Noteworthy Decision Summary

Decision: WCAT-2005-05194-RB **Panel**: Deirdre Rice **Decision Date:** September 29, 2005

Graduated return to work – Refusal to submit to medical treatment – Suspension of wage loss benefits – Sections 30(1) and 57(2)(b) of the Workers Compensation Act – Policy items #34.11 and #78.13 of the Rehabilitation Services and Claims Manual, Volume I

A refusal by a worker to participate in a graduated return to work (GRTW) program is not refusal to submit to essential medical treatment. Thus, the worker's wage loss benefits may not be suspended under section 57(2)(b) of the *Worker's Compensation Act* (Act) and policy item #78.13 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

The worker, a greenchain worker in the forestry industry, injured his left shoulder. The Workers' Compensation Board (Board) accepted his claim for left shoulder strain and paid the worker health care and wage loss benefits. Eight months later, the Board advised the worker that it was suspending his claim as he had refused to participate in a recommended GRTW program. The worker appealed to the former Review Board. On March 3, 2003, the Workers' Compensation Appeal Tribunal (WCAT) replaced the Review Board.

The panel noted that section 57(2)(b) of the Act allows the Board to suspend compensation if a worker refuses to submit to medical or surgical treatment which the Board considers reasonably essential to promote the worker's recovery. The panel accepted that the GRTW process is of critical significance to the Board's ability to assist injured workers to safely return to their pre-injury employment. However, the panel concluded the GRTW process is not medical or surgical treatment within the scope of section 57(2)(b). The panel acknowledged that previous WCAT panels reached a different conclusion on this issue.

The panel further noted that item #78.13 RSCM I, the Board policy concerning section 57(2)(b), does not suggest the term "medical treatment" should be interpreted so broadly as to include all forms of rehabilitation. As section 57(2)(b) is punitive, the panel concluded it was not appropriate to adopt a broad interpretation that would capture all forms of rehabilitation, regardless of whether they involve therapy, medication and the other hallmarks of medical treatment, and regardless of whether they are administered by a medical professional. The panel noted the Board medical advisor in this case had stated the worker should enter into a GRTW program, not that it was reasonably essential to promote his recovery.

The panel also noted that item #34.11 RSCM I specifically deals with the circumstance where a worker refuses to participate in a GRTW, as opposed to medical treatment. If a worker refuses to accept an offer of selective/light employment and the Board decides that the worker's refusal is unreasonable, it may determine the worker's entitlement to partial benefits under section 30(1) of the Act. The panel concluded the Board should not have referred to item #78.13 as item #34.11 was the more appropriate provision.

The worker's appeal was allowed. The panel directed the Board to determine whether the worker was entitled to further wage loss benefits.

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WCAT Decision Number: WCAT-2005-05194-RB
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Panel: Deirdre Rice, Vice Chair

Introduction

The worker, formerly a greenchain worker in the employer's forest products business, filed a claim for compensation for a left shoulder condition. A log entry dated February 27, 2002 on the claim file confirms that, initially, the Workers' Compensation Board (Board) accepted the claim for payment of health care benefits only on the basis that the worker had sustained a left shoulder or rotator cuff strain on February 4, 2002 while pulling lumber and then re-injured the same shoulder while shoveling snow. The worker subsequently went off work and the Board began paying him wage loss benefits as of March 20, 2002.

In a November 29, 2002 decision, a Board case manager advised the worker that his claim had been suspended effective November 26, 2002 in accordance with policy item #78.13 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). The case manager determined that, by refusing to participate in a recommended graduated return to work (GRTW), the worker had refused to participate in medical treatment which the Board considered reasonably essential to promote his recovery from the compensable condition accepted on the claim.

The worker is appealing this decision. He participated in the oral hearing of his appeal with the assistance of his representative. Although provided with the opportunity to do so, the employer did not participate.

Issue(s)

The issue is whether the worker refused to submit to "medical treatment" reasonably essential to promote his recovery so as to warrant suspension of his wage loss benefits pursuant to section 57(2) of the *Worker's Compensation Act* (Act) and policy item #78.13 of the RSCM I.

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Review Board and the Appeal Division of the Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As the appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), section 38.) The worker's injury occurred prior to June 30, 2002, the transition

date for relevant changes to the Act. His entitlement to benefits is to be determined under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). WCAT panels are bound by published policies of the Board pursuant to Bill 63. Policy relevant to this appeal is set out in the RSCM I, which relates to the former (pre-Bill 49) provisions of the Act.

Background and Evidence

The worker is currently 40 years old and began working for the employer on July 20, 2000. The Board file contains varying information about the circumstances surrounding the onset of the worker's left shoulder condition. This information includes:

- The worker's application for compensation, received by the Board on March 5, 2002, in which the worker attributed the development of a left shoulder condition to having grabbed three to four 20 foot 4 X 4's at a time while swamping on the greenchain on February 4, 2002. He denied having any prior shoulder problems.

- The employer's report of injury, in which the employer advised that the worker's injury occurred on January 29, 2002, and that he had been given light duty work due to previous shoulder problems.

- A first physician's report from the worker's family physician, Dr. H. Nell, for a February 6, 2002 consultation, in which Dr. Nell advised that the worker had sustained a soft tissue injury to his left shoulder on February 4, 2002, while pulling lumber, and had been working light duty until February 6, 2002, at which time pushing snow aggravated his left shoulder and left medial scapula. Dr. Nell advised that the worker was able to do light duties. Dr. Nell also said that a soft tissue injury to the left shoulder the worker sustained in 2001 was affecting his recovery and disability.

- A February 7, 2002 letter from the employer's short term disability carrier, advising the worker that his December 28, 2001 claim for short term disability benefits would be further considered once he provided details of how he injured his shoulder, as well as details about a prior injury from the 1980's that had been referenced by his doctor.

- The February 25, 2002 report from an emergency room physician, who identified the date of injury as January 30, 2002 and said that the worker was still unable to use his left shoulder and had had no improvement since hurting his shoulder three weeks prior. This physician indicated that the worker was to stay off work until the possibility that he had sustained a rotator cuff tear could be ruled out.

- A March 3, 2002 letter from Dr. Nell in which Dr. Nell advised that the worker injured his left shoulder in 2001 and had to stop working on the greenchain for a while. Dr. Nell said that he found an area of scar tissue above the upper medial border of the left scapula and tenderness in this area on examination, and that the worker's condition looked like myofascial pain. Dr. Nell injected Lidocaine in the trigger point a few times, with some improvement. He said that the worker "actually got better enough for him to go back to work but after ten minutes pulling off the green chain" he developed pain again.

- An April 15, 2002 log entry in which a Board entitlement officer recorded that the worker said the following:

    - He started working for the employer in July 2000 and, after three to four months, his shoulder started to bother him periodically.

    - He had seen a doctor in the past, but had not previously lost time from work as a result of this condition.

    - He went to see his doctor on December 19, 2001 to get a medical note for time off due to stress, as he was not getting along with his co-workers and felt that he was being harassed. He mentioned that his shoulder was also sore at this time, but he was not disabled because of it. He said that, but for the stress leave, he would have kept working.

    - He returned to work on January 14, 2002 and his shoulder was feeling good until he injured it while pulling lumber.

    - He did not tell anyone about his previous problems because his doctors told him that his current pain was in a different area; further, he returned to work in January 2002 and was not having any trouble with his shoulder until the cross up on the green chain.

- An April 23, 2002 log entry in which the entitlement officer recorded that the worker had received a Lidocaine injection in his left shoulder as recently as December 28, 2001.

- A July 24, 2002 log entry in which the case manager recorded that the worker told him that:

    - He had had shoulder problems for years since his 1989 claim and had seen a doctor on and off.

    - His shoulder was much worse since the incident under his current claim and he had severe pain at present.

- There was no incident that sent him to the doctor in December 2001.

- A May 27, 2002 Discharge Planning Report from a Board-sponsored medical rehabilitation program (MRP), in which the supervising physician, Dr. P. King, recorded that the worker had given the following history:

  > [The worker] indicates that he has been having shoulder problems episodically going back to 1991 when he apparently "tore a muscle". The symptoms were usually worse with use. Despite this on most occasions he was better by the following day. Leading up to this particular injury last fall and winter he had several visits to [Dr. Nell's] office and included trigger point injections into the painful areas.

- An April 13, 2003 letter from Dr. Nell, in which he said that:

  - The worker saw him on December 19, 2001 with a history of having hurt his left shoulder.

  - He diagnosed the worker's condition as myofascial pain of the left trapezius muscle and injected Lidocaine.

  - He saw the worker again on February 6 and 27, 2002, at which time the worker had a reduced range of movement in his left shoulder.

- An April 19, 2005 report (exhibit #3 to the hearing) from Dr. H. Anton, a specialist in physical medicine and rehabilitation, in which Dr. Anton recorded that the worker told him that: he first injured his left shoulder at work in about 1989; he still had pain when he returned to work but continued working; that shoulder pain grew gradually more severe; and, on December 19, 2001, he suddenly felt his left side "give out" as he was pulling some heavy 4 x 4s and then experienced severe pain in the same location as he had previously.

- The worker's oral testimony that:

  - At some point between 1990 and 1995, he had called the Board and complained about his left shoulder, but the Board would not accept a reopening of his 1989 claim.

  - He injured his back in 1998 and this also went into this shoulder.

- He subsequently re-injured his shoulder while working at a sawmill, and missed a week to ten days from work, but did not file a claim at that time because he had not been working for very long and did not want to create a bad name for himself.

- His right shoulder started hurting while he was in the first 30 days of working for the employer, but the pain would subside and he was able to return to work each day with the assistance of Advil and aspirin.

- He then injured his shoulder while working on the greenchain, while he was pulling two to three green 4 x 4s at a time.

Information from the 1989 claim file confirms that the worker sustained a left shoulder strain on September 13, 1989 when he was pulling sheets of wet veneer. He was off work from September 14 to November 5, 1989. On his application for compensation, he denied any previous problems and the diagnosis was a supraspinatus muscle strain plus trapezius. The worker's doctor reported that the worker had similar pain in March 1989, and although information was gathered regarding this pain, there was no claim. The last report from the worker's family physician at that time, Dr. Sutcliff, was for an October 24, 1989 visit, in which Dr. Sutcliffe said that the worker would be fit to return to work on November 6, 1989.

Initially after January 29, 2002, the worker continued to work on light duties, but he then went off work in March. Even though all investigations of his left shoulder were normal, the Board referred him to the MRP. The worker was discharged from this program on September 11, 2002. In the discharge report, Dr. King wrote:

> Unfortunately, we have made no headway regarding symptom resolution or furthering his diagnosis. … If anything, his symptoms are worsening. He reports that the left arm is aching with pins and needles sensation. He has pain extending into the left chest wall and also reports that his hip and leg are painful with the foot tingling episodically. ….
>
> At the moment [the worker] expresses great frustration regarding his ongoing symptoms, which are largely pain in the absence of any other objective findings. He has now undergone a number of imaging studies, including x-ray of neck and shoulder, arthrogram of left shoulder and MRIs of the shoulder as well as the left thorax area, all of which have been normal. At this point, with [the worker's] symptoms actually progressing, it is difficult to explain this on the basis of his original injury in January and his features are more in keeping with chronic pain.

In an initial report dated September 12, 2002, Dr. C. Smecher, a pain management specialist to whom the worker had been referred by Dr. Nell, advised that the worker walked guarding his left arm and sat with his left shoulder lower than his right. Dr. Smecher said that the worker had myofascial pain that had been neither partially nor

properly treated, and this was consistent with the worsening of the worker's symptoms with the strengthening approach taken by the MRP. Dr. Smecher said that the best course of treatment would be stretching, with trigger point injections as necessary.

The Board file includes a videotape of the worker's activities on September 9, 16 and 17, 2002. This video was reviewed by a Board medical advisor who noted in an October 3, 2002 Board log entry, as follows:

> … The subject of the video is seen walking with a normal swing to his arms during walking. The time that he is seen to actually guard his arm is when he is at the [hospital]. He walks out with, what appears to be, [a] white gauze bandage at his antecubital area. He is observed to have symmetrical shoulder height and seems to use both the right and left arm equally. He demonstrates abduction to approximately 90° degrees petting his dog, extension of the shoulder while opening his vehicle door, free flexion of his arm when controlling the steering wheel with his left arm, including moving into an adducted position when it is flexed. He seems to be able to rotate his neck to the right when backing up his vehicle. He is not seen carrying anything particularly heavy but he does not seem to favour carrying the lighter items more with one arm than the other. He is also observed taking hip waders and a fishing rod out of the back of the truck.

At the hearing, the worker explained the videotape on the basis that he had received injections and that, on the dates in question, he was consequently not suffering his usual degree of disability.

The information that had been provided to the Board by the MRP confirmed that the worker had engaged in significant guarding while there: in an August 27, 2002 conversation, a member of the MRP staff advised the case manager that, although there was no objective reason for this, the worker was not doing anything in the program and was sitting with his left arm held in front of him, guarding it; Dr. King also noted in a September 3, 2002 conversation with a Board medical advisor that the worker was guarding his left shoulder and arm when being observed, however, was able to walk for one-half hour on the treadmill without protecting his left arm. In light of this information, the medical advisor said that he would review the file again once further information had been obtained from the MRP and, if the case manager so chose, from a functional capacity evaluation (FCE).

On October 9, 2002, the worker saw Dr. King for a follow-up consultation. Dr. King reported that the worker had stood with his left shoulder elevated and rotated forward, and that internal rotation, external rotation and elevation of the shoulder were all accompanied by grimacing and the appearance of self-limiting and some cogwheel movements. Dr. King said that there had been modest improvement in the worker's condition with trigger point injections and that, since the worker was apparently half way

through the treatment protocol, he believed it would be reasonable to carry on with this treatment until its completion. Dr. King said that, if the worker's pain levels improved, then hopefully the worker could return to an activity-based program through physiotherapy and, if tolerating this, move on to an occupational rehabilitation program.

In an October 10, 2002 decision, the Board advised that it would not continue to fund the trigger point injections with physiotherapy that Dr. Smecher was administering to the worker. Dr. Nell asked that the Board reconsider this decision, however, the Board declined to do so. The worker nevertheless continued to receive these treatments.

The worker underwent an FCE on October 16 and 17, 2002. He told the external evaluator that he was still experiencing discomfort in his left shoulder and had done so since 1989. In the resulting report, the evaluator stated that the worker's responses to reliability check items were marginally reliable. Further, the evaluator said that, other than a slight limitation in the range of right shoulder movement, there were no objective findings. The evaluator concluded that the worker met the critical demands of his job, except for carrying, reaching, and handling. In this regard, while the worker was capable of occasionally lifting a maximum weight of 20 pounds, his job required him to lift 50 to 100 pounds. Further, the worker could lift a maximum of 10 pounds frequently and carry a maximum of 10 pounds, but his job required him to lift and carry 20 to 50 pounds. The evaluator recommended that the worker start a GRTW in mid-November.

The Board medical advisor subsequently reviewed the worker's file again and, in an October 31, 2002 opinion, concluded that the worker should be entering into a GRTW starting on November 11, 2002. The medical advisor considered that the FCE and MRP reports and the videotape showed the worker to be functioning better than he was representing himself to healthcare providers, and concluded that the worker met his work activities with regard to sitting, standing, walking, pushing, pulling, balancing, climbing, stooping, kneeling, crawling, and crouching. Further, although there was some limitation to lifting of 20 pounds and to carrying of 10 pounds, the medical advisor thought that these could be expected to increase a bit beyond this, to 30 pounds and 20 pounds respectively.

In a November 25, 2002 conversation, the case manager advised the worker that he would be referred for a GRTW. The Board log entry recording that conversation confirms that the case manager advised the worker that the Board medical advisor had provided the opinion, following his review of the FCE, Dr. King's assessment, and the video surveillance evidence, that a GRTW was considered reasonably essential to promote his recovery. The worker advised that he would not participate in any form of work, that his decision was supported by his doctor, and that he believed he was still disabled from working in any capacity because of his ongoing shoulder pain.

The case manager decided to suspend the claim, as set out in the November 29, 2002 decision.

The worker disagrees with the case manager's decision. He seeks wage loss benefits from November 27, 2002 to the present, a disability pension, vocational rehabilitation benefits, and health care benefits. He takes the position that he is unable to do any work because of his compensable condition and that this position is consistent with his doctor's advice.

The worker's representative based his submissions in support of the appeal on two central bases. First, he submitted that the worker was never cleared for a return to work by his doctors. The representative noted that the November 29, 2002 decision did not indicate what medical conditions were accepted in the claim, and submitted that the Board had not treated the myofascial pain the worker developed and persisted following a workplace injury. Second, he submitted that policy item #78.13 of the RSCM I cannot be stretched so as to include a GRTW. Rather, that provision talks strictly about "medical treatment." The representative argued that the worker did submit to all of the medical treatment the Board required him to submit to, and did not refuse medical treatment.

I accepted three exhibits at the hearing:

Exhibit #1: A June 20, 2005 prescription pad note from Dr. Smecher, in which Dr. Smecher provided the opinion that the worker suffers from myofascial chronic pain that was caused by his work-related injuries and the repetitive strain of his previous employment.

Exhibit #2: A copy of a two-page prescription pad note dated June 20, 2005 from Dr. Nell. Dr. Nell confirmed that he received a phone call from the Board on November 14, 2002 informing him of a video showing the worker doing more than expected. Dr. Nell said that, on November 20, 2002, he asked the worker to explain these allegations and that he was satisfied that the video had no bearing on the case. Dr. Nell said that he recommended that the worker continue his treatment with Dr. Smecher. Dr. Nell also said that the worker had a left shoulder injury which caused myofascial pain as described in his reports.

Exhibit #3: The April 19, 2005 report from Dr. Anton.

The Board file also includes the April 13, 2003 letter from Dr. Nell that is referenced above. In that letter, Dr. Nell did not mention an incident in January 2002, and instead indicated that the worker had a chronic pain condition in December 2001 that was impeding his ability to keep up with his co-workers. Dr. Nell advised that his diagnosis in December 2001 was myofascial pain of the left trapezius muscle, and confirmed that he had injected the shoulder with Lidocaine. Dr. Nell then summarized his chart notes for the worker's next visit, on February 6, 2002, and for subsequent visits. He said that, to date, Dr. Smecher had performed trigger point injections at least 55 times, and the worker had been referred to the pain clinic at St. Paul's Hospital.

Dr. Nell said that: the worker presented with a work-related injury of his left shoulder which developed into myofascial pain; the routine treatment for muscle injury the worker received was ineffective since he was not treated specifically for myofascial pain; the worker's symptoms have been aggravated by the anxiety and depression that have resulted from his disability and his anxiety about the future; and, he feels that a team approach to the worker's myofascial pain and dealing with his anxiety and depression would help a lot. Dr. Nell also said that: the worker has a significant disability and is not able to do his previous work; the Board has a responsibility to the worker; and, both he and Dr. Smecher consider that the worker has been straightforward with them, seems to be keen to be able to work again and get on with his life, and is not a malingerer or "trying to pull a fast one" on the Board.

The Board claim log confirms that the case manager referred Dr. Nell's April 13, 2003 letter to a Board medical advisor for review. In a June 19, 2003 claim log entry, a Board medical advisor who had not previously been involved in the worker's case noted that the file was under appeal and said she was, "therefore, at present, unable to comment on new information."

Reasons and Findings

Section 57(2)(b) of the Act allows for the suspension of compensation. It states, in part, as follows:

> The Board may reduce or suspend compensation when the worker …
>
> (b) refuses to submit to medical or surgical treatment which the Board considers, based on expert medical or surgical advice, is reasonably essential to promote his or her recovery.

Section 21(1) of the Act, confers a broad authority to provide for an injured worker "any **medical, surgical**, hospital, nursing **and other care or treatment** … that is considers reasonably necessary at the time of injury, and thereafter to cure and relieve from the effects of the injury or alleviate those effects." I accept that the GRTW process is of critical significance to the Board's ability to assist injured workers to safely return to their pre-injury employment, and that this process may amount to "other care or treatment" within the meaning of section 21(1) of the Act in that it can form part of the rehabilitative process. However, I do not accept that the GRTW process is "medical or surgical treatment" within the scope of section 57(2)(b) of the Act. In so doing, I acknowledge that other WCAT panels have reached a contrary conclusion, for example in *WCAT Decision #2005-01520* and *WCAT Decision #2005-02805*. However, I find the reasoning in *WCAT Decision #2005-00780-rb* more persuasive. In that case, the panel concluded that a worker's refusal to attend at a workplace visit in order to determine her functional capabilities and to get her input as to the work duties she could reasonably

perform did not amount to a refusal to submit to medical treatment. Rather, the panel concluded that, although a return to work at modified duties may form part of the rehabilitation process, it is not medical treatment as described in policy item #78.13.

Item #78.13 of the RSCM I, which sets out the requirements that must be met before the Board can suspend a claim for compensation under section 57(2)(b), does not suggest that the term "medical treatment" should be interpreted expansively so as to encompass all forms of rehabilitation. Rather, the policy states:

> The term "medical treatment" in [section 57(2)(b)] is not limited to treatment performed by doctors. It includes, for example, therapy by paramedical personnel.

In view of the punitive character of section 57(2)(b), I do not consider that it is appropriate to adopt an expansive interpretation that would capture all forms of rehabilitation, regardless of whether they involve therapy, medication and the other hallmarks of "medical treatment", and regardless of whether they are administered by a medical professional. This is particularly so since there is Board policy that specifically deals with the circumstance where a worker refuses to participate in a GRTW, as opposed to "medical treatment."

This policy, in item #34.11 of the RSCM I, deals with "selective/light employment." Selective/light employment is a temporary work alternative intended to promote a worker's gradual restoration to the pre-injury level of employment and is regarded as an integral component of the worker's rehabilitation. The policy provides for the Board's involvement in the process of determining what would be suitable selective/light employment. The Board's evaluation will be based on, but not limited to, a detailed description of the employment being offered, including the physical requirements, and detailed medical information outlining the worker's physical restrictions and medical requirements. If a worker refuses to accept an offer of selective/light employment and the Board decides that the worker's refusal is unreasonable, it may determine the worker's entitlement to partial benefits pursuant to section 30(1) of the Act.

Section 30 of the Act provides, in the case of a temporary partial disability, for the payment of wage loss benefits based on the difference between the worker's average pre-injury earnings and the amount the worker earns, or is capable of earning, in a suitable employment after the injury.

Although the case manager told the worker that the Board medical advisor had provided the opinion that the proposed GRTW was reasonably essential to promote his recovery, the medical advisor's opinion does not include a statement to this effect. Rather, the medical advisor merely stated that, because the worker appeared to be functioning better than he was representing to healthcare providers, and because the worker met many of the demands of his work activities, he should be entering into a GRTW. The medical advisor did not identify the GRTW as appropriate "medical treatment," and

indeed did not consider whether further medical treatment, including treatment for the worker's pain condition, was reasonably essential to promote his recovery. I find that policy item #34.11 would have been the more appropriate provision for the Board to invoke in this case, rather than item #78.13, which only deals with a refusal to accept medical treatment. On that basis, the appeal must be allowed.

The worker has asked for various remedies, including a reinstatement of wage loss benefits. In my view, the determination of whether the worker has any entitlement to further wage loss benefits is a matter that should be left to the Board.

As the worker's representative noted, the November 29, 2002 decision does not identify what conditions have been accepted under the claim and, in particular, whether the myofascial pain which Dr. Smecher was treating is a compensable consequence of the injury accepted under the claim. In view of the confused evidence regarding the cause of the worker's condition that is set out above, it is not clear that the myofascial pain is a compensable consequence of the January 31, 2002 and February 4, 2002 injuries. The worker maintains that he has had an ongoing condition since his compensable injury in 1989, and denies any injury in 2001. Conversely, Dr. Nell, who stated in his April 13, 2003 letter that he has been worker's physician since 1994, identified the cause of the worker's condition as a work-related injury in 2001 and makes no reference to a pre-existing condition. Further, although there were indications in his earlier reports that the January and February work incidents contributed to the progress of the worker's myofascial pain condition, Dr. Nell attributes that condition wholly to this 2001 incident in his April 13, 2003 letter.

In addressing the worker's entitlement to further benefits, it will be necessary for the Board to determine what conditions have been accepted as compensable, whether under the current claim or under the worker's 1989 claim.

I note that the Board medical advisor's June 19, 2003 opinion was provided in response to a request for an opinion regarding whether the medical evidence that had been received by the Board since October 31, 2002 (including Dr. Nell's April 13, 2003 letter) changed the Board medical advisor's October 31, 2002 opinion. In particular, the case manager asked if there was any evidence of temporary partial or temporary total disability. The November 29, 2002 decision does not include a finding as to whether the worker was disabled from working by reason of his compensable condition as of November 26, 2002. Consequently, the question of whether the medical evidence available in June 2003 supports a conclusion that the worker had a temporary partial or temporary total disability is outside the scope of this appeal. It is one which the Board ought to have considered, and is one that will have to be considered in light of the conclusion I have reached in the appeal.

Conclusion

The worker's appeal is allowed. I find that, as the worker did not refuse to submit to "medical treatment," section 57(2)(b) of the Act and policy item #78.13 of the RSCM I were improperly applied to his circumstances. The Board's November 29, 2002 decision is varied accordingly, and the claim file is referred back to the Board for determination of the worker's entitlement to further benefits, if any.

The worker is entitled to reimbursement for the cost of return travel between his home and the hearing, in accordance with the applicable Board tariff. In addition, since I consider that it was reasonable for the worker to seek and obtain Dr. Nell's April 13, 2003 report, he is entitled to be reimbursed for the $300.00 expense associated with so doing. There were no additional reimbursable expenses associated with the appeal.

Deirdre Rice
Vice Chair

DR/dw

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