Noteworthy Decision Summary

Decision: WCAT-2005-03633 **Panel**: Steven Adamson **Decision Date:** July 8, 2005

Occupational disease – Date of injury – Date of disablement vs. Date of diagnosis vs. date of treatment – Section 6(2) of the Workers Compensation Act – Policy item #32.50 of the Rehabilitation Services and Claims Manual, Volume I

Section 6(2) of the *Workers Compensation Act* dictates that the date of disablement must be treated as the occurrence of the injury. The statement in item #32.50 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), indicating that the date treatment is first sought should be used, applies only where there is no period of disablement and the claim is for health care expenses only.

The worker had problems with red cedar asthma in 1975 while working for his former employer. In 2001, the worker experienced similar problems after cutting cedar for two years for the accident employer. The accident employer sought an adjustment to the date of injury set for this claim, arguing that it should be the date the red cedar asthma was first diagnosed in 1975. It argued that policy item #32.50 contemplated the lessening of costs experience rated to current employers where the claim arises as a final straw in a long history of occupational asthma.

The selection of a date of injury in an occupational disease claim must focus first and foremost on the date the worker was disabled from employment. Item #32.50 enables the Workers' Compensation Board to deviate from the general rule to extend health care benefits to injured workers before they become disabled. It is not concerned with the employer's experience rating. The appropriate policy for that purpose is item #115.30 which lists occupational diseases that have a long latency period. Red cedar asthma is not included in that list.

The date of injury was properly set as the date of disablement in 2001, as the current exposure aggravated the pre-existing condition. There was no continuity of symptoms from 1975.

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Panel: Steven Adamson, Vice Chair

Introduction

The employer appeals *Review Decision #18880* dated October 22, 2004, in which a review officer confirmed the June 14, 2004 Workers' Compensation Board (Board) decision concerning the refusal to adjust the Board's date of injury set for this claim. The review officer recognized the worker's prior Red Cedar Asthma claim with disability in 1975. He concluded, however, that the current claim was for an exacerbation of a pre-existing condition from exposure in 2001. Having found the worker's 2001 condition was properly dealt with under a new claim, he concluded there was no merit in assigning a claim number in 1975.

Issue(s)

Whether the worker's Red Cedar Asthma claim date of injury was properly determined pursuant to section 6 of the *Workers Compensation Act* (Act).

Jurisdiction and Procedural Matters

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act. WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). 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. WCAT has 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 (section 254).

I find that the applicable policy for determining this appeal is found in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) (see item #1.03 of RSCM I).

The employer is represented by a consultant, and the worker is participating in the employer's appeal and is represented by his union. The employer's letter appealing the October 22, 2004 decision failed to indicate whether an oral hearing was necessary. After reviewing the evidence on file and the employer's written submissions, I find that I am able to properly and fairly determine this matter without an oral hearing. The issue in this appeal concerns the appropriate interpretation of Board policy, and the relevant facts are not in dispute.

Background and Evidence

Dr. Mainra, a respirologist, wrote a report dated June 27, 2001 following his examination of the worker. He noted the worker started a job in a lumber mill in 1974 and was exposed to large amounts of cedar wood. Soon after this exposure began, he started noticing shortness of breath and had to begin asthma inhalation treatment. The worker was forced to stop working at this mill after a year, and commenced a new job with the accident employer at another mill. In the new job, he did not process cedar.

However, in the year prior to Dr. Mainra's examination, the worker was again exposed to cedar wood at work and his asthma symptoms returned. Dr. Mainra diagnosed moderate to severe airways obstruction and noted the worker was highly sensitive to cedar wood, which was not uncommon in asthmatic patients. He recommended the worker discontinue exposure to this wood or face permanent airways obstruction. Dr. Mainra supported the worker's compensation claim.

In a July 19, 2001 claim log entry, the Board claims adjudicator documented his conversation with the worker. The worker started working with the accident employer in 1977. He worked as a drop edge operator trimming lumber since 1992. Two years earlier, he began cutting cedar for the first time at the mill. His asthma symptoms gradually increased with this exposure. The worker noted similar complaints occurred while working for his former employer in 1975. At that time, he missed one week from work.

The claims adjudicator summarized the worker's 1975 claim in the claim log entry dated August 8, 2001. Work exposure from January 1974 until November 25, 1975 caused the worker's Red Cedar Asthma. At the time of the claim, it was recommended that he not return to work where he would be exposed to western red cedar. The worker's claim was apparently ended, as he chose to continue working where he would be exposed.

In the same claim log, the claims adjudicator concluded the worker's 2001 disabling symptoms were related to Red Cedar Asthma. He decided to establish a new claim for the worker's current outbreak, given the lengthy period of time between the claims and the fact that the worker now had a different employer. The claims adjudicator stated that relief of costs might be granted after 13 weeks of disability. He decided it was unnecessary to seek an opinion from the Board medical advisor regarding preventative vocational rehabilitation, since all of the undue risk questions were previously answered under the 1975 claim.

In an August 8, 2001 decision letter, the claims adjudicator outlined the Board's acceptance of the worker's Red Cedar Asthma claim. He distinguished this claim from the worker's previously accepted claim for the same condition in 1975. The claims adjudicator informed the worker his file would be referred for vocational rehabilitation.

In the March 25, 2002 decision letter, the Board terminated the worker's wage loss benefits as of March 24, 2002, after concluding his condition had stabilized.

In the April 2, 2002 decision letter, the employer was informed it was relieved of short-term claim costs completely as of September 20, 2001. In a claim log entry of the same date, the claims adjudicator explained that the worker was first diagnosed with Red Cedar Asthma three years after starting his job with the prior employer (the 1975 claim). He concluded this was a longstanding pre-existing problem and, therefore, the current employer was relieved of claim costs after 13 weeks.

The worker was granted a substantial loss-of-earnings-based disability award in June 2003. It was noted, in the February 17, 2003 memorandum, that 75% relief of costs under section 39(1)(e) was applied to the award, due to the worker's previous Red Cedar Asthma symptoms dating back to 1974. The disability awards claims adjudicator explained that the worker was susceptible to reoccurrence when his employer, at the time of this claim, began cutting cedar. He concluded that the worker's residual impairment under this claim was enhanced to a significant extent by the pre-existing condition.

On May 6, 2004, the employer's consultant wrote to the Board seeking an adjustment of the date for the 2001 claim. He noted the worker's history of Red Cedar Asthma symptoms and medical treatment prior to his problem in 2001.

The Board responded with a decision letter, dated June 14, 2004, reconsidering its earlier decision setting the date of injury as June 20, 2001. The claims adjudicator agreed with the consultant that the worker had a history of Red Cedar Asthma symptoms prior to his exposure in 2001. In deciding not to change the date of injury from that of June 20, 2001, he found the applicable policy (item #32.50) offered two possible methods for calculating a date of injury. The first selection method used the date the worker was first diagnosed with an occupational disease for administrative purposes, while the second method involved using the date the worker was disabled by the disease. Here, the Board chose the date of injury with reference to the date of disablement, and the claims adjudicator found choosing this method was consistent with Board policy.

The employer's consultant's July 21, 2004 written submission to the Review Division argued policy item #32.50 must be read as providing direction on several issues. The first deals with establishing wage rates and date of disability for occupational disease claims, and the second provides direction on administrative items, such as assigning a claim number. The consultant argued the policy is clear, with regard to administrative issues such as assigning a claim number, that the date of the worker's first seeking medical treatment by a physician for the occupational disease is the one to be used. Where the worker's condition was not diagnosed at that time, the date of injury for administrative purposes should be set using the date the disease was first diagnosed.

Here, the worker first sought treatment for Red Cedar Asthma in 1974, and by 1975 he had a definite diagnosis of this disease. He also suffered periods of temporary disability in 1975 and 1976. With reference to the applicable policy, the claim date in this case should be the date the occupational disease was first diagnosed. He submitted that, even if this method was not used, a calculation based on the date of first disability would result in a mid-1970s date of injury.

The Review Division rejected the consultant's argument and confirmed the Board's decision that the appropriate date of injury was June 20, 2001. As noted above, the review officer concluded item #32.50 contemplated a hierarchy of methods for the selection of a date of injury in an occupational disease claim. In his opinion, the most prominent consideration was the date of disablement. Normally, the date of diagnosis was only used where there was no period of disability. The review officer concluded that, even if the date of diagnosis was used, this would be a date in 2001 because this was the time when an exacerbation of the worker's disease was first confirmed.

In his January 12, 2005 written submission to this panel, the consultant argued the review officer's interpretation of item #32.50 was incorrect. In his opinion, the policy allowed for two distinct dates of injury, one for administrative purposes and the other for the purpose of setting wage rates. The consultant stated that the nature of occupational diseases was such that they often onset over periods involving multiple employers. In his view, item #32.50 contemplated the lessening of costs experience rated to current employers where the claim arises as a final straw in a long history of occupational asthma.

In a further written submission dated February 2, 2005, the consultant referred to the recent *WCAT Decision #2005-00523*, dated January 31, 2005. He asked this panel to follow the rationale in this decision, regarding the application of item #32.50 of the RSCM I.

Reasons and Findings

In deciding whether the Board appropriately chose June 20, 2001 as the date of injury for this claim, I commence with a review of the relevant law and policy.

Subsection 6(1) of the Act states, in part, that where a worker suffers from an occupational disease, and is thereby disabled from earning full wages at the work at which the worker was employed, compensation is payable as if the disease was a personal injury arising out of and in the course of that employment. Subsection 6(2) of the Act states simply that the date of disablement must be treated as that of the occurrence of the injury.

RSCM I policy item #32.50, entitled "'Date of Injury' for Occupational Disease", states in full:

> For purposes of establishing a wage rate on a claim for occupational disease (determining the average earnings and earning capacity of the worker at the time of the injury), the Adjudicator will consider the occurrence of the injury as the date the worker first became disabled by such disease. A worker will be considered disabled for this purpose when they are no longer able to perform their regular employment duties and as such would in the ordinary course sustain a loss of earnings as a result. This date may or may not correspond with the date the worker was first diagnosed with the occupational disease.
> For administrative purposes, such as assigning a claim number, the date of the worker's first seeking treatment by a physician or qualified practitioner for the occupational disease is the one used. For example, this date will be used where there is no period of disability. Where the worker's condition was not at that time diagnosed as an occupational disease, the relevant date is the date the occupational disease is first diagnosed. These dates may also, in the absence of evidence to the contrary, be used as the date of disablement for the purpose of determining compensation entitlement under Section 55 of the Act.

In *Appeal Division Decision #98-1809*, where this consultant also participated, the panel addressed the meaning of RSCM I item #32.50. In particular, it considered whether establishing a date for a claim, for administrative purposes, must occur using the date of first treatment, rather than the date of disablement. The panel agreed with the consultant that the first sentence of the second paragraph of item #32.50, taken alone, suggests that the date of treatment must be used to establish the date of injury, for administrative purposes. The panel concluded, however, that this sentence cannot be read in isolation. It found the very next sentence in item #32.50 seemed to contradict any absolute direction to use the date of first treatment. The obvious implication, after reading the phrase: "For example, this date will be used where there is no period of disability…", is that where there is a period of disability a different date will be used. The panel concluded that the further sentences in the second paragraph of item #32.50 make it clear that other dates can be used "as the date of disablement" for the purposes of establishing the time frame for applying for compensation. The panel found a reasonable interpretation of the policy was to use the administrative dating provisions for situations where there is no date of disablement. Ultimately, the statute specifies that the date of disablement must be treated as that of the occurrence of the injury in occupational disease claims.

Appeal Division Decision #98-1809 was reconsidered in *Appeal Division Decision #00-0612*. In the context of reconsidering the prior decision, the latter Appeal Division panel concluded that the previous panel had taken the provisions of the policies into account and provided an analysis. While the consultant preferred another analysis, the panel's analysis did not contain an error of law going to jurisdiction. It was pointed out that subsection 6(2) of the Act states that the date of disablement must be treated

as the occurrence of the injury. To the extent that policies of the governors conflict with the Act, the Act is paramount. In addition, policies must be interpreted within the context of the Act. In *Appeal Division Decision #98-1809*, the panel noted the difficulties presented by the interpretation of item #32.50, and concluded that the Board manager's interpretation of the policy was reasonable.

In *WCAT Decision #2005-00523* the panel considered whether the assignment of a claim number for administrative purposes should be based on the date of disablement or the date the worker's condition was first diagnosed as an occupational disease. After reviewing the two prior Appeal Division decisions discussed above, the panel in *WCAT Decision #2005-00523* concluded that a different interpretation of item #32.50 of RSCM I was appropriate in the circumstances it was considering. In that case, the worker sought medical attention for his Red Cedar Asthma in April 1998. He was diagnosed with the condition on August 12, 1998, and become disabled from work on July 10, 1999. The panel distinguished this case from the earlier Appeal Division decisions, since the worker sought medical treatment prior to the date of disability. After concluding the Appeal Division decisions left room for an alternative interpretation of item #32.50, the panel in *WCAT Decision #2005-00523* found that the claim date, for administrative purposes, in that case, should be determined with reference to the date the worker first sought medical treatment.

The panel in *WCAT Decision #2005-00523* concluded that the policy in item #32.50 of RSCM I consisted of two parts addressing two different issues. The first part established a procedure for setting a wage rate which best reflected the worker's earnings as of the date of disablement. Given the often lengthy onset of occupational disease claims, using the date of disablement to calculate wage loss entitlement ensures the most relevant earnings information are used to select a wage rate. The panel concluded that the second part of item #32.50 was structured specifically to ensure the employer was fairly experience rated for occupational disease claims. Thus, for "administrative purposes", the dates of these claims are established with reference to the date the worker first sought treatment of the disease by a physician. The panel reasoned that using this method was imperative, since it forced the Board and the employer to define the exposure time frame and accurately assess the worker's employment history.

The employer's consultant has argued that this panel should follow the reasoning of the panel in *WCAT Decision #2005-00523*, and adjust the claim number in this case to reflect a date in 1975. After considering the employer's consultant's written submissions and the evidence on file, I find the Board appropriately selected June 20, 2001 as the all-purpose date of injury for this claim. To start, I respectfully disagree with the reasoning found in *WCAT Decision #2005-00523*, regarding the operation of item #32.50 of the RSCM I. With reference to subsection 6(2) of the Act, which states that the date of disablement must be treated as that of the occurrence of the injury, I find the selection of a date of injury in an occupational disease claim must focus first and

foremost on the date the worker was disabled from his or her employment. I find little evidence indicating that policy item #32.50 of the RSCM I was written for the purposes of ensuring that employers are fairly experience rated in occupational disease claims. Further, I am not convinced item #32.50 was designed to promote a more thorough adjudication of occupational disease claims. I find the purpose of this policy is more likely tied to situations where a worker develops an occupational disease and seeks health care benefits from the Board prior to the occurrence of any disability from this disease. In such situations, the Board, pursuant to RSCM I policy item #32.50, has the ability to deviate from the general rule found in subsection 6(2) of the Act, which states that the date of disability shall be treated as that of the occurrence of the injury. Using this exception to the general approach, the Board has the ability to extend health care benefits to injured workers before they become disabled from their pre-injury occupations.

In making this finding regarding the operation of RSCM I item #32.50, I note issues concerning the employer's experience rating are addressed in section 42 of the Act. Here, the Board has the authority to design a system of experience rating, and may include claims costs as deemed appropriate by it. RSCM I item #115.30 lists some exceptions to the general rule that all acceptable claims coded to a particular employer are counted for experience rating purposes. At paragraph #5, item #115.30 lists specific occupational diseases considered to have latency periods of two or more years before manifesting disability. The list does not include Red Cedar Asthma.

The employer's consultant argued, in his January 12, 2005 written submission, that Red Cedar Asthma does have a latency period, on average, of more than two years. As such, it should be included in the list of occupational diseases found at paragraph #5 of item #115.30 of RSCM I. The consultant noted the Board's refusal to list Red Cedar Asthma in item #115.30. Nevertheless, he argued the wording of RSCM I item #32.50 is broad enough to find that the appropriate claim date for administrative purposes in this case is 1975. I do not agree with the consultant's argument and conclude, as discussed above, that item #32.50 does not operate for the purposes of adjusting experience ratings in occupational disease claims. The appropriate policy item addressing experience rating questions for occupational diseases is item #115.30 of RSCM I. Here, the Board has chosen not to include Red Cedar Asthma in its list of occupational disease claims excluded from employers' experience rating.

Having found that the process in the establishment of a date of injury in occupational disease claims must start with the general approach of using the date of disablement as the significant date for the claim, I will now determine whether the date of injury was properly chosen in the case at hand. The employer's consultant argued, before the Review Division, that the relevant date of disability in this case was the date the worker was disabled while working for a previous employer in the mid-1970s. The evidence is clear that the worker suffered a prior period of disability as a result of Red Cedar Asthma some decades earlier. After reviewing the evidence on file and the consultant's

written submissions, I do not share his view that a mid-1970s date should be used to establish the date of injury *vis-à-vis* the worker's problems in 2001. In the claim before me, the worker's pre-existing Red Cedar Asthma was exacerbated by an exposure to this wood at work during a two-year period prior to mid-2001. There is a lack of evidence on file indicating the worker had any Red Cedar Asthma symptoms for many years prior to this exacerbation. I note the Board's acceptance of a new claim in 2001 was not appealed by the employer. With all of this in mind, I find the relevant date of disability in this claim is June 20, 2001. I find this is the date the worker became disabled as a result of the exposure which exacerbated his underlying Red Cedar Asthma condition. The Board has recognized the occurrence of an exacerbation of the underlying condition in both its short-term disability and disability award section 39(1)(e) of the Act relief of costs decisions. These decisions were not appealed by the employer.

Having found the relevant date of disability was June 20, 2001, I see no reason to depart from the general approach of using this date to determine the date of injury in this claim. This is not a situation where the worker established his claim long before June 20, 2001 and is seeking coverage of health care costs during such a prior period.

Conclusion

The employer's appeal is denied. The Board correctly determined the date of injury for the worker's Red Cedar Asthma occupational disease pursuant to section 6 of the Act. As such, the Review Division's October 22, 2004 decision is confirmed pursuant to section 253(1) of the Act.

No expenses are allowed in this appeal, as I have not identified any appropriate expenses and none were requested by the employer's representative.

Steven Adamson
Vice Chair

SA/jy