Noteworthy Decision Summary

Decision: WCAT-2006-04128 **Panel**: Lois Williams **Decision Date:** November 3, 2006

Reopening for recurrence of disability – Whether current or former provisions apply to a reopening – Amended policy item #1.03 of Rehabilitation Services and Claims Manual – Section 35.1(8) of the Workers Compensation Act

The worker's injury occurred before June 30, 2002, and his claim was reopened in 2004 for temporary benefits which were paid under the current provisions of the *Workers Compensation Act* (Act) and Workers' Compensation Board, operating as WorkSafeBC (Board), policy. Amended policy item #1.03(b) of the *Rehabilitation Services and Claims Manual* (RSCM) limits reassessments of pension entitlements under the former provisions to workers who were granted a pension prior to June 30, 2002. Since the worker was not awarded a pension before June 30, 2002, he was disallowed from receiving a pension reassessment under the former provisions of the Act and the RSCM.

The worker's knee injury occurred before June 30, 2002, the transition date for relevant changes to the Act. In 1996, the Board declined to award him a pension on the basis that it found no significant permanent functional impairment and he had returned to work with no loss of earnings. The worker did not appeal this decision. The Board reopened his claim in 2004 for payment of temporary benefits under the current Act and Board policy. On appeal, the worker submitted that the former provisions of the Act and Board policy applied to the 2004 reopening.

Amended item #1.03 of the RSCM states that the former provisions only apply if the worker had been granted a pension before June 30, 2002 and the permanent disability deteriorates. The policy was amended following the British Columbia Supreme Court decision in *Cowburn v. Workers' Compensation Board of British Columbia,* which found that item #1.03 of the RSCM in effect at that time was patently unreasonable. The amended policy limits reassessments of pension entitlements under the former provisions to workers who were granted pensions prior to June 30, 2002. As the decision not to grant the worker a pension before June 30, 2002 was not appealed, it still stands and disallows the worker from now receiving a pension reassessment under the former provisions. The result is that the worker is not entitled to the same benefit for the deterioration of his permanent condition that he would have received had a pension been implemented when his permanent condition was first assessed in 1996. The panel found that the worker's pension assessment, when his condition again plateaus, must be under the current provisions.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT Decision Number: WCAT-2006-04128
WCAT Decision Date: November 03, 2006
Panel: Lois J. Williams, Vice Chair

Introduction

The worker appeals a review officer's February 24, 2006 decision (*Review Decision #R0056784*) that varied a case manager's June 27, 2005 decision. The worker had suffered a left knee injury in 1992 and his claim for benefits was allowed by the Workers' Compensation Board, operating as WorkSafeBC (Board). The worker returned to work following three knee surgeries, but his claim was later reopened for further benefits. The case manager's decision stated that the worker had plateaued in his recovery by June 26, 2005, but that his claim would be referred for consideration of vocational rehabilitation and disability awards entitlement. The review officer confirmed that the new provisions of the *Workers Compensation Act* (Act) and Board policy applied to the July 31, 2004 reopening of the worker's 1992 left knee claim for a recurrence of disability, including the referral to Disability Awards, but found that the worker's condition had not plateaued by June 26, 2005.

The worker seeks a finding that the reopening of his claim and in particular, the referral for disability awards entitlement, should be under the former provisions of the Act.

The worker asked that his appeal be decided by the read and review method without an oral hearing. As the issue under appeal deals with the application of law and policy to a set of undisputed facts, there is no compelling reason to hold an oral hearing, and I find that the appeal can be decided fairly by reviewing the evidence and submissions in the worker's claim and appeal files.

The worker is represented by his union, and the employer is represented by an employer's adviser. Both have made written submissions.

Issue(s)

Should the reopening of the worker's claim and the referral for disability awards entitlement be under the former or current provisions of the Act?

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The worker's injury in this case occurred before June 30, 2002, the transition date for relevant changes to the Act. If the worker's permanent disability first occurred before that date, the worker's entitlement to a pension award for a permanent deterioration in his condition is adjudicated under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49), and policy relevant to the appeal is set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), which relates to the former (pre-Bill 49) provisions of the Act.

If the worker suffers a period of temporary disability on or after June 30, 2002, this is considered a recurrence of his injury, and the current provisions of the Act apply. If the worker suffers a permanent disability for which he is awarded a pension for the first time with an effective date on or after June 30, 2002, the policies that would be relevant to both the temporary and permanent disability entitlement are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), except that disability award benefits are based on 75 percent of a worker's average earnings, and there is no deduction made for Canada Pension Plan disability benefits paid to the worker for the same injury (section 35.1(5) of Bill 49).

Background and Evidence

The worker injured his left knee in 1992 and underwent partial meniscectomy surgery and further arthroscopic surgeries in 1993 and 1996. Prior to his claim being reopened for the 1996 surgery a Board medical advisor told a claims adjudicator on February 8, 1996 that it was likely the worker's need for medical aid in January 1996 was a consequence of his 1992 injury; that it was greater than 50% likely that the worker had sustained a permanent disability as a consequence of the original injury; and, there was a likelihood the worker would require further surgery. Following his recovery from the 1996 surgery, the worker's orthopaedic surgeon said that there was significant degenerative change in the patellofemoral joint, and the worker would likely always have some discomfort on stairs.

The worker was examined for permanent functional impairment in November 1996. The worker had just started taking Glucosamine in the hope that it might help his knee cartilage regenerate. After performing the examination, the disability awards medical advisor reported to the disability awards officer, in part:

> This man only has minimal limitation of left knee impairment, in comparison to the right, and for that slight limitation of movement, I assess his impairment at 1% of total. There is no instability of the knee. He does appear to have slight retropatellar irritation bilaterally. He is known to have at least mild chondromalacia of the left patella, which had gotten worse between the first and second arthroscopes in 1993. Perhaps it has progressed further, although I don't get the impression of very significant retropatellar irritation.
>
> He is obviously at high risk of developing progressive osteoarthritis in the medial compartment of the left knee, having been found to have at least mild pre existing femoral condylar changes, now aggravated by the fact that he has had a significant portion of his medial meniscus excised.

The disability awards medical advisor went on to make some comments about the worker's right knee, for which he had undergone two surgeries, and which is the subject of another claim.

On December 12, 1996 (memo #11) the disability awards officer said that the worker had twisted his left knee in 1992, had undergone meniscus repair by arthroscopic surgery, had an uneventful recovery, and returned to work. The disability awards officer said the disability awards medical advisor had found no significant permanent functional impairment, and, while the worker's subjective complaints were recognized, the worker had returned to work with no loss of earnings. As a result, the disability awards officer decided not to grant the worker a pension. The disability awards officer wrote to the worker the same day, stating that as no significant impairment had been found that would, in the long term, affect earning capacity, no award was payable. However, if the worker's compensable condition worsened in the future, the matter might be considered again at that time.

The worker has not appealed the December 12, 1996 decision and it still stands.

In December 2003, an orthopaedic surgeon said the worker's knee was moving towards a more end stage arthritis, and prescribed an unloading brace. In 2004 the worker could no longer kneel at work, and the Board reopened the worker's claim for further benefits. As the worker's claim was reopened for temporary benefits more than three years after his injury, and after June 29, 2002, the reopening was covered by the current provisions. The worker had left knee replacement surgery on January 18, 2005. The case manager found that the worker's condition had again plateaued by June 26, 2005. The case manager acknowledged that the worker had residual

impairment and referred the worker's claim for assessment of a permanent disability award and also for consideration of vocational rehabilitation.

The review officer's decision was that the worker had not again plateaued in his recovery by June 26, 2005, and the Board reinstated the worker's temporary disability benefits. The worker underwent further surgery in March 2006 and to date remains on temporary disability benefits. He has further left knee replacement surgery scheduled for November 14, 2006.

The case manager reopened the worker's claim in 2004 under the current Act and policies. Board policy item #1.03 at that time provided four rules to apply in determining whether the former provisions (RSCM I) or the current provisions (RSCM II) applied in a particular case. Rule 1 stated that the current provisions apply to an injury that occurs on or after June 30, 2002. Rule 2 stated that, except as noted in rules 3, 4, and 5, the former provisions apply to an injury that occurred before June 30, 2002. Rule 3 said that, subject to rule 4 respecting recurrences, if an injury occurred before June 30, 2002, but the first indication that it is permanently disabling occurs on or after June 30, 2002, the current provisions apply to the permanent disability award with two modifications: 75% of average earnings (former provisions) is used for calculating the award rather than 90% of average net earnings (current provisions); and no deduction is made for disability benefits under the Canada Pension Plan (former provisions). Rule 3 gave the following guidance:

> Under this rule, for an injury that occurred before June 30, 2002, where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of permanent disability is on or after June 30, 2002, the award will be adjudicated under the current provisions, using the modified formula described in (i) and (ii) above. The determination of when permanent disability first occurs will be based on available medical evidence.
>
> An example of when this rule applies is where a worker, injured before June 30, 2002, shows no signs of permanent disability before that date. However, on or after June 30, 2002, the worker has surgery, which first causes permanent disability. The permanent disability award will be adjudicated under the current provisions, using the modified formula.

Rule 4 stated that a recurrence includes any claim that is reopened for:

- any additional period of temporary disability where no permanent disability award was previously provided in respect of the compensable injury or disease;

- any additional period of temporary disability where a permanent disability award was previously provided in respect of the compensable injury or disease, and;

- any permanent changes in the nature and degree of a worker's permanent disability.

One of the important distinctions between the former and current provisions is that the former provision pensions are payable for life, and the current provision pensions are generally payable only until age 65.

At the time of the review officer's February 24, 2006 decision, policy item #1.03 of the RSCM I and II read the same as it had when the case manager referred the worker's claim for disability awards assessment and for vocational rehabilitation consideration. The review officer confirmed that the current provisions applied.

Policy item #1.03 was amended following the British Columbia Supreme Court decision in *Cowburn v. Workers' Compensation Board of British Columbia*, 2006 BCSC 722. The facts of that case were that a worker had been granted a pension prior to June 30, 2002 and after that date his permanent condition had deteriorated. When his pension was reassessed after June 30, 2002, it was reassessed in accordance with the new provisions, as dictated by policy item #1.03 in effect at that time. The worker in that case appealed to the Supreme Court on the basis that the policy was patently unreasonable. The *Cowburn* decision was that the policy was patently unreasonable. The Board's board of directors (BOD) amended policy item #1.03 effective August 1, 2006, and the amendments apply to all decisions, including appellate decisions, made on or after October 16, 2002. Rule 4 now states:

> If an injury occurred before June 30, 2002, and the disability recurs 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.

Submissions

The worker's representative argued that the worker did have a measure of permanent disability as early as 1996; it just was not sufficient at that time, according to the disability awards officer's December 12, 1996 decision, to warrant an award. The worker had undergone three surgeries by that time, and his subjective complaints were recognized. The disability awards medical advisor acknowledged that the worker had a mild chondromalacia and was at high risk of developing progressive osteoarthritis. The worker's representative submitted that these conditions deteriorated with time, and quoted the following from the *Cowburn* decision:

> "Counsel for the WCB argued that the Minister used the phrase "the Bill does not reduce any benefits already awarded to injured workers" and that meant there would be no reduction in the amount of money injured workers were already receiving. I do not agree. The Minister used the word "benefits". One of the benefits that the workers had already received was the right to an increased pension, if his condition got worse. To take this away is the taking away of a benefit already awarded. In my view, the legislation clearly intended that workers who had suffered injuries prior to the 2002 amendments should retain those rights. Any workers who suffered an injury or a recurrence of an injury after the 2002 amendments would have their compensation calculated under the new system. The legislature could easily have included the word "deterioration" or some similar concept in s.35 and it chose not to. The minister made it clear that no retired pensioner would lose "any benefits" (my emphasis) and the

> section makes it clear that no retired worker would lose benefits unless an injury "recurred".
>
> …
>
> I find that the BOD interpretation of the word "recurrence" to include to deterioration is patently unreasonable."
>
> [reproduced as written in the submission]

The worker's representative submitted that the worker's known deteriorating condition is solely governed pursuant to the former provisions.

The employer's representative said that as policy item #1.03 of the RSCM I and II was being revised as a result of the court decision, any decision made on the appeal should reflect the revised policy in conjunction with the evidence.

Reasons and Findings

The worker's claim was reopened for the payment of temporary disability benefits in 2004. Neither the worker nor the employer has provided specific argument that the reopening of the worker's claim for temporary disability benefits should have been governed by the former provisions. A reading of the Act and policy makes it clear that a reopening of a claim for a further period of temporary disability on or after June 30, 2002 is governed by the new provisions. I find that the worker's entitlement to temporary disability benefits was correctly calculated under the current provisions.

The remaining question at hand is, once the worker plateaus in his recovery, which Act and policies govern a referral for disability awards assessment?

In 1996, the medical evidence and opinions from the treating physicians, the objective impairment measured by a disability awards medical advisor who is an expert in assessing disability, and the worker's recognized subjective complaints, provide evidence that the worker did have a permanent condition in his left knee as a result of his injury. 1.00% of total disability was objectively measured. Although the disability awards officer recognized there was some permanent impairment, he decided the impairment did not warrant a pension at that time.

Amended policy item #1.03 states that the former provisions only apply if the worker had been granted a pension before June 30, 2002 and the permanent disability deteriorates.

The thrust of the worker's argument is that, prior to June 30, 2002 he had a permanent condition causing mild impairment as a result of his injury, and, as he now suffers a deterioration in that condition, he is entitled to a pension under the former provisions.

WCAT must make its decision based on the merits and justice of the case, but in doing so must apply a policy of the board of directors that is applicable in that case. The Board's amended policy item #1.03, which does not appear to be patently unreasonable given the provisions of the Act and the *Cowburn* decision, limits reassessments of pension entitlement under the former provisions to workers who were granted a pension prior to June 30, 2002. In this case, the worker has not appealed the disability awards officer December 12, 1996 decision not to grant the worker a pension in 1996. As the decision not to grant a pension before June 30, 2002 stands, it disallows the worker from now receiving a pension reassessment under the former provisions. The result is that the worker is not entitled to the same benefit for the deterioration in his permanent condition that he would have received, had a pension been implemented when his permanent condition was first assessed in 1996.

I find that the worker's pension reassessment, when his condition again plateaus, must be under the current provisions.

Conclusion

I deny the worker's appeal and confirm the review officer's February 24, 2006 decision.

No appeal expenses have been requested and none are apparent; I therefore make no order regarding expenses.

Lois J. Williams
Vice Chair

LJW/ml

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898