

Noteworthy Decision Summary

Decision: WCAT-2007-01194 **Panel:** Debbie Sigurdson **Decision Date:** April 16, 2007

Reopening for Additional Temporary Wage Loss Benefits—Cowburn v. Workers' Compensation Board of British Columbia – Application of Current Provisions of Workers Compensation Act – Policy Item #1.03(4) of the Rehabilitation Services and Claims Manual

This decision is noteworthy for concluding that the Supreme Court of British Columbia decision in *Cowburn v. Workers' Compensation Board of British Columbia* does not encompass circumstances where a worker's claim is reopened for a period of additional temporary disability benefits after June 30, 2002. The *Cowburn* decision considered the definition of recurrence in relation to a deterioration of a permanent condition, and not a recurrence of a temporary disability, after June 30, 2002.

The worker's 1992 claim was accepted for a right elbow fracture and a complex regional pain syndrome. The worker was granted a permanent partial disability award prior to June 30, 2002. The Worker's Compensation Board, operating as WorkSafeBC (Board), reopened the claim for further temporary wage loss benefits in June 2005 because of a depressive condition. The worker's temporary wage loss benefits were calculated on the basis of 90% of her net earnings in the one year prior to the reopening. She disputed the calculation of her wage rate on the reopening, seeking a decision that she was entitled to 75% of the gross wage rate.

The worker argued that the Board's decision was a patently unreasonable interpretation of section 35.1(8) of the *Workers Compensation Act* (Act) and asked that this matter be referred to the chair of WCAT pursuant to section 251 of the Act. Section 35.1(8) provides that if a worker has, on or after June 30, 2002, a recurrence of disability that results from an injury that occurred before June 30, 2002, the Board must determine compensation for the recurrence based on the Act, as amended by the *Workers Compensation Amendment Act, 2002*. The worker argued that the amendments to policy item #1.03(4) of the *Rehabilitation Services and Claims Manual, Volume II* subsequent to the *Cowburn* decision fell short of rectifying the patently unreasonable findings made in that case. The Board's practice of reopening claims under the current provisions of the Act as amended on June 30, 2002 for further periods of temporary total disability benefits is in contravention of item #34.12 (Worker in Receipt of Permanent Disability Award) of the RSCM II. The *Cowburn* decision supported a broader interpretation of the word "deterioration" as provided in item #34.12. She argued that the former provisions of the Act should apply in setting the wage rate for further periods of temporary total disability benefits where a permanent partial disability award had already been granted prior to June 30, 2002.

The panel denied the worker's appeal on the wage rate. She found that the *Cowburn* decision considered the definition of recurrence in relation to a deterioration of a permanent condition. The worker's permanent disability had not deteriorated at the time of the reopening. The scope of the *Cowburn* decision did not encompass the circumstances where a worker's claim is reopened for a period of additional temporary disability benefits after June 30, 2002. Although the use of different wage rates (net vs. gross) for temporary disability benefits and a permanent partial disability award might be confusing, this was not sufficient to establish that the transition rule in item #1.03(4) as amended was patently unreasonable.

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Introduction

The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for a right elbow fracture that occurred at work on August 3, 1992. The worker has undergone four compensable surgeries to her right elbow. The Board has accepted the worker's claim for complex regional pain syndrome (CRPS) and for a depressive condition. The worker has received periods of temporary total disability benefits from August 4, 1992 to April 7, 2006. She has been provided with a permanent partial disability award of 20.26% of total disability.

The Board reopened the worker's claim on June 11, 2005 when she stopped work due to her depressive condition and due to right shoulder complaints. On February 14, 2006 a Board officer determined that the worker's compensable depressive condition caused a partial temporary disability of 50%, but that non-claim-related right shoulder symptoms accounted for her further disability. She concluded that the worker's psychological condition was temporary. The Board officer noted that the compensability of the worker's right shoulder complaints had already been determined. The Board officer calculated the worker's wage rate on the reopening of her claim at a net weekly rate of \$582.14, and the worker was entitled to receive 90% of that amount. The Board officer noted the worker had been accepted into a pain program commencing February 20, 2006, and that she would be entitled to temporary total disability benefits while attending the pain program. The Board officer anticipated that the worker would be able to return to work at her regular job duties on completion of the pain program, such that her temporary disability benefits would terminate at that time.

The worker requested a review of the Board decision. On June 15, 2006 a review officer at the Review Division determined that the issue of whether the worker's right shoulder condition was a compensable consequence of her right elbow injury had not been decided. She referred that issue back to the Board for a decision. The review officer concluded that the worker was temporarily totally disabled because of her compensable depressive disorder from June 11, 2005 to February 20, 2006, and that she was entitled to full wage loss benefits for that period. The review officer confirmed that the worker's depressive condition had resolved by April 7, 2006 when she was discharged from the pain program, and that the Board properly concluded temporary total disability benefits at that time.

The worker has appealed the Review Division decision. The worker disputes that her psychological condition has resolved. She requests further benefits in relation to her

psychological condition, including reimbursement for prescription medication and counselling. The worker disputes the calculation of her wage rate on the reopening of her claim, and seeks a decision that she is entitled to receive 75% of the gross wage rate, rather than 90% of the net wage rate.

Issue(s)

1. What is the worker's wage rate on the reopening of her claim?
2. Did the worker's compensable psychological condition resolve by April 7, 2006 such that she is not entitled to further temporary disability benefits in relation to that condition?

Jurisdiction

Section 239(1) of the *Workers Compensation Act* (Act), as amended, provides that a decision made by a review officer under section 96.2 may be appealed to the Workers' Compensation Appeal Tribunal (WCAT). Section 250(1) of the Act allows WCAT to consider all questions of law and fact arising in an appeal, subject to section 250(2), which requires that WCAT apply the relevant Board policy, and make its decision based on the merits and justice of the case.

The worker's disability in this case recurred after June 30, 2002, the transition date for relevant changes to the Act. The provisions of the Act and the *Rehabilitation Services and Claims Manual* that apply in this appeal are in dispute, and will be discussed and determined in the reasons and findings. WCAT panels are bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63).

The worker requested this appeal proceed by way of reading and reviewing the file evidence. This appeal has proceeded without an oral hearing. I am satisfied that the matter can be decided without the necessity of an oral hearing based on consideration of the submissions from the worker's representative to the Review Division and WCAT and a review of the evidence on the Board file. The employer is not participating in this appeal although advised of its right to do so.

Background and Evidence

The employer operates a waterslide park. This now 35-year-old worker was employed as a lifeguard at the time of her injury.

On August 3, 1992 the worker was stepping over a waterslide when she slipped and fell, banging her right elbow against the side of the slide. She sought first aid treatment and then attended at hospital. The worker sustained a commuted right radial head fracture.

The worker has appealed a number of decisions relating to this claim. I will not detail the worker's claim history or medical evidence extensively in this appeal, except as relevant to the issues in this appeal, as it has been set out in detail in previous appellate decisions.

The worker has undergone four surgical repairs of her right elbow, including insertion and removal of a radial head implant in 2003.

On November 10, 2003 Dr. Wilson, psychologist, assessed the worker while she was in attendance at an occupational rehabilitation program. Dr. Wilson provided an opinion that the worker did not have significant levels of clinical or major depression or anxiety disorder at that time. The worker demonstrated some frustration, mood disturbance, and elevated distress and tension due to her physical limitations and pain symptoms.

On November 13, 2003 an occupational therapist completed a job site visit to the clothing store where the worker has been employed as a manager. The occupational therapist reported that on a weekly basis, the worker received boxes and checked product for 2 to 3 hours, received stock and counted product for 5 to 10 hours, and engaged in occasional climbing on a daily basis. The occupational therapist recommended the worker have an ergonomic keyboard with a tenting feature available for use on her return to work. The worker returned to work following her discharge from the occupational rehabilitation program.

On April 15, 2005 Dr. Canning, the worker's attending physician, reported that the worker was experiencing anxiety over the scarring to her right arm. He recommended the worker receive counselling. On June 13, 2005 Dr. Canning noted the worker was experiencing increased stress due to her pain and had concerns over the deformity from the scar on her right arm.

On September 7, 2005 Dr. McGuire, psychologist, examined the worker and provided an opinion that the worker had developed a major depressive disorder. She noted the worker complained of significant weight loss, feelings of sadness and guilt, concentration and memory difficulties, tearfulness, irritability, loss of energy, and sleep disruption. Dr. McGuire confirmed the worker had a pain disorder associated with both psychological factors and a general medical condition. Dr. McGuire indicated the worker would benefit from cognitive behavioural therapy to address her depressive symptoms and to improve her pain management strategies.

The worker had appealed the Board's decision regarding her entitlement to a loss of function pension award. On November 29, 2005 a WCAT panel confirmed a Review Division decision regarding the worker's loss of function pension entitlement. In the decision, the panel noted that the worker's representative had made submissions regarding the worker's right shoulder condition. The WCAT panel noted that a previous Board decision regarding the scope of the worker's CRPS was limited to the worker's

right upper limb and not her arm, such that the shoulder condition was not an accepted condition that the Board officer in Disability Awards ought to have considered. The panel noted the worker may wish to ask the Board to consider whether her CRPS had developed further and whether she would be entitled to benefits in that regard.

The worker attended an assessment at a pain clinic on January 3, 2006. At that time the worker's main limiting complaint was pain to her right shoulder. Although she continued to experience pain to her right wrist and elbow, the worker indicated that she had learned to deal with those symptoms previously, and thought she would be able to again if she could manage her right shoulder pain symptoms. The assessor diagnosed the worker with chronic pain associated with both psychological factors and a general medical condition. The assessor confirmed the worker was disabled from her current occupation as a manager of two retail stores, and that she was also disabled from returning to work as a lifeguard. The assessor indicated the worker would continue to be disabled until her pain condition and her mood condition were in better control, but that her disability would not be permanent. The assessor confirmed the worker would benefit from counselling and better control of her pain medications.

On February 14, 2006 the Board officer accepted the worker had developed a depressive condition, on a temporary basis, as a compensable consequence from her work injury. The Board officer determined the worker was temporarily partially disabled as a result of her depressive condition from June 11, 2005 to February 20, 2006, and entitled to 50% wage loss benefits. The worker would receive temporary total disability benefits from February 20, 2006 to April 7, 2006 while she attended a chronic pain program. The Board officer concluded that by the time of discharge from the chronic pain program, the worker's depressive condition would have resolved and she would be able to return to work at her regular employment without limitations. Temporary total disability benefits would terminate at the time of her discharge from the pain program. The Board officer concluded that the WCAT panel in the decision of November 29, 2005 had already determined the issue of the compensability of the worker's right shoulder complaints.

The worker commenced participation in the pain program on February 20, 2006. At that time the worker indicated that she was depressed and that anxiety controlled her life. The worker's depression was assessed at the moderate range. At the commencement of the program, the worker was functioning at less than a sedentary strength level. The assessors noted that her regular job was at the medium to heavy strength level and required frequent use of her right arm.

A job demands analysis was completed on March 21, 2006. The worker's primary job duties as a retail manager involved opening and closing the store, managerial duties, service associate duties, stock person duties, and visual coordination duties. Her work pace and physical demands varied through the day. The assessor noted that the worker completed the staff scheduling, such that she could schedule herself into slower shifts with less physical demands. The assessor concluded there were no significant

changes to the physical demands of the position compared to the job demands analysis completed in November 2003. The assessor recommended the worker use a head set for telephone use, an ergonomic keyboard, and a dicta-phone to reduce her writing. The worker would require frequent breaks and task rotation.

The worker was discharged from the chronic pain program on April 7, 2006 as fit to return to work with limitations. The assessor recommended the worker return at modified duties part time initially. At the time of discharge from the pain program, the worker reported to be less anxious and upset. The assessor recommended that she continue to receive psychological support in her local community. Testing revealed that the worker's depressive condition had improved significantly during the program. At the time of discharge, the worker was diagnosed with only minimal depressive symptoms. The barriers to the worker's return to work included her limited tolerance for use of her right arm, her functional level at the sedentary strength level, and her decreased endurance to meet the high pace of her job. The assessor noted that the Board would not support a graduated return to work on the worker's discharge from the chronic pain program. The assessor provided an opinion that a graduated return to work would have been helpful given the worker's functional limitations, current physical level, her length of time off work, and the anticipated difficulties with the return to work process.

On April 3, 2006 the worker's representative submitted to the Review Division that there is ample evidence the worker has developed a problem with her right shoulder that is a consequence of her right arm injury. He submitted that the WCAT decision had not determined this issue. The worker's representative asked the review officer to rely on the evidence from the pain program to find that the worker was totally disabled from work from June 11, 2005 because of her depressive condition, such that she is entitled to full wage loss benefits to February 19, 2006. The worker's representative submitted that it was speculative of the Board officer to conclude the worker would be able to return to work at her pre-reopening employment prior to completion of the pain program. He submitted the Board ought to have considered the worker's entitlement to vocational rehabilitation assistance after her discharge from the pain program.

The worker's representative provided the review officer with a letter from Dr. Canning dated March 30, 2006. Dr. Canning provided an opinion that the worker's right shoulder pain was most likely due to the abnormal motion of the right wrist and elbow, which forced the worker to use her right shoulder in an awkward fashion.

On June 15, 2006 the review officer determined that the WCAT panel had not made a decision regarding the compensability of the worker's right shoulder complaints. She referred that issue back to the Board for a decision. The review officer relied on the chronic pain program assessment of January 3, 2006 to find the worker was totally disabled because of her psychological condition by June 11, 2005. She noted that the worker was disabled by both her right shoulder complaints and her psychological condition, but accepted that the psychological issues were a significant factor in her disability. The review officer determined that the worker's temporary disability because

of her psychological condition had concluded by the time of her discharge from the chronic pain program on April 7, 2006. She confirmed the worker's psychological condition had resolved and that the worker was not entitled to further temporary disability benefits beyond April 7, 2006.

On August 25, 2006 the Board officer denied acceptance of the worker's right shoulder pain complaints as a compensable consequence of her work injury. The worker requested a review of that decision. On January 26, 2007 a review officer at the Review Division varied the Board's decision and concluded that the worker's right elbow fusion had resulted in adaptive changes to her right shoulder, such that the right shoulder pain was a compensable consequence of the right elbow injury. The Board has referred the worker to Disability Awards to assess her permanent right shoulder pain condition and is considering whether she is entitled to additional health care benefits, including pain medications, in relation to her right shoulder condition.

On October 12, 2006 the employer advised the Board officer that the worker had remained off work since June 2005. The employer indicated that the worker was attempting to return to work but that there were concerns about the performance of her job duties in relation to her disability. The Board officer advised the employer by letter dated October 12, 2006 that based on the job duties analysis report of March 2006, there were no modifications, equipment or further accommodations required by the employer for the worker to return to her employment. The Board officer indicated the worker was fit to return to work at her full regular job duties at the conclusion of the pain program in April 2006, but that the physical restrictions present in 2003 remain. The Board officer noted that the worker's job duties in 2006 were less demanding than in 2003 and were within her physical capabilities. The Board officer noted that as a manager, the worker was able to create her own schedule with less physical demands.

Submissions

On the notice of appeal, the worker's representative submitted that the worker's depressive condition has not resolved. He noted that she has continued to take medication for her psychological condition, which is ongoing.

On September 5, 2006 the worker's representative confirmed that the worker did not dispute the Review Division decision with respect to her entitlement to temporary total disability benefits from June 11, 2005 to February 20, 2006 or the decision to refer the issue of the compensability of her right shoulder complaints back to the Board for a decision. The worker's representative submitted that the worker's depressive condition has not resolved. He noted that following her discharge from the pain program, she has required use of anti-depressant medication and further follow-up treatment in her home community. He acknowledged that the discharge report from the pain clinic indicated the worker had a minimal level of depressive symptoms but he submitted that this did not confirm her depression had resolved. He noted that the assessors at the pain program had recommended the worker seek further counselling on discharge from the

program. The worker's representative noted the worker has been prescribed Wellbutrin for depression since March 2005, and he noted that she has continued to take anti-depressant medication since that time. He submitted that there is no evidence that the worker's depression has resolved.

The worker's representative noted that the worker did not successfully return to work at her occupation as a retail store manager because the employer determined they could not accommodate the occupational modifications identified in the job demands analysis of March 21, 2006. He further noted that the Board has not referred the worker to Disability Awards for consideration of a psychological permanent functional impairment based on her unresolved psychological condition. He noted that the review officer had only determined that the worker's depressive condition had ceased to be temporary under the meaning of section 31.1 of the Act, and that the decision did not conclude the worker's depressive condition had resolved for all compensation purposes. The worker's representative requested that the worker's prescription medication for treatment of her depression be accepted, that her claim be referred to Disability Awards for consideration of a permanent functional impairment for her depressive condition, and that she be considered for formal vocational rehabilitation assistance in light of the barriers affecting her return to work at her pre-reopening employment.

The worker's representative provided the panel with a copy of a letter from Dr. Canning dated September 6, 2006. In that letter, Dr. Canning confirmed that the worker continued to take anti-depressant medication for treatment of her depressive condition. He noted that the worker was very frustrated with her chronic pain and inability to use her right arm, wrist and hand as she would like.

In separate submissions dated September 5, 2006, the worker's representative objected to the Board's decision to provide the worker with temporary disability benefits on the reopening of her claim pursuant to the provisions of the Act in place after June 30, 2002, such that her wage rate was based on 90% of her net earnings in the one year prior to the date of the reopening (the current provisions). The worker's representative requested that the panel determine that the Board's decision was a patently unreasonable interpretation of section 35.1(8) of the Act and refer the matter to the chair of WCAT pursuant to section 251 of the Act. The worker's representative asked the panel to consider *Cowburn v. Worker's Compensation Board of British Columbia (2006 BCSC 722)*. He submitted that the amendments by the Board of Directors to *Rehabilitation Services and Claims Manual, Volume II (RSCM II)*, item #1.03(4) subsequent to the *Cowburn* decision fell short of rectifying the patently unreasonable finding with respect to claims commenced under the provisions of the Act as it read prior to June 30, 2002 and the reopening of those claims (the former provisions).

The worker's representative submitted that the Board's practice of reopening former provision claims under the current provisions for further periods of temporary total disability benefits is in contravention of RSCM II item #34.12. He explained that the difficulty lies in the conversion from gross to net earnings for reopening of former provision claims, which he submitted is inconsistent with *Cowburn* and is confusing. He

noted that RSCM II item #34.12 provides for payment of temporary total disability benefits when there is medical evidence of a significant deterioration, which broaches the very argument raised in *Cowburn*. He submitted that the former provisions of the Act should apply for further periods of temporary total disability benefits when a former provision pension has been awarded. The worker's representative submitted that the current amendment creates confusion. He submitted that the current legislation does not appear to allow appeals of wage rates for current provision pensions, and that he expected that would also be the case to increases under former provision pensions. The worker's representative submitted that the confusion lies in an inconsistent application of former and current provisions for reopenings related to long-term wage rates and wage loss benefits versus pension wage rates in increased permanent partial disability awards. The result is that workers receive a net wage rate for temporary total disability benefits and a potential gross wage rate for any increase to the permanent partial disability award. The worker's representative submitted that the worker's wage rate on the reopening of her claim ought to be based on the former provisions of the Act. The worker's representative recognized that his interpretation of *Cowburn* was much broader than that of the Board; however he submitted the Board amendments do not comply with the court's direction in *Cowburn*.

Reasons and Findings

Issue #1: Wage rate on the Reopening of the Claim

As a preliminary matter, I note that the worker's representative had not raised the issue of the worker's wage rate on the reopening of her claim in his submissions to the Review Division, and the Review Division decision did not address this issue. The Board decision of February 14, 2006 at page 11 determined the worker's wage rate on the reopening of her claim was based on her average net earnings and that the worker was entitled to receive 90% of that amount. The *WCAT Manual of Rules of Practice and Procedure* at item #14.30 provides that WCAT has jurisdiction to address any issue determined in either the Review Division decision or the Board decision which was under review. As such, I confirm I have jurisdiction to consider the worker's representative's submissions regarding the wage rate on the reopening of the worker's claim.

The Act as it read prior to June 30, 2002 provided that wage loss benefits were paid based on 75% of a worker's gross average earnings -- the former provisions. In contrast, the legislative amendments that came into force on June 30, 2002 (transition date) provide that wage loss benefits are paid on a basis of 90% of a worker's net average earnings -- the current provisions. Section 35.1 of the Act and both volumes of the RSCM at item #1.03(4) provide guidance on transition between the former provisions and current provisions. Section 35.1(8) of the Act 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) was amended on August 1, 2006, in response to *Cowburn*. This policy item states:

The 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 a worker's permanent disability following an additional period of temporary disability.

The worker's disability occurred prior to the transition date, and she has been in receipt of a disability pension award for that injury.

The worker's representative has provided substantive argument regarding whether the Board erred in applying the current provisions to calculate the worker's wage rate on the reopening of her claim. He has argued that the *Cowburn* decision supports a broader interpretation of "deterioration" as provided for in RSCM II item #34.12, such that in the facts of this case the worker's claim ought to have been reopened under the former provisions of the Act.

I am unable to agree with the worker's representative that the scope of the *Cowburn* decision encompasses circumstances when a worker's claim is reopened for a period of additional temporary disability benefits. In the *Cowburn* decision, Mr. Justice Maczko considered the definition of recurrence in relation to a deterioration of a permanent condition. He accepted and adopted the reasoning of the WCAT panel in *WCAT-2005-01710*, and found that the ordinary meaning of recurrence does not include the concept of deterioration. Mr. Justice Maczko also noted the distinction in section 32 of the Act between a recurrence of a temporary disability and an occurrence of an increase in permanent disability. While Mr. Justice Maczko noted that the legislature's intent in amending the legislation was that workers injured prior to the statutory changes would not have benefits taken away from them, I am unable to conclude that the scope of that statement encompasses the circumstances of this appeal. The worker is not losing a benefit that she was previously entitled to prior to the changes to the Act, as at June 30, 2002 she had not developed a compensable depressive condition and she was not entitled to any benefits in that regard.

In *WCAT-2006-03125*, a WCAT noteworthy decision, the panel considered policy item #1.03(4) in light of the amendments made August 1, 2006. The panel found that the amended policy did not allow 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. She noted that the current provisions of the Act apply when a worker has an additional period of temporary disability, and that the deciding factor is whether the worker's disability recurred, in that its status as a "temporary disability" recurred. I agree with the panel that the primary question in the application of the transition rules is whether a temporary disability has recurred.

It is not disputed that the worker became temporarily disabled on June 11, 2005 due, in part, to her depressive condition and that she has received a period of temporary disability benefits after the transition date. I note that for the purpose of the transition rules, a recurrence is defined as a period of temporary disability. I find that the worker's compensable condition recurred within the context of policy item #1.03(4) when she became disabled because of her depressive condition. The worker's permanent disability did not deteriorate at the time of the reopening of her claim. Rather, she developed a compensable consequence from her right elbow injury, which temporarily disabled her from work. The facts of this case fall squarely within that contemplated by policy item #1.03(4), where there is a recurrence of temporary disability after the transition date.

I acknowledge the worker's representative's submission that the use of different wage rates for temporary disability benefits and a permanent partial disability award may be confusing. I do not find the fact that two wage rates are used for separate and distinct entitlements under the Act is sufficient to establish that the transition provisions, as amended, are patently unreasonable. The worker's representative has suggested that when a current provision wage rate is used for periods of temporary disability benefits and a former provision wage rate is used for calculation of changes to the permanent partial disability award, there is the potential to deny a worker the right to challenge the wage rate used to calculate pension entitlement. I am unable to agree with that submission. I acknowledge that the Act as amended does not provide for a review of the wage rate used for calculation of a pension award, other than to dispute the calculation of the long-term average earnings at the time the wage rate is calculated. This limitation does not apply to former provision claims. Entitlement to an increased permanent partial disability award is calculated under the former provisions of the Act. The amendments as set out in RSCM II item #1.03(4) state that the transitional rule does not apply to changes in the nature and degree of a worker's permanent disability.

Issue #2: Permanency or Resolution of the Worker's Psychological Condition

The worker's representative disputes that the worker's compensable psychological condition has resolved. He notes that at the time of her discharge from the pain program, the worker required use of anti-depressant medication and community-based psychological counselling. Section 29(1) and section 30(1) of the Act provide for

payment of temporary disability benefits when a worker is temporarily disabled from work as a result of a compensable injury. RSCM II item #34.10 defines a temporary disability as one that is likely to improve or become worse and is therefore not stable. RSCM II item #35.30 provides for termination of temporary wage loss benefits when a worker's temporary disability has ceased. A temporary disability ceases when it has resolved entirely or stabilized as a permanent impairment. RSCM II item #34.54 provides that a condition is deemed to have plateaued or become stable when there is little potential for improvement or when any potential changes in the condition are in keeping with the normal fluctuations that can be expected. If the potential for change is likely to occur within a relatively quick period, generally less than one year, the condition is considered temporary, whereas if the potential for changes to the condition are likely to be protracted, the condition is considered permanent.

I note that the medical evidence from the treating specialists is that with appropriate treatment, the worker's psychological condition would resolve. The evidence from the discharge report from the pain program indicates that the worker's depressive condition was resolving. I note that during the six-week treatment program the worker's depressive symptoms had improved significantly from a moderate level at the commencement of the program to minimal depressive symptoms at the time of discharge from the program. I acknowledge, however, that the worker was encouraged to continue to receive psychological support in her local community and I accept that at the time of discharge from the pain program, she continued to use anti-depressant medication to control her symptoms.

The worker's representative provided submissions regarding section 21 of the Act and has requested that the panel find the worker is entitled to receipt of further health care benefits for her depressive condition. I note that the Review Division decision and the Board decision did not address the worker's entitlement to health care benefits in relation to her depressive condition. The Board officer in the decision of February 14, 2006 specifically declined to make a decision at that time regarding the worker's entitlement to medication upon her discharge from the pain program, and indicated that a subsequent decision would address that issue. I make no finding on the worker's entitlement to further health care benefits in relation to her depressive condition.

The worker's representative has raised concerns with the fact that the Board issued a decision to terminate the worker's temporary disability benefits prospectively. I note that RSCM II item #34.53 provides that as a general rule, decisions relating to compensation should relate to past events and continuing situations, and that a termination date should not be set for the future. The policy item provides for exceptions to that general rule, and notes that workers may adapt to returning to work if provided with a specified date in the future when compensation benefits will terminate. I note that in most circumstances, such a decision should be based on past and continuing events; however, there are circumstances that warrant providing a worker with a projected date for termination of temporary disability benefits. I find that the circumstances in this appeal, however, were not such a case. I note that from the outset the treating

clinicians at the pain program had recommended the worker commence a graduated return to work following completion of the program. I find that this recommendation from the worker's treating professionals was not properly considered by the Board.

RSCM II item #35.11 sets out the factors for a decision-maker to consider as to whether a worker is temporarily partially disabled. The policy item recognizes that in many cases the reports from the worker's attending physician and consulting specialists will provide evidence regarding whether the disability is "partial." The issue to determine in such circumstances is whether a worker's medical condition has resolved to the point that he or she is no longer totally disabled and may re-enter the work force.

I note that the worker was discharged from the pain program as fit to return to work with limitations, which included limited tolerance for use of her right arm, a functional level at the sedentary strength category, and decreased endurance to meet the high paced demands of her job. The assessor had provided an opinion that the worker would have benefited from a graduated return to work and performance of modified duties initially. I note that the worker had been out of the workplace for ten months at the time she was discharged from the pain program. The worker has a significant permanent functional impairment to her right wrist and elbow, and I accept that her level of functioning had decreased during her period of absence from the workplace, which was due in part to her psychological condition. I find that it would have been appropriate to re-introduce the worker to her job duties gradually. I accept that the worker had become deconditioned and unaccustomed to her regular job duties during the ten-month absence. I note that her regular job duties were at the medium to heavy strength level and required frequent use of her right arm, yet on her discharge from the pain program the worker was only functioning at a sedentary strength level. I further note that the worker's right shoulder condition has also been accepted on a permanent basis as forming part of her claim, and thus the non-compensable right shoulder condition the Board officer referenced in her February 14, 2006 decision ought to be considered in the decision to terminate her temporary total disability benefits.

I rely on the evidence from the pain program discharge report to find that the worker was temporarily partially disabled on her discharge from the program, such that she was not capable of returning to work at her full duties on a full time basis by April 7, 2006. I find that temporary disability benefits were terminated prematurely. The evidence from the worker and the employer confirm that the worker did not successfully return to work at her full duties on a full time basis in April 2006 on her discharge from the pain program. I disagree with the Board officer that the worker did not require modification and accommodation on her return to work. The occupational therapists that completed the job demands analysis in 2003 and in 2006 both recommended adaptive tools be provided to the worker to limit the use of her right hand and arm in the performance of her job duties. Additionally in November 2003 the occupational therapist noted that the worker would require frequent breaks and task rotations, and the assessors at the pain program recommended the worker perform modified duties on her return to work. There is some evidence from the worker and the employer that the employer was not

able to accommodate the worker. I find the worker is entitled to further temporary disability benefits after April 7, 2006. As I have found that the worker's compensable psychological condition had not totally resolved or stabilized by April 7, 2006, I make no finding on whether the worker's psychological condition is a permanent condition.

Conclusion

I allow the worker's appeal in part and vary the Review Division decision. The worker's wage rate on the reopening of her claim June 11, 2005 is calculated pursuant to the current provisions of the Act. The worker's compensable psychological condition had not completely resolved by April 7, 2006, such that the worker is entitled to further temporary disability benefits.

The worker has not requested reimbursement of expenses in relation to this appeal. I make no order for reimbursement of expenses.

Debbie Sigurdson
Vice Chair

DS/cda/gw