

Noteworthy Decision Summary

Decision: WCAT-2005-05595 **Panel:** Elaine Murray **Decision Date:** October 21, 2005

Section 252(1) of the Workers Compensation Act – Suspension of appeal proceedings pending a Workers' Compensation Board decision respecting a related matter – Item #5.55 of the Manual of Rules of Practice and Procedure

This decision is noteworthy because it illustrates the use of section 252(1) of the *Workers Compensation Act* (Act) to suspend an appeal to WCAT pending a Workers' Compensation Board, operating as WorkSafeBC (Board), decision respecting a matter related to the appeal.

The Board accepted the worker's claim for a full thickness tear of the left supraspinatus tendon, a temporary aggravation to a pre-existing right shoulder condition, and chronic pain. The worker was provided with a 2.5% permanent partial disability award for chronic pain in both shoulders. The worker was not provided with an award for any restriction in the range of motion of the right shoulder because the Board had not yet adjudicated whether the aggravation to the pre-existing right shoulder condition was permanent.

The permanent disability award was confirmed by the Workers' Compensation Review Division (Review Division) and the worker appealed this decision to WCAT. The Review Division subsequently referred back to the Board the issue of whether the cumulative effect of four prior right shoulder claims, which included the claim under appeal, caused or permanently aggravated the worker's right rotator cuff tendinitis.

Section 252(1) of the Act provides that an appeal to WCAT may be suspended if a decision of the Board is pending respecting a matter that is related to the appeal. Item #5.55 of the *WCAT Manual of Rules of Practice and Procedure* states that before suspending an appeal the vice chair should be satisfied that there is a pending decision of the Board or a review officer, and the pending decision involves a determination of a matter that is related to the matter(s) in appeal. The vice chair found that there was a pending decision of the Board concerning the right shoulder which warranted a suspension of the appeal under section 252(1) of the Act. The decision sets out the conditions that apply to a suspension of a WCAT appeal.

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Panel: Elaine Murray, Vice Chair

Introduction

The worker appeals a March 22, 2005 Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). The worker is represented by Mr. Guenther. The employer is participating in this appeal, and is represented by Mr. Baillie. At the commencement of an oral hearing on October 18, 2005, I asked the parties for their comments concerning the suspension of this appeal.

Issue(s)

Should the worker's appeal be suspended pursuant to section 252(1) of the *Workers Compensation Act (Act)*?

Jurisdiction

Section 252(1) of the Act provides that an appeal may be suspended if a decision of the Board is pending respecting a matter that is related to the appeal. The application of that section is discussed in item #5.55 of WCAT's *Manual of Rules of Practice and Procedure (MRPP)*.

Background and Decision

On July 15, 2002, the worker, a now 62-year-old lumber grader, injured his neck and both shoulders. The Workers' Compensation Board (Board) accepted his claim for a full thickness tear of his left supraspinatus tendon, a temporary aggravation of a pre-existing right shoulder condition, and chronic pain. The Board referred the worker's claim to the Disability Awards Department to assess any entitlement that he may have to a permanent partial disability (PPD) award.

By decision dated October 25, 2004 (which attached an October 19, 2004 memorandum), a disability awards officer (DAO) informed the worker that he was entitled to a PPD award of 2.5% of total to recognize the chronic pain complaints in both of his shoulders, and that would be the extent of his award. The DAO also concluded that the worker was not entitled to a loss of earnings assessment.

The worker submitted a request for review of the October 25, 2004 decision to the Board's Review Division. By decision dated March 22, 2005, a review officer advised that her jurisdiction was "confined to the permanent partial disability award based on the right shoulder condition and chronic pain." She then decided that "at the time of the decision under review," the Board had not accepted that the worker had a permanent right shoulder condition (it had only accepted a temporary aggravation of a pre-existing condition), "other than chronic pain." As a result, she agreed with the DAO's decision not to award a permanent functional impairment percentage for the worker's restricted right shoulder range of motion.

The review officer agreed with the DAO, however, that the worker suffered from disproportionate chronic pain, and found as follows:

I interpret the policy to mean that in this case, the worker is entitled to only an award equal to 2.5% and not an award of 2.5% for each area affected. As such, I conclude the worker is only entitled to a total award of 2.5% and not 2.5% for each shoulder.

In addition, the review officer referred the issue of a loss of earnings back to the Board.

Mr. Guenther asks WCAT to provide the following remedies:

- The worker is entitled to a PPD award with respect to the reduced range of right shoulder measurements shown during a permanent functional impairment evaluation on May 21, 2003; and
- The worker is entitled to an additional award of 2.5% for chronic pain in his shoulders (to recognize that he has bilateral chronic shoulder pain).

Mr. Guenther also asks that I consider awaiting the outcome of a referral under section 251 of the Act concerning whether the Board's chronic pain policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

By decision dated December 1, 2004, a review officer directed the Board to determine whether the cumulative effect of the worker's four right shoulder claim injuries (this claim, along with claims from June 1998, July 2000, and April 2002) caused or permanently aggravated the worker's right rotator cuff tendonopathy.

In a February 8, 2005 claim log entry, a Board officer noted that an appeal had been launched with respect to the December 1, 2004 Review Division decision. As a result, the Board officer appears to have concluded that the Board could not address the review officer's December 1, 2004 direction concerning the worker's right shoulder condition.

The worker's file does not reveal that there was a request for review or an appeal of the December 1, 2004 Review Division decision. I also confirmed with the parties at the hearing that neither of them had requested a review or launched an appeal of the December 1, 2004 decision.

Item #5.55 of the MRPP contains a practice directive on suspensions pending a Board decision on a related matter. Prior to suspending the appeal(s), the vice chair should be satisfied that there is a pending decision of the Board or a review officer, and the pending decision involves a determination of a matter that is related to the matter(s) under appeal.

After considering the evidence on file and the submissions of the representatives, I find that there is a pending decision of the Board warranting the suspension of the worker's appeal. I am, therefore, suspending this appeal to WCAT to await the Board's pending decision concerning whether the cumulative effect of the worker's four right shoulder claim injuries (this claim, along with claims from June 1998, July 2000, and April 2002) caused or permanently aggravated the worker's right rotator cuff tendonopathy. I urge the Board to address this matter as a priority, if possible, given that it was directed by the review officer to do so on December 1, 2004.

Conclusion

I suspend the worker's appeal of the March 2, 2005 Review Division decision pursuant to section 252(1) of the Act, for the reasons set out above.

Please note that certain conditions apply to a suspended WCAT appeal:

- After the Board issues the decision, you may make a request to WCAT **within 30 days of the date of the new decision** if you wish to proceed with the suspended appeal.
- If you appeal the new Board decision to the Review Division, you may request the appeal remain suspended pending the Review Division decision. This request must also be made to WCAT **within 30 days of the date of the new Board decision**.
- If you wish to appeal the new Review Division decision, you must appeal that decision separately to WCAT, and **within 30 days of the date of the new Review Division decision**.
- Should you fail to make a request to WCAT to proceed with the suspended appeal **within 30 days after the Board or Review Division decision**, WCAT will consider dismissing the appeal. **Any subsequent request to proceed with the appeal will require an extension of time application.**

- At any time, you may ask WCAT to continue the appeal proceedings without waiting for the Board decision. WCAT may grant or deny this request.

For further information, see item #5.55 of the MRPP, available on the WCAT website, www.wcat.bc.ca.

Please notify WCAT **within 30 days** of the date of the new Board or Review Division decisions. If WCAT does not hear from you within this time period, we will consider dismissing this appeal.

No expenses were requested and none are awarded.

Elaine Murray
Vice Chair

EM/ml