoulder condition. I will not disturb the Board's decision to accept the claim.

With respect to the length of disability caused by the aggravation, I note that the worker stated that after the incident, his shoulder did not need to be forced back in; it had just rolled back in. The RSCM II item #15.60 provides that if there is a prompt reduction of the recurrent dislocation, there may be no disablement from work and consequently no need for wage-loss benefits. The Board MA did not provide an indication as to whether the worker's shoulder having "rolled back in" on its own at the time of the incident would be considered a "prompt reduction". However, since within days of the fall at work, the worker had to see Dr. Hamza for the condition, and Dr. Hamza had indicated the worker

required time off work as a result, it appears that the September 18, 2003 may well have aggravated his condition and caused him some disablement from work.

The RSCM II item #15.60 provides that where there is a disablement, this should not normally endure more than two weeks. As the worker's counsel has submitted, the use of the term "not normally" suggests the policy allows for some discretion but does not provide any examples of how that discretion ought to be exercised. The worker returned to modified but full working hours by October 7, 2003, but had told the Board earlier that day that he had been waiting for the employer to provide him with forms regarding the modified duties. Although the worker did not specify for how long he had been waiting for the forms, I note that he did not see his physician in the period between October 4 and 7, 2003 and there was no other evidence to suggest the reason for his ongoing absence from work, other than that he was waiting for arrangements to be made. This suggests that it was the arrangements for modified duties and not his shoulder condition that prevented his return to modified duties. I find his length of disability was within the norm expected by the Board and I find that, for temporary aggravation of his pre-existing shoulder condition, the worker was entitled to wage loss benefits for the usual two weeks, up to October 3, 2003.

As an aside, the Board entitlement officer was aware of the worker's complaints of wrist symptoms as well as his dental treatments on October 24 and 31, 2003. Since neither the Board entitlement officer nor the Board review officer adjudicated the compensability of the worker's wrist condition, I find that is not a matter before me. Similarly, there appears to have been no decision as to whether wage loss benefits were warranted for time off for dental treatments. The worker may approach the Board directly for such a decision.

2. Is the worker entitled to benefits related to surgery for his left shoulder?

The RSCM II item #15.60 suggests that surgery would not normally be considered if directed at the pre-existing primary cause of the dislocation, except under certain circumstances. In his January 6, 2005 letter, Dr. McCormack stated he suspected the March 2004 revision surgery was required in part because of the underlying shoulder condition, which was aggravated by a fall at work. Although the worker's counsel has suggested that a labral and rotator cuff tear were found during the surgery, Dr. McCormack did not comment on these at all. I find this suggests that Dr. McCormack did not consider the tears to be significant. I find his comments in total, including his comments regarding the stability of the worker's shoulder, suggest the surgery was primarily directed at the pre-existing primary cause of the dislocation, and that the workplace incident merely aggravated that primary condition.

As noted above, item #15.60 still allows for exceptions to be made where the non-compensable dislocation was many years previously and evidence shows that the shoulder had been stable for many years without any recurrent dislocation, or where the recurrent dislocation at work was induced by severe trauma.

I have found that the medical evidence contradicts the worker's statements to the Board that his shoulder was not previously dislocating. I have found that, as late as September 16, 2002, the worker's left shoulder was unstable and dislocating. Dr. McCormack had stated it was hard for him to say that the worker's left shoulder condition had been stable since the surgical repair of 2000, given his complaints of significant instability when assessed in October 2001. By the same token, he had no record in his chart of continuing complaints after that date. However, Dr. Hamza's medical file did include continuing complaints after that date, and I find the worker's left shoulder condition had not been stable for many years as contemplated in item #15.60. Rather, it had been causing him increasing problems, including recurrent dislocation, as recently as September 2002.

Thus, according to the RSCM II item #15.60, the only way the Board might still accept his surgery was if the September 18, 2003 recurrent dislocation at work was induced by severe trauma.

Within one-half hour of the fall at work on September 18, 2003, the worker reported to his employer. However, the employer knew only about the worker's tooth injury and knew nothing of the worker's left shoulder injury until the following week. Similarly, the worker sought attention for his tooth that same day, but did not see Dr. Hamza about his shoulder until September 22, 2003. I understand that he had to wait for an appointment to see his physician. However, on his initial application for compensation on September 26, 2003, the worker primarily described his tooth injury. He did refer to having put out his left arm in the fall, but stated that when he landed he had injured his tooth. Although he had commented that his left shoulder was very sore and he was having a hard time doing daily tasks, I find that, within the first few days after his fall at work, the worker's focus was on his injured tooth. There was a suggestion of soreness but no indication that he had dislocated his left shoulder in the fall. Even on October 16, 2003, the worker described having "tweaked" his shoulder in the incident. I find that none of this early evidence suggests that the fall itself resulted in a "severe" trauma as contemplated in the RSCM II, item #15.60.

In summary, I find the worker previously had a primary shoulder dislocation, which was not sustained as a compensable injury. A work incident on September 18, 2003 was of sufficient causative significance to induce a further dislocation – a temporary aggravation - but was not a severe trauma. Although Dr. McCormack had also stated the surgery was "in part" to address the aggravation from the workplace incident, I have found the surgery in March 2004 was directed primarily at the pre-existing primary cause of the shoulder instability and recurrent dislocations which had been increasing in the years prior to September 18, 2003. I find the circumstances described in item #15.60 were not met, and the worker was not entitled to compensation for the surgery.

Conclusion

I deny the worker's appeals and confirm the Board review officer's July 19, 2004 decision. Pursuant to section 7 of the *Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02*, I find the worker is entitled to expenses associated with obtaining or producing Dr. McCormack's January 6, 2005 letter, which I found to be helpful.

Joanne Kembel
Vice Chair

JK/ml