

Noteworthy Decision Summary

Decision: WCAT-2006-00554-RB **Panel:** Paul Petrie **Decision Date:** February 3, 2006

Relief of costs – Date of injury – Occupational disease – Sections 6(1), 6(2), and 39(1)(e) of the Workers Compensation Act – Policy items #32.50 and #115.30 of the Rehabilitation Services and Claims Manual, Volume I

Section 6(2) of the *Workers Compensation Act* (Act) states that the date of occurrence of an occupational disease is the date of disablement. Policy item #32.50 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) does not establish a second date of occurrence of injury for administrative purposes for relief of claim costs consideration.

The worker, a nurses' aide, developed active tuberculosis (TB) in her spine and lungs in 1987 after having been exposed to patients with TB in 1983. The Workers' Compensation Board (Board) granted the worker a 100% permanent disability award.

The employer applied for relief of claim costs under section 39(1)(e) of the Act on the basis that the worker's TB was enhanced by a pre-existing disease, condition, or disability. The Board denied the employer's request. In a subsequent decision, the Board concluded the worker's exposure to TB was with the same employer and confirmed the decision to deny relief of claim costs. In this decision, the Board established the effective date of the claim as February 27, 1987 under section 6(2) of the Act. The employer appealed to the former Appeal Division. The Appeal Division denied the employer's appeal with respect to relief of costs under section 39(1)(e) of the Act and concluded it did not have jurisdiction to determine the worker's date of injury. The employer appealed to the former Review Board on the issue of date of injury. On March 3, 2003 the appeal was transferred to the Workers' Compensation Appeal Tribunal (WCAT) under section 38 of the *Workers Compensation Amendment Act (No. 2), 2002*.

The panel noted that item #32.50 provides that the date of injury for occupational diseases is the date the worker first became disabled by the disease. However, for administrative purposes, such as assigning a claim number, the relevant date is the date the worker first sought medical treatment.

The panel considered the conflicting WCAT decisions on the interpretation of item #32.50. In *WCAT Decision #2005-00523*, the panel stated that item #32.50 has two parts that address two different issues. According to this interpretation, the first part establishes a procedure for the Board to set a wage rate that best reflects the worker's earnings at the time of disablement, with the second part structured to ensure employers are fairly experience rated with respect to the costs of occupational disease claims. Thus, the date of injury would be set at the date the worker first sought medical treatment. In *Decision #2005-03633* the panel did not follow the reasoning of *Decision #2005-00523*. The panel found little evidence that item #32.50 was written for the purposes of ensuring that employers are fairly experience rated in occupational disease claims. Rather, the purpose was likely to give the Board the ability to extend health care benefits to workers suffering from occupational diseases before they become disabled from their pre-injury occupations.

The panel concluded that item #32.50 must be interpreted with reference to section 6(2) of the Act, which requires that the date of disablement “must” be treated as the date of occurrence of the injury. However, section 6(1) of the Act provides for an exception where a health care benefit may be paid when the worker suffers from an occupational disease due to the nature of the employment, but is not disabled from earning full wages at the work at which the worker was employed. In such cases, the date of first medical treatment or the date when the disease was first diagnosed is used. Furthermore, item #115.30 RSCM I provides the basis for determining whether experience rating applies to particular occupational disease claims, not item #32.50.

The employer’s appeal was denied. The panel concluded there was no basis in item #32.50 to establish a second date for administrative purposes for relief of claim costs consideration.

WCAT Decision Number : WCAT-2006-00554-RB
WCAT Decision Date: February 03, 2006
Panel: Paul Petrie, Vice Chair

Introduction

The worker, a nurses' aide, developed low back problems that disabled her commencing February 27, 1987. Her condition was subsequently diagnosed as active tuberculosis (TB) of the spine and pulmonary TB. Her claim was accepted for TB after the Workers' Compensation Board (Board) determined that she had been exposed to patients with TB in 1983. The Board eventually granted the worker a 100% permanent disability award on January 20, 1992.

In a decision dated September 4, 1998 the Board denied the employer relief of claim costs under section 39(1)(e) of the *Workers Compensation Act* (Act) on the basis that the worker's TB was not enhanced by a pre-existing disease, condition or disability. A consultant for the employer appealed that decision to the Appeal Division of the Board, but subsequently withdrew the appeal pending further adjudication. In the further decision dated June 25, 2002 a Board client services manager found that the worker's exposure to TB was with the same employer on this pre-1998 claim. The client services manager confirmed the previous decision to deny relief of claim costs. The client services manager also found that the Board correctly established the effective date of the claim at February 27, 1997 in accordance with section 6(2) of the Act.

On July 3, 2002 the consultant representing the employer appealed the June 25, 2002 decision to the Appeal Division.

In the January 16, 2003 decision, a panel of the Appeal Division concluded that the Board's September 4, 1998 and June 25, 2002 decisions contained no error of fact, error of law or contravention of published policy and denied the employer's appeal with respect to relief of costs under section 39(1)(e) of the Act. On the issue of the effective date of injury, the Appeal Division panel found that a determination of the date of injury could effect the worker's benefit entitlement and concluded that a decision with respect to a worker's entitlement was not appealable directly to the Appeal Division under section 96(6) or 96(6.1) of the Act.

The Appeal Division panel also made the following finding:

If I am wrong about my jurisdiction on the “date of injury” decision I find no error of fact, error of law or contravention of policy in the June 25, 2002 decision to not change the date of injury on the worker’s claim. The manager’s decision concluded the “date of injury” was arrived at based on the date of disability, which occurred in 1987 pursuant to section 6(2) of the Act. After reviewing the evidence on file and the employer representative’s submissions I find insufficient evidence of an error of fact, error of law or contravention of published policy in the manager’s June 25, 2002 decision to determine the injury date based on the date of disability.

On June 30, 2003 the employer’s consultant wrote to the Workers' Compensation Review Board (Review Board) and requested an extension of time to appeal the date of injury issue in the June 25, 2002 letter. On March 10, 2005 a Workers' Compensation Appeal Tribunal (WCAT) registration clerk advised the consultant that a WCAT vice chair had allowed an extension of time to appeal the date of injury issue in the June 25, 2002 decision.

Issue(s)

The issue is whether the Board’s decision to establish the date of injury on February 27, 1987 is consistent with the facts and in accordance with Board policy.

Jurisdiction

The employer appealed the June 25, 2002 decision to the Review Board. On March 3, 2003 the Review Board was replaced by WCAT. Since a panel of the Review Board did not consider the employer’s appeal on the merits prior to that date it has been considered by WCAT in accordance with section 38 of the *Workers Compensation Amendment Act (No. 2), 2002*.

Section 250(2) of the Act requires WCAT to make its decision in accordance with the merits and justice of the case, but in doing so, WCAT must apply a policy of the board of directors of the Board that is applicable in the case. Applicable policy in the circumstances of this case is found in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

The employer did not request an oral hearing and I find that the issue raised in this appeal may be fully and fairly considered on the basis of the documentary evidence on file and the written submissions from the employer.

Submissions

In the March 17, 2005 submission, the employer's consultant noted that the worker's exposure to TB started in 1983 when an outbreak of TB was discovered in the extended care ward where the nurses' aide worked. She had a chest x-ray on April 10, 1985 after developing upper respiratory problems. The x-ray showed a two centimetre lesion in the upper right lung, but tests at that time did not confirm that she had active TB in her chest/lungs. Following the back problems in February 1987, she was admitted to hospital and a biopsy confirmed active TB of the spine.

On behalf of the employer, the consultant submitted that the case manager incorrectly concluded that the date of injury must coincide with the date of diagnosis and the date of disablement. The consultant submitted that policy item #32.50 of the RSCM I provides two methods for selecting the date of injury:

The first is with respect to establishing a wage rate and the second is with respect to the administrative purposes of assigning a claim number. The latter can have a dramatic impact with respect to employer's experience rated claims costs.

The consultant relied on *WCAT Decision #2005-00523* in which the panel concluded that policy #32.50 of the RSCM I has two parts and addresses two different issues.

The consultant submitted that the date of injury on the claim should be set in 1985, not in 1987.

Prior WCAT Decisions

In *WCAT Decision #2005-00523* cited by the employer's representative, the panel considered the issue of whether the date the worker was first disabled from cedar dust asthma or the date the asthma was first diagnosed should be used to establish the date of injury for the claim. In that case a review officer with the Board's Review Division had confirmed the Board's decision that the date of injury was appropriately set at July 10, 1999, the date the worker first became disabled. The employer appealed the review officer's decision to WCAT. In support of the appeal the consultant representing the employer (the same consultant who represents the employer in the case now before me), argued that the Board incorrectly interpreted policy item #32.50 which provides adjudicative guidance for determining the date of injury for occupational diseases.

The WCAT panel in *Decision 2005-00523* made the following finding:

Clearly, policy item #32.50 has two parts that address two different issues. The first part establishes a procedure for the Board officer to set a wage

rate which best reflects the worker's earnings at the time of disablement. I agree with the employer that the unique problem with occupational disease claims is that, as in this case, the disease may have been contracted or have occurred months, if not years, before the worker became disabled. The intention, however, as far as the payment of compensation in the form of wage loss, is to ensure that the most relevant earnings information can be used in setting a wage rate. Therefore it is appropriate to base the wage rate on the claim, as in this case, at the time the worker first became disabled and wage loss commenced on July 9, 1999.

However, part two of policy item #32.50 is structured specifically to ensure that the employer was being fairly experience rated with respect to the costs of these occupational disease-type claims. Clearly, for administrative purposes, on occupational disease claims, the date the worker first sought treatment by a physician for the occupational disease is used to set the claim number. I also agree with the employer that it is imperative because both the Board and the employer need to define the exposure time frame, so the worker's employment history can be accurately assessed.

The WCAT panel concluded that the date of injury should be set at the date the worker first sought medical treatment for the asthma and not set at the date of disablement. The panel reasoned:

The issue involves the administrative question of assigning the claim number and the year of the claim as contemplated by part two of policy item #32.50 and not for the purposes of determining compensation under part one of this policy.

The same issue was considered by a different WCAT panel in *Decision #2005-03633* dated July 8, 2005. (I note that the employer's representative in that matter is the same consultant who represents the employer in the appeal now before me.) The panel in *WCAT #2005-03633* also considered the application of policy item #32.50 of the RSCM I to a red cedar asthma claim. The panel in *WCAT #2005-03633* disagreed with the reasoning in *WCAT Decision #2005-00523* regarding the interpretation and application of policy item #32.50. The panel in *WCAT #2005-03633* found:

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.

Further Submission

Since the employer's March 17, 2005 submission was received prior to *WCAT Decision #2005-03633*, I requested the employer's further submission on the panel's reasoning in *WCAT Decision #2005-03633*. In the further submission dated December 13, 2005, the consultant noted that *WCAT Decision #2005-00523* and *#2005-03633* interpreted policy item #32.50 of the RSCM I "In Completely Opposite Manners." The consultant submitted that the interpretation in *Decision #2005-00523* should be preferred because it is most consistent with the relevant provisions of the Act. The consultant argued that the first part of policy item #32.50 was designed to set a wage rate for the worker's claim based on the date of disablement. The consultant submitted that the second part of policy item #32.50 was:

...specifically structured to ensure that the employer was being fairly experience rated with respect to the costs of the occupational disease type claims. It is imperative for "administrative purposes" that in occupational disease claims the date the worker first sought treatment by a physician for the occupational disease is used to set the claim number. It is imperative because both the Board and the employer need to define that exposure time frame, so the worker's employment history can be accurately assessed. The fact that the case manager is required to assess the claim as well under Policy item #113.20 of the RSCM with respect to apportionment of costs must also occur and further supports the relevance of part two of policy item #32.50.

The consultant argued that both parts of policy item #32.50 of the RSCM I:

...must be used concurrently to ensure that the worker receives a fair wage rate and the employer is fairly experience rated. The Board's

intentions were to allow for both Part 1 and Part 2 to be concurrently applied and considered.

Background Evidence

The evidence with respect to the appropriate date of injury in this case can be summarized as follows:

- In December 1983 the worker was exposed to a number of cases of TB among the patients in the extended care ward where she was assigned.
- After experiencing a series of colds, the worker had a chest x-ray on April 10, 1985 that showed a two-centimetre lesion in the right upper lung, but a bronchoscopy was negative for TB.
- On February 23, 1987 the worker advised the employer of a back problem that developed after lifting a patient on February 20, 1987.
- The worker was hospitalized for back pain on February 27, 1987 and an x-ray study showed an abscess adjacent to the spine which was confirmed as active TB of the spine.
- On May 8, 1988 the Board accepted the worker's TB claim, and then paid temporary disability benefits from February 27, 1987 to January 11, 1992.
- The employer appealed the Board's decision to accept the worker's claim to the Review Board, but subsequently withdrew the appeal on February 7, 1989.
- On January 20, 1992 the Board granted the worker a 100% permanent disability pension. The adjudicator advised the employer that the value of the permanent disability award was charged against class 06 rather than charged directly to the employer's account.
- The employer's application for relief of claim costs was denied by an employer cost relief officer on September 4, 1998 on the basis that there was no evidence that the worker's TB was enhanced by a pre-existing disease, condition or disability.
- On October 7, 1999 the employer's representative applied for reconsideration of the application for relief of costs on grounds that the date of injury should be set effective 1985 when the worker was first treated for respiratory symptoms, in accordance with item #32.50.
- On October 30, 2001 a Board client services manager advised the employer that the date of injury was not an issue to be addressed under a relief of costs application. The manager pointed out that policy item #115.30 provides for exclusion of costs in some cases but the worker's claim did not satisfy that criteria.
- The employer's consultant then applied to the Board to set the date of injury in April 1985, again relying on policy item #32.50. In the March 4, 2002 decision the case manager advised the employer that the date of injury would not be changed, since the worker was first diagnosed with TB in 1987.
- The employer then applied for reconsideration of the March 2002 decision in May 2002. On June 25, 2002 the client services manager advised the employer that

section 6(2) of the Act requires the Board to treat the date of disablement as the occurrence of the injury and concluded that there would be no change in the date of injury under the claim. The manager also advised that there was no evidence of a pre-existing disease, condition or disability aside from the TB accepted under the claim and no basis to apply relief of costs.

- In the January 16, 2003 decision, a panel of the Appeal Division confirmed the Board's September 14, 1998 decision and denied the employer's appeal for relief of costs under section 39(1)(e) of the Act. The panel also found that he did not have jurisdiction to consider the employer's appeal from the June 25, 2002 decision, since the issue of the date of injury may affect the worker's entitlement to compensation and was not therefore appealable under section 96(6) or (6.1) of the Act which only provided for an appeal regarding relief of costs with respect to an employer's assessments.
- The employer applied for and was granted an extension of time to appeal the June 25, 2002 decision to the Review Board and its successor WCAT.

Decision and Reasons

Section 6 of the Act provides for entitlement to occupational disease claims. The relevant portions of section 6 of the Act for purposes of this decision are:

6(1) Where

- (a) a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which the worker was employed or the death of a worker is caused by an occupational disease; and
- (b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments,

compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. A health care benefit may be paid although the worker is not disabled from earning full wages at the work at which he or she was employed.

- (2) The date of disablement must be treated as the occurrence of the injury.

Policy item #32.50 provides adjudicative guidance for determining the date of injury for occupational diseases and states:

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.

Policy item #115.30 of the RSCM I provides adjudicative guidance for the application of experience rating for a range of circumstances including some occupational disease claims. Item #115.30(5) lists a number of occupational diseases excluded from experience rating on the basis that on average they require exposure for, or involve latency periods of, two or more years before manifesting into a disability. The list in policy item #115.30(5) does not include TB.

After considering the analysis and reasons in *WCAT Decision #2005-00523* and *WCAT Decision #2005-03633* and the submissions on behalf of the employer, I agree with the analysis of policy item #32.50 in *Decision #2005-03633* for the following reasons.

I find that policy item #32.50 must be interpreted with reference to the provisions in section 6 of the Act. Section 6(1) provides that generally, the worker must be disabled from earning full wages at the work at which he was employed by an occupational disease due to the nature of the employment before an occupational disease claim is established. Section 6(2) requires that where there is disablement, the date of disablement "must" be treated as the occurrence of the injury. Section 6(2) is an imperative requirement and does not give the Board the discretion to establish a different date other than the date of disablement for the occurrence of the injury where there has been disablement. However, section 6(1) does provide for an exception where a health care benefit may be paid when the worker suffers from an occupational disease due to the nature of the employment, but is not disabled from earning full wages at the work at which he or she was employed.

Policy item #32.50 of the RSCM I specifically refers to the "date of injury" for occupational diseases and reflects the provisions of section 6(1) and 6(2) of the Act. The policy states that the occurrence of the injury "will" be the date the worker first became disabled and

this date may or may not correlate with the date the worker was first diagnosed with the disease.

The second part of policy item #32.50 makes specific reference to the use of the date the worker first sought medical treatment or when the disease is diagnosed where there is no period of disability. However, where there is disablement, section 6(2) specifies that the date of disablement must be treated as the occurrence of the injury.

I agree with the panel in *WCAT Decision #2005-03633* that the process of establishing a date of injury must start with the general approach of using the date of disablement as the significant date where there is disablement. Where there is no disablement, the Act and policy provides for the use of the date of first medical treatment or the date when the disease was first diagnosed.

I also agree with the reasoning in *WCAT Decision #2005-03633* that there is little evidence to indicate that policy item #32.50 of the RSCM I was written for the purpose of ensuring that employers are fairly experience rated for occupational diseases. Policy item #115.30 provides the basis for determining whether experience rating applies to particular occupational disease claims.

The evidence in this case shows that the worker was first exposed to TB in 1983 as a result of an outbreak of TB among the patients on the ward to which the worker had been assigned. Although the worker had some respiratory symptoms for which she was treated in April and June 1985, she was not diagnosed with active TB until 1987. The evidence shows that the worker was first disabled in February 1987 as a result of being hospitalized for what was subsequently determined as active TB of the spine.

After considering the facts of the case and applicable Board policy I find no error in the client services manager's June 25, 2002 decision. That decision bases the date of injury effective the date of the worker's disablement from TB. That decision is in accordance with section 6(2) of the Act. For the reasons previously outlined, I find no basis in policy item #32.50 to establish a second date for "administrative purposes" for relief of claim costs consideration. Policy item #115.30 is the applicable policy for relief of claim costs consideration and that issue does not arise under the employer's appeal from the June 25, 2002 decision.

Conclusion

I confirm the client services manager's June 25, 2002 decision and deny the employer's appeal. The employer did not request expenses related to the appeal and I make no order with respect to expenses.

Paul Petrie
Vice Chair

PP/cda