

Noteworthy Decision Summary**Decision:** WCAT-2006-03125**Panel:** Deirdre Rice**Decision Date:** August 8, 2006***Recurrence of temporary disability – Wage rate – Section 35.1(8) of the Workers Compensation Act – Cowburn decision – Item #1.03(b)(4) of the Rehabilitation Services and Claims Manual***

Where a worker was injured prior to the transition date (June 30, 2002) and has a recurrence of temporary disability after that date, pursuant to section 35.1(8) of the *Workers Compensation Act* (Act) and policy item #1.03(b) of the *Rehabilitation Services and Claims Manual* (RSCM), the current provisions of the Act apply to the calculation of the worker's temporary disability wage rate. The recent amendments to item #1.03(b)(4) in response to the *Cowburn* decision do not affect the calculation of wage loss benefits for the recurrence of a temporary disability. They only apply to the calculation of benefits when there has been deterioration of a permanent disability.

The worker suffered injuries to his right shoulder and elbow on June 20, 2002. In an October 21, 2004 decision, the Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for permanent injuries to his shoulder and forearm and chronic pain, and determined the worker's disability from working was no longer temporary as of October 24, 2004. The worker did not appeal this decision. On April 25, 2005, the Board granted the worker a permanent disability award of 11.21%. On July 7, 2005, the worker underwent surgery on his right shoulder and his wage loss benefits were reinstated. Pursuant to section 35.1 of the Act, which came into force on June 30, 2002, his wage rate was converted from a rate based on 75% of gross average earnings (under the former provisions of the Act) to a rate based on 90% of average net earnings (under the current provisions of the Act). The worker requested a review by the Review Division of the Board, which confirmed the Board decision. The worker appealed to WCAT.

The worker submitted the October 21, 2004 decision was a provisional decision. He submitted that at the time of the decision, although his condition was permanent, it had not yet plateaued and further surgery was still being considered. Thus, the worker submitted his wage loss benefits should have been based on the wage rate initially established on the claim. The panel concluded that as the worker did not appeal the October 21, 2004 decision she was precluded from finding the worker's condition remained temporary after October 24, 2004.

The panel noted that an issue was whether the worker's wage rate should be calculated according to the pre-June 30, 2002 provisions or according to the current provisions of the Act. Item #1.03(b) of the RSCM was amended on August 1, 2006 in response to the British Columbia Supreme Court decision of *Cowburn v. Workers' Compensation Board of British Columbia* 2006 BCSC 722. The amended policy states that section 35.1(8) does not apply to permanent changes in the nature and degree of a worker's permanent disability. A "recurrence", for the purposes of section 35.1(8), includes any claim re-opened for an additional period of temporary disability regardless of whether the worker was entitled to a permanent disability award before June 30, 2002. The worker submitted that the recent amendments might apply to his claim. The panel concluded that neither the amended policy nor the previous policy allowed for the former provisions of the Act to be applied in calculating a worker's wage rate where the



“recurrence of disability” is a recurrence of temporary disability. The panel denied the worker’s appeal.

WCAT Decision Number : WCAT-2006-03125
WCAT Decision Date: August 08, 2006
Panel: Deirdre Rice, Vice Chair

Introduction

On June 20, 2002, the worker lost his footing while descending a ladder and fell about three feet. He was still holding on to the ladder with his right hand, and his right arm and hand caught the full weight of his body and the tool belt he was wearing. He filed a claim for compensation with the Workers' Compensation Board (Board). The claim has been accepted on the basis that the worker sustained permanent conditions in his shoulder and forearm, and chronic pain.

In an October 21, 2004 decision, a Board case manager accepted the opinion of a Board medical advisor, and determined that the worker's right shoulder and elbow injuries "have become permanent, that the conditions have stabilized and that you will be left with permanent loss of function because of your injuries." The case manager advised that, "since your condition is no longer temporary, your current wage loss benefits will conclude on October 24, 2004." Further, the case manager accepted that, due to the effects of these permanent conditions, the worker would be unable to resume his pre-injury employment as a welder and millwright in the employer's sawmill construction business and so referred the worker's claim file to the Board's Disability Awards and Vocational Rehabilitation Departments.

The worker began receiving vocational rehabilitation benefits on October 25, 2005. He did not appeal the October 21, 2004 decision.

On April 25, 2005, the Board granted the worker a permanent partial disability (PPD) award equal to 11.21% of total disability for the permanent impairment resulting from the June 20, 2002 injury. The effective date of the award is October 25, 2004, and it was based on the results obtained in a March 1, 2005 permanent functional impairment (PFI) evaluation.

On July 7, 2005, the worker underwent surgery on his right shoulder and his wage loss benefits were reinstated at that time. As confirmed in an August 5, 2005 decision, his wage rate was converted from a rate based on 75% of gross average earnings to a rate based on 90% of average net earnings.

The worker asked the Board's Review Division to review the August 5, 2005 decision. A review officer confirmed the Board's decision in a January 12, 2006 decision (*Review Decision #R0055002*).

The worker has appealed this decision to the Workers' Compensation Appeal Tribunal (WCAT) with the assistance of his representative. The employer is not participating, although provided with the opportunity to do so.

Issue(s)

The issue is whether the worker experienced a "recurrence of disability" such that the current provisions of the Act apply to the calculation of the temporary wage loss benefits he began receiving on July 7, 2005.

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act). The statutory provisions pursuant to which wage rates are calculated under the Act were amended as of June 30, 2002 (the transition date) by the *Workers Compensation Amendment Act, 2002* (Bill 49). The worker's injury occurred prior to the transition date. The provisions of the Act as amended by Bill 49 (current provisions) and the policy set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) apply if the worker's wage loss benefits were reinitiated for a recurrence of disability. The provisions of the Act as they read prior to the transition date (former provisions) and the policy in the *Rehabilitation Services and Claims Manual Volume I* (RSCM I) apply if the reinstatement of wage loss benefits was merely a continuation of his benefits without reopening for a recurrence of disability. WCAT panels are bound by published policies of the Board pursuant to Bill 63, the *Workers Compensation Amendment Act (No. 2) 2002*.

Background and Evidence

The worker is currently 49 years old and began working for the employer in 1998.

It is the worker's position that his temporary wage loss benefits following July 7, 2005 should be based on the wage rate initially established on the claim, and that the Board erred in recalculating the wage rate on the basis of the Act as amended by Bill 49.

In the review proceeding, the worker's representative argued that the October 21, 2004 decision letter concluding temporary wage loss benefits effective October 24, 2004 is a provisional decision. The representative said that, at the time of the October 21, 2004 decision, the worker's condition was certainly permanent, but it was far from plateaued. He pointed out that it was known at the time of the October 21, 2004 decision that further surgery was still being considered. Further, he said that a Board medical advisor had advised the worker's family physician, Dr. Joly, to "rescind a referral back to Dr. Regan in order to complete a disability awards examination." Dr. Regan is the surgeon who performed the July 7, 2005 procedure.

In regard to this latter point, in a March 10, 2005 claim log entry, a Board medical advisor recorded that he had discussed the worker's case with Dr. Joly and that they agreed that referral back to Dr. Regan at this point "was probably unnecessary, especially given the fact that a disability awards examination for permanent functional impairment purposes is coming up shortly." Dr. Joly renewed his request for a referral to Dr. Regan in May 2005, and a second Board medical advisor made the referral on May 25, 2005.

In addition, the representative noted that the worker's claim had previously been "reopened" for further wage loss benefits and the worker's wage rate resumed under the former provisions. The representative said that there was no difference in the current fact pattern and, consequently, the former provisions should apply.

The review officer concluded that the Board properly paid the worker's wage loss benefits based on 90% of his net average earnings because this was required by section 35.1 of the Act. This provision establishes transitional rules which determine whether a claim is subject to the former provisions or the current provisions. In particular, the review officer noted that:

Section 35.1(8) of the *Act* provides that the Board must determine compensation for a recurrence of disability on or after June 30, 2002, resulting from an injury prior to June 30, 2002, on the basis of the current provisions. Policy item #1.03, contained in Volumes I and II of the RSCM, provides, in part, that for the purpose of applying this provision, a recurrence includes any claim that is re-opened for an additional period of temporary disability where a permanent disability award was previously provided in respect of the compensable injury or disease.

In the worker's case, his injury occurred before June 30, 2002, but it was determined in October 2004 that he was no longer totally temporarily disabled. The worker was referred to vocational rehabilitation and to the Disability Awards department to determine if he had a permanent disability. The worker was placed in a vocational rehabilitation program and received a permanent partial disability award. When the worker had surgery in [July] 2005, this resulted in a further period of temporary disability. As a result, section 35.1 of the *Act* and Policy 1.03 in the RSCM require that the worker's wage loss benefits be calculated in accordance with the current provisions of the *Act*. Section 29 of the current provisions of the *Act* requires the Board to pay compensation for TTD equal to 90% of the worker's net earnings.

[all quotations typed as written unless otherwise indicated]

With respect to the argument that the worker's claim had previously been opened for further benefits that were calculated on the basis of 75% of his gross earnings, the

review officer noted that these “reopenings” occurred before the Board determined in October 2004 that the worker’s temporary disability had plateaued, and that “the Board apparently treated these periods of temporary disability as a continuation of the worker’s disability.” The review officer concluded:

Whether or not this was appropriate at the time is not a matter that is before me. In reviewing the Board’s August 5, 2005 decision, I am clearly bound by the law and policy outlined above.

With regard to the argument that the worker had not reached medical plateau when he began receiving vocational rehabilitation assistance and had therefore been continuously temporarily disabled since his injury, the review officer noted that the worker had not requested a review of the October 21, 2004 decision. The review officer concluded that it was not within her jurisdiction to review it in the course of the review.

Reasons and Findings

The worker’s representative said that an oral hearing was necessary so that the worker could provide testimony regarding temporary disability and disputed facts. WCAT advised the representative that, based on a preliminary review of the appeal, it had been determined that the appeal would proceed by way of written submissions. I have reviewed the claim and appeal files. The only factual dispute raised by the worker relates to whether he continued to be temporarily disabled after October 24, 2004, notwithstanding the October 21, 2004 decision to the contrary. For the reasons set out below, the worker’s testimony on this point would not assist. The appeal turns on the application of law and policy to facts that are fully documented in the claim file. Based on my review of the files and the guidelines for considering an oral hearing in item #8.90 of WCAT’s *Manual of Rules of Practice and Procedure* (MRPP), I conclude that an oral hearing is not required to ensure a full and fair consideration of the issue in this appeal. I have based my decision on the materials in the worker’s claim and appeal files.

I note that additional material has been added to the worker’s claim file since the Board last provided updated disclosure to the parties. However, this new information does not add materially to the facts that are relevant in the appeal and I have determined that further disclosure is not necessary.

As noted in policy items #1.00 through #1.03 of both volumes of the RSCM, the Act underwent significant legislative amendment in relation to benefit entitlement, effective June 30, 2002. Whether wage loss benefits for an injured worker are to be calculated in accordance with the pre-June 30, 2002 provisions of the Act and the RSCM I or in accordance with the provisions of the Act that came into force on June 30, 2002 and the RSCM II depends upon the transitional rules. These transitional rules are outlined in policy item #1.03 of both versions of the RSCM, and are a reflection of section 35.1 of the Act.

Under the Act as it read prior to June 30, 2002, wage loss benefits were based on 75% of a worker's gross average earnings. In contrast, wage loss benefits in particular circumstances that came to exist on or after June 30, 2002 are based on 90% of the net average earnings figure.

Section 35.1 of that Act (enacted by Bill 49) provides instruction as follows:

- Section 35.1(2) provides that the current provisions apply to "an injury" that occurs on or after the transition date.
- Section 35.1(3) provides that, subject to subsections (4) to (8), the former provisions apply to "an injury" that occurred before the transition date.
- Section 35.1(4) provides that the current provisions apply if a worker's "permanent disability" first occurs on or after the transition date, as a result of "an injury" that occurred before the transition date.
- Section 35.1(8) provides that the current provisions apply if a worker has, on or after the transition date, "a recurrence of a disability that results from an injury that occurred before the transition date."

Policy item #1.03(4) of both volumes of the RSCM provides guidelines for the application of section 35.1(8). This provision was amended on August 1, 2006 (subsequent to the review officer's decision), in response to the decision of the British Columbia Supreme Court in *Cowburn v. Workers' Compensation Board of British Columbia* (2006 BCSC 722). The policy now states:

If an injury occurred on or after June 30, 2002, the current provisions apply to the recurrence.

This transitional rule applies only to a recurrence of a disability on or after June 30, 2002. It does not apply to permanent changes in the nature and degree of a worker's permanent disability. Where a worker was entitled to a permanent disability award before June 30, 2002 in respect of a compensable injury or disease, the former provisions apply to any changes in the nature and degree of the worker's permanent disability after that date.

For the purposes of this policy, a recurrence includes any claim that is re-opened for an additional period of temporary disability, regardless of whether the worker had been entitled to a permanent disability award before June 30, 2002. However, where the worker was entitled to a permanent disability award before June 30, 2002, the former provisions apply to any changes in the nature and degree of the worker's permanent disability following an additional period of temporary disability.

The following are examples of a recurrence:

- A worker totally recovers from a temporary disability resulting in the termination of wage-loss payments. Subsequently, there is a recurrence of the disability and the claim is re-opened for compensation.
- A worker is in receipt of a permanent partial disability award and the disability subsequently worsens so that the worker is temporarily totally disabled. The claim is re-opened to provide compensation for a new period of temporary disability. The additional period of temporary disability is a recurrence to which the current provisions apply. However, a subsequent change in the nature and degree of the worker's permanent disability is adjudicated under the former provisions.

It is without question that the worker's injury occurred before the transition date of June 30, 2002. Further, it is clear that the worker had not recovered from his compensable injury and was not fit to return to his pre-injury employment as of October 24, 2004, the date on which his temporary wage loss benefits were terminated. However, the deciding factor under the Act and Board policy is not whether the worker's injury continued, nor is it whether the worker remained unfit to return to his pre-injury employment because of that injury. Rather, under policy item #1.03(4) of both versions of the RSCM, the current provisions of the Act apply when the worker has "an additional period of temporary disability." Therefore, the deciding factor is whether the worker's disability recurred, in the sense that its status as a "temporary disability" recurred.

The October 21, 2004 decision is binding and I must accept that the worker was no longer temporarily disabled as of October 24, 2004. In the result, even if I were to conclude that the worker's disability was temporary a day, an hour, or even a minute after October 24, 2004, that further period of temporary disability would be a "an additional period of temporary disability." I agree with the review officer's conclusion that the October 21, 2004 decision, which was not appealed, forecloses a finding that the worker's condition remained temporary after October 24, 2004. Even if I were to disagree with the October 21, 2004 conclusion, it would not be open for me to determine that the worker's temporary disability continued beyond that date. For that reason, the worker's testimony regarding the state of his condition as of that date would not assist.

In addition to relying on the submission he made to the Review Division, the worker's representative made one additional argument in the June 29, 2006 submission he filed in support of the appeal. In particular, he submitted that the *Cowburn* decision might apply and that, if it is not binding, the panel should find it persuasive.

The *Cowburn* case involved consideration of policy item #1.03(4)(b) as it read prior to August 1, 2006 and the decision by the Board's board of directors not to amend that policy following *WCAT Decision #2005-01710*. In *WCAT Decision #2005-01710*, the chair of WCAT determined that the element of policy item #1.03(b)(4) that characterized a reopening of a worker's claim for "any permanent changes in the nature and degree of a worker's permanent disability" as a "recurrence" was so patently unreasonable that it was not capable of being supported by the Act. The chair concluded that section 35.1(8) of the Act cannot be rationally interpreted to mean that there is a "recurrence" when a permanent disability for which a pension was granted under the former Act permanently gets worse or deteriorates after June 30, 2002.

The Board's board of directors initially disagreed with the chair of WCAT but, subsequent to the *Cowburn* decision (where the Court agreed with the chair of WCAT), amended the relevant element of the policy. As set out above, the amended policy now provides that where a worker was awarded a permanent disability pension before June 30, 2002, any deterioration in the permanent disability that occurs on or after June 30, 2002 is not considered a "recurrence of disability". Thus, the provisions of the Act in place prior to June 30, 2002 apply to any increased pension entitlement due to the deterioration. This amendment came into effect on August 1, 2006, and applies to all decisions, including appellate decisions, made on or after October 16, 2002. However, neither the amended policy nor the previous policy allow for the former provisions of the Act to be applied in calculating a worker's wage rate where, as here, the "recurrence of disability" is a recurrence of temporary disability.

I agree with the reasons the review officer provided for rejecting the additional arguments that were made in the review proceeding, and I find that the review officer correctly determined that the current provisions of the Act apply to the calculation of the worker's temporary disability wage rate as of July 7, 2005.

Conclusion

The appeal is denied and *Review Decision #R0055002* is confirmed.

No expenses were requested, and it does not appear from a review of the file that any reimbursable expenses were incurred in relation to this appeal. I therefore make no order regarding expenses of this appeal.

Deirdre Rice
Vice Chair

DR/dw