

Noteworthy Decision Summary

Decision: WCAT-2007-03304 **Panel:** Marguerite Mousseau **Decision Date:** Oct. 25, 2007

Tinnitus – Entitlement to Permanent Disability Award – Chronic Pain – Policy Item #31.00 of the Rehabilitation Services and Claims Manual, Volume II.

This decision is noteworthy because it considers whether tinnitus alone entitles a worker to a permanent disability award (PDA) and, in particular, an award based upon chronic pain.

The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for traumatically induced tinnitus which was permanent but concluded that he was not entitled to a PDA for it. This decision was confirmed by the Review Division. The worker appealed to WCAT.

The worker's appeal was denied. Policy item #31.00 of the *Rehabilitation Services and Claims Manual, Volume II* states that tinnitus alone is not considered to be a condition for which a PDA can be granted. The panel acknowledged that previous decision-makers had interpreted this policy to deal with compensation for tinnitus associated with or caused by occupational noise-induced hearing loss only. However, the policy does not state that tinnitus caused by or tinnitus associated with occupational noise-induced hearing loss is not compensable. It simply states that tinnitus, in itself, is not compensable, regardless of the cause. It would be inconsistent and unfair to pay compensation for tinnitus, in itself, when it is caused by trauma, but not pay compensation for tinnitus, in itself, if it is caused by exposure to occupational noise. Tinnitus is a condition for which a PDA cannot be granted, regardless of its cause. The panel also found that it was unlikely that the policy on chronic pain was intended to apply to permanent tinnitus.

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Panel: Marguerite Mousseau, Vice Chair

Introduction

This appeal involves the worker's entitlement to compensation for tinnitus. In *Review Division Decision #R0069175*, dated December 29, 2006, a review officer confirmed that the worker was not entitled to a permanent partial disability award (pension) for tinnitus. The worker appeals that decision to the Workers' Compensation Appeal Tribunal (WCAT).

WCAT has jurisdiction to consider this appeal under section 239(1) of the *Workers Compensation Act* (Act) as an appeal from a final decision made by a review officer.

The worker is represented by a private consultant. The employer is participating in this appeal and is represented by a management consultant. The worker requested that the appeal proceed on the basis of written submissions. I am satisfied that this appeal may fairly proceed on that basis since it primarily involves the interpretation and application of law and policy to medical evidence.

Issue(s)

The issue on this appeal is whether the worker is entitled to a pension for his tinnitus.

Background

The worker was employed as a construction carpenter. On September 24, 2004 a four-metre piece of scaffold tubing fell from some distance above him and struck him on the head and left side of the face with sufficient force to knock him to the ground. The worker was wearing a hardhat and he did not lose consciousness but he experienced some post-concussive symptoms of dizziness, poor balance, headaches, fatigue and cognitive difficulties. He also developed bilateral tinnitus some days after the incident. According to a consultative report of March 14, 2000 by Dr. Thiessen, neurologist, the worker had a prior history of striking his head approximately ten times but had never lost consciousness or had any significant periods of amnesia. A Board medical advisor (BMA) opined that this history would likely result in a prolonged recovery from the work injury.

The worker's symptoms, other than the tinnitus, slowly resolved. Dr. Johnston, neurologist, saw the worker on January 18, 2005 and he considered that the worker had made a significant recovery from a mild post-concussion syndrome. He noted that the

worker still had tinnitus and he said that this was “not an uncommon association with concussive injuries to the brain.” He thought the worker would have a full recovery within a matter of months. He also noted that the worker’s brother had tinnitus but he did not consider that the worker’s tinnitus was a familial condition.

The worker continued to experience tinnitus. Audiovestibular testing was conducted on July 8, 2005 and this revealed some hearing loss in the mid-to-high frequencies. Other test results were normal. In an opinion dated December 21, 2005, a BMA noted that the worker was still reporting symptoms of tinnitus. He noted that this condition tends to resolve over time and that it is not a disabling condition; however, the worker was now more than one year post-injury and he thought that he might wish to consider tinnitus retraining therapy. In a subsequent opinion, dated March 8, 2006, the BMA stated that the worker’s tinnitus was likely permanent. He said that the worker should be considered to have a mild permanent functional impairment and that there would be no medical restrictions or physical limitations. Following this opinion, the worker’s claim was accepted for a permanent tinnitus.

After considering policy at item #31.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), a disability awards officer concluded that the worker was not entitled to a pension for the tinnitus. The worker was informed of this decision in a letter dated May 8, 2006 and he requested a review of the decision. The Board officer’s decision was confirmed by a review officer and the worker appeals the review officer’s decision.

In a submission to the Review Division dated September 13, 2006 the worker’s representative requested a pension based on a disability equivalent to 2.5% of a totally disabled person. She submitted that policy item #31.00 was not applicable when a worker’s tinnitus was caused by trauma. She referred to statements to this effect made in *WCAT Decision #2005-02385*. She submitted that the policy dealing with pensions for chronic pain should be applied to grant a pension to the worker for his tinnitus. The representative noted that a policy that addressed compensation for subjective complaints had been used in the past to support the payment of pensions for traumatically caused tinnitus. Although this policy no longer exists, she submitted that the policy on chronic pain that supplanted it could be used to the same effect. She stated that pain is defined in the *Oxford Dictionary of Current English* as “any unpleasant bodily sensation produced by illness, accident, etc.” She submitted that the worker’s tinnitus was “pain,” according to this definition. In addition, the worker’s tinnitus was permanent. She submitted that this permanence was beyond what was normally expected for trauma related tinnitus and, therefore, the worker was entitled to a pension under the chronic pain policy.

The employer’s representative submitted that the WCAT decision cited by the worker’s representative did not support a finding that the policy on chronic pain was applicable to tinnitus. He found no basis for interpreting the policy at item #31.00 in such a way that it applied only to tinnitus that was related to non-traumatic hearing loss. Beyond that,

since there is a specific policy on tinnitus, if the chronic pain policy were intended to apply to tinnitus he thought that there would be some reference to the tinnitus policy in the chronic pain policy.

Essentially the same submissions were made to WCAT except that a letter from the worker was appended to his representative's submission to WCAT. In that letter, the worker described the effects of the tinnitus on his life. He stated that it is a constant, high-frequency noise that is frustrating and irritating. He also said that it can be painful in certain situations and that it affects his sleeping patterns. He submits that it affects his work, as he has to be very cautious in a noisy environment because of the pain that sometimes occurs in his ears with large impact sounds and it is also affecting his career as he is looking for work that would remove him from the noise of the construction trade. He also stated that it affects him on a personal level in that it affects his enjoyment of music and interferes with the peace that he used to enjoy during overnight adventures in remote areas. He also feels that it is affecting his hearing.

Law and policy

Section 23(1) of the Act provides, in part:

...if a permanent partial disability results from a worker's injury, the Board must

- (a) estimate the impairment of earning capacity from the nature and degree of the injury, and
- (b) pay the worker compensation that is a periodic payment that equals 90% of the Board's estimate of the loss of average net earnings resulting from the impairment.

The policies at items #31.00 to #31.80 of the RSCM II provide direction on the adjudication of claims for non-traumatic hearing loss. These policies are found in Chapter 4 of the RSCM II, which deals with occupational disease. Policy item #31.00, "Hearing Loss," specifically addresses compensation for tinnitus. It states:

Tinnitus alone is not considered to be a condition for which a permanent disability award can be granted. It is recognized, however, that tinnitus, in combination with a permanent degree of hearing loss, may have an impact on a worker's employability and affect the amount of the resulting award.

Policy item #22.35, "Pain and Chronic Pain," provides the following definition of pain for the purposes of the chronic pain policies:

Pain is an unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage. It includes cognitive, affective, behavioural and physiological components.

The policy at item #39.02, "Chronic Pain," addresses the question of when chronic pain constitutes a permanent disability for the purposes of an award under section 23(1) of the Act. It starts by describing the difference between "specific" chronic pain and "non-specific" chronic pain as follows:

Specific chronic pain - pain with clear medical causation or reason, such as pain that is associated with a permanent partial or total physical or psychological disability.

Non-specific chronic pain - pain that exists without clear medical causation or reason. Non-specific pain is pain that continues following the recovery of a work injury.

The policy goes on to describe the circumstances in which an award under section 23(1) may be made for specific or non-specific chronic pain as follows:

(a) Specific Chronic Pain – Consistent with the Impairment

Where a worker has specific chronic pain that is consistent with the associated compensable physical or psychological permanent impairment, the section 23(1) award will be considered to appropriately compensate the worker for the impact of the chronic pain. Pain is considered to be consistent with the associated compensable impairment where the pain is limited to the area of the impairment, or medical evidence indicates that the pain is an anticipated consequence of the physical or psychological impairment. In these cases, an additional award for the specific chronic pain will not be provided, as it would result in the worker being compensated twice for the impact of the pain.

(b) Specific and Non-Specific Chronic Pain – Disproportionate to the Impairment

A worker's entitlement to a section 23(1) award for chronic pain will be considered in the following cases:

- (i) Where a worker experiences specific chronic pain that is disproportionate to the associated objective physical or psychological impairment.

Pain is considered to be disproportionate where it is generalized rather than limited to the area of the impairment or the extent of the pain is greater than that expected from the impairment.

In these cases, a separate section 23(1) award for chronic pain may be considered in addition to the award for objective permanent impairment.

- (ii) Where a worker experiences disproportionate non-specific chronic pain as a compensable consequence of a work injury or disease.

Disproportionate pain, for the purposes of this policy, is pain that is significantly greater than what would be reasonably expected given the type and nature of injury or disease.

Where a Board officer determines that a worker is entitled to a section 23(1) award for chronic pain in the above noted situations, an award equal to 2.5% of total disability will be granted to the worker.

Reasons and Decision

I accept that the worker's tinnitus is very uncomfortable and frustrating and irritating and that it interferes with the quality of his life. It is well recognized that tinnitus can have this type of effect. But, a pension may only be awarded under section 23(1) when a worker suffers a permanent disability that impairs his or her earning capacity. Where the condition is a pain condition, the requirements in policy #39.02 must be met before the pain is recognized as being of such a nature that it is likely to impair the worker's earning capacity.

Turning to the policy at item #31.00, a number of previous decision-makers have noted that this policy appears to address only tinnitus that is associated with noised-induced hearing loss. The policy itself does not say this though. The policy does not state that tinnitus caused by or tinnitus associated with hearing loss is not compensable. It simply states that tinnitus, in itself, is not compensable. It then goes on to say that tinnitus, when combined with a compensable degree hearing loss, may be taken into account in assessing an award. Again, the policy does not state that the tinnitus must be caused

by the hearing loss; it simply indicates that a combination of these two factors may impact employability to a greater degree than either one alone.

The placement of this policy in the policies specifically dealing with compensation for occupational noise-induced hearing loss suggests that it is not applicable to tinnitus that is associated with other causes and it has been interpreted in this manner. In this regard, see *Appeal Division Decision #97-0803* (15 WCR 55). But, the policy itself certainly suggests that tinnitus, in itself, is not compensable – regardless of the cause.

Even if one accepts that policy item #31.00 applies only to tinnitus associated with or caused by occupational noise-induced hearing loss, this does not mean that tinnitus associated with other causes should be compensated on a completely different basis. It would be inconsistent, and unfair, to pay compensation for tinnitus, in itself, when it is caused by trauma, but not pay compensation for tinnitus, in itself, if it is caused by exposure to occupational noise. Accordingly, taking into account the one policy that does address tinnitus, it would seem that tinnitus, in itself, is not “a condition for which a permanent disability award can be granted,” regardless of its cause.

Turning to the submission that the worker’s tinnitus is compensable under the policy respecting chronic pain, there is no dispute that tinnitus may be experienced as painful, as that term is defined in a dictionary. However, when a policy specifically provides a definition, as policy item #22.35 does for pain, I consider that the definition in the policy must be applied. Pain, for the purposes of compensation, must be “associated with actual or potential tissue damage or described in terms of such damage.” This raises the question of whether it can be said that the worker’s tinnitus, which was originally associated with a brain injury, satisfies this criterion. It seems that it may.

If tinnitus is recognized as pain, the next factor that must be considered is whether it is specific or non-specific pain, as that is defined by policy. In this regard, I find that if tinnitus is to be characterized as “pain,” it is non-specific pain for the purposes of the policy. That is, it is “pain that continues following the recovery of a work injury.” In this case, the tinnitus continued after the worker’s other post-concussive symptoms had resolved.

The next question is whether the worker’s tinnitus is “disproportionate pain,” which is defined as “pain that is significantly greater than what would be reasonably expected given the type and nature of injury or disease.”

The worker’s representative submits that the worker’s pain is disproportionate because it still exists; it is permanent when it should have resolved. The permanence of a condition, however, is fundamental to the payment of a pension, given that it is an award for permanent disability. Accordingly, when the policy states that the pain must also be disproportionate, I take this to refer to the magnitude of the pain, not its duration.

I do appreciate the point that the representative is making: since it would be expected that the worker should have no tinnitus by this time, the fact that he still has it indicates that he has disproportionate pain. But, I do not consider that the intention of the chronic pain policy is to provide a pension for a pain condition, of any nature, solely on the basis that it has become permanent.

I find that applying the policy on chronic pain to a tinnitus condition leads to much the same result in this case as would the application of the policy at item #31.00. The mere existence of tinnitus is not a sufficient basis for a permanent disability award. I consider it unlikely that the policy on chronic pain is intended to apply to tinnitus but, having given it consideration, I find that it does not permit a permanent disability award in the worker's case.

Conclusion

I confirm *Review Division Decision #R0069175*, dated December 29, 2006. The worker is not entitled to a permanent disability award for tinnitus.

There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Marguerite Mousseau
Vice Chair

MM/gw