

Noteworthy Decision Summary

Decision: WCAT-2011-02557 **Panel:** Shelina Shivji **Decision Date:** October 13, 2011

WCAT Jurisdiction – New matter not yet adjudicated – Whether decision appealable – Section 246(3) of the Workers Compensation Act - Discretion

The worker sought additional temporary disability (wage loss) benefits for a period in February and March 2010. Previously, the Workers' Compensation Board, operating as WorkSafeBC (Board), had reopened the worker's claim for surgery and a period of wage loss from December 2007 to June 2009, at which time the worker returned to work after a graduated return to work program.

The worker submitted before the Review Division of the Board and to WCAT that he was entitled to a reopening of his claim in February 2010, when he experienced another period of temporary disability. The review officer concluded that this was a new matter yet to be adjudicated by the Board.

The WCAT panel agreed with the review officer that the issue of whether the worker was entitled to temporary disability benefits in February and March 2010 was a new matter to be decided. The Board had not made an implied or express decision respecting the worker's entitlement to additional benefits. The panel found that WCAT was without jurisdiction to decide whether the worker was entitled to benefits in February and March 2010 because this issue did not form part of the Review Division decision under appeal or the underlying Board decision.

The panel considered whether to invoke section 246(3) of the *Workers Compensation Act* and direct the Board to adjudicate the worker's entitlements in February and March 2010, but decided not to. That it was open to the panel to do so did not mean the panel was required to do so. The worker could have approached the Board for adjudication of this matter, and it was still open to the worker to do so. That section 246(3) was not invoked in no way impairs the worker's ability to raise the issue with the Board.

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Background

- [1] This appeal concerns the worker's request for temporary disability benefits in February 2010.
- [2] The worker, an aircraft inspector, injured his left ankle on February 18, 2003. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for a left ankle sprain/strain injury. In March 2003 the worker returned to work. Temporary disability benefits were concluded.
- [3] In 2007 the worker was diagnosed with a left ankle osteochondral lesion of the talar dome and he sought a reopening of his 2003 left ankle claim. By Board decision dated February 22, 2008 the worker's request for a reopening of his 2003 left ankle claim was denied. The Board determined the worker's left osteochondral lesion was not causally related to the worker's 2003 injury. An October 6, 2008 Review Division decision (#R0092275) confirmed the Board's decision.
- [4] The worker appealed to the Workers' Compensation Appeal Tribunal (WCAT). In a May 29, 2009 WCAT decision (WCAT-2009-01478), a WCAT panel found that the worker's osteochondral lesion of the left talar dome was a compensable consequence of the worker's 2003 left ankle sprain/strain. The panel made no finding respecting what benefits, if any the worker may be entitled to as a result.
- [5] In an April 20, 2010 Board letter the worker was informed that further to WCAT's May 29, 2009 decision, his 2003 left ankle claim had been reopened for temporary disability benefits effective December 10, 2007; however further queries were pending with the employer to ascertain the period of disability resulting from the reopening.
- [6] By Board decision dated July 20, 2010 the worker was informed that temporary disability benefits would be paid from December 10, 2007 to June 14, 2009. The Board officer noted that the worker had participated in and completed a graduated return-to-work (GRTW) program, returning to full duties effective June 15, 2009.
- [7] The Board's June 20, 2010 decision was confirmed by a February 10, 2011 Review Division decision (#R0121291), the latter which is the subject of this appeal. The review officer concluded that as the worker had returned to his pre-injury work by June 15, 2009, the Board appropriately terminated temporary disability benefits. The review officer concluded that the worker's entitlement to a reopening of his claim in February 2010 was a new matter yet to be adjudicated by the Board.

- [8] The worker, represented by legal counsel, seeks payment of temporary disability benefits beyond June 14, 2009. Specifically, the worker argues that his compensable left ankle condition resulted in a further period of disability (specified as 25 hours) in February and March 2010.
- [9] The worker asked that his appeal proceed on the basis of written submissions. Rule #7.5 of the WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will normally conduct an appeal based on written submissions where the issues are largely medical, legal, or policy based, and credibility is not in issue. I have reviewed the claim file and am satisfied that this appeal can be fairly and fully adjudicated based on written submissions; the issue relates to the interpretation of medical evidence and Board policy and credibility is not a concern.
- [10] The employer, represented by a private consulting firm, has filed a notice of participation and provided submissions. The employer seeks confirmation of the February 20, 2010 Review Division decision.

Jurisdiction

- [11] This appeal was filed with WCAT under subsection 239(1) of the *Workers Compensation Act* (Act).
- [12] Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. It must make its decision based on the merits and justice of the case, but in so doing it must apply policies of the board of directors of the Board that apply to the case, except in circumstances as outlined in section 251. Section 254 provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it.

Preliminary Matters and Issue(s)

- [13] Item #3.3.1 of WCAT's MRPP provides that WCAT has jurisdiction to address any issue determined in either the Review Division decision or the Board decision which was under review, subject to the statutory limit on WCAT's jurisdiction. However, WCAT will generally restrict its decision to the issues raised by the appellant in the notice of appeal and the appellant's submissions to WCAT.
- [14] The review officer concluded that the Board had not rendered a decision respecting the worker's entitlement to temporary disability benefits in February and March 2010. The review officer determined this was a new matter for adjudication which the worker should bring directly to the Board.

[15] Based on the above, I consider the following are issues in this appeal:

1. Whether the decisions giving rise to this appeal, specifically the July 20, 2010 Board decision and the February 10, 2011 Review Division decision, included an appealable decision with respect to the worker's entitlement to temporary disability benefits in February and March 2010.
2. And, if so, whether the worker is entitled to temporary disability benefits specifically in February and March 2010.

Relevant Information and Evidence

- [16] I consider the evidence and relevant information respecting the worker's 2003 left ankle injury has been provided in previous Review Division decisions and the May 29, 2009 WCAT decision. I have provided a brief summary above. Below I have outlined that which is pertinent to the issues before me in this appeal.
- [17] The worker underwent surgery in January 2009, specifically left ankle arthroscopy and debridement, with complete synovectomy and debridement of the osteochondral lesion. Orthopaedic surgeon Dr. Penner re-examined the worker on March 25, 2009, reporting the worker's surgical scars were well healed and his left ankle mobility and range of motion markedly improved. He also reported the worker's ankle was stable; there was no tenderness to palpation and no swelling. Dr. Penner recommended physiotherapy treatment, followed by a return to work.
- [18] On May 19, 2009 the worker commenced a GRTW program.
- [19] By Board decision letter dated July 16, 2009 the worker was informed that further to WCAT's May 29, 2009 findings, inquiries would be made with the employer to ascertain the extent and duration of benefits owing to the worker.
- [20] On August 13, 2009 the employer wrote to the Board to advise that the worker was off work from December 10, 2007 to May 18, 2009 after which he participated in a GRTW program. The employer reported the worker had returned to full hours/full duties effective June 15, 2009.
- [21] In September 2009 clinic physician Dr. Kapoor confirmed the worker had returned to work in June 2009 to full-time hours/duties. Dr. Kapoor reported that the worker continued to complain of residual pain and was advised to resume physiotherapy treatment.
- [22] On January 15, 2010 clinic physician Dr. Arora reported the worker was still working, however continued to complain of intermittent pain more pronounced over the last few weeks.

- [23] On January 18, 2010 the worker sought further physiotherapy treatment for left ankle symptoms.
- [24] The worker telephoned the Board on February 12, 2010 advising he was off work due to his injury. He requested the Board officer contact him respecting the status of his claim.
- [25] By Board decision dated April 20, 2010, the Board informed the worker that his 2003 claim had been reopened for temporary disability benefits effective December 10, 2007. The worker was also informed of his reopening wage rate.
- [26] In March, April, and May 2010 (reference Board telephone log memoranda) worker's counsel contacted the Board inquiring of the status of the implementation of WCAT's decision to allow a reopening of the worker's claim.
- [27] In the July 20, 2010 Board decision, the Board officer stated the following, in part:

As per the letter of April 20, 2010, your claim was reopened for short term disability benefits effective December 10, 2007. A review of the claim confirms that wage loss was issued up to and including June 14, 2009 and that you successfully returned to work on June 14, 2009.

Physiotherapy was also approved.

- [28] In a November 26, 2010 submission to the Review Division, worker's counsel reported that the worker had returned to work in June 2009, however was unable to work for a period in 2010 due to his compensable injury. The worker had contacted the Board on February 12, 2010, advising he was off work due to his compensable left ankle injury. Counsel argued the Board ought to have provided the worker payment for this subsequent period.
- [29] In a December 31, 2010 submission to the Review Division, the employer argued the worker was not entitled to further benefits respecting his 2003 left ankle injury. The employer also argued there was no evidence substantiating disability subsequent to June 14, 2009.
- [30] In her decision, the review officer considered there was no dispute that the worker returned to his full duties and hours in June 2009. The review officer considered that if the worker experienced a significant change in or recurrence of his condition in February 2010 (approximately eight months later), this was a separate matter that required adjudication as a reopening. The review officer noted the worker's claim was reopened in January 2011, and it was open to the worker to dispute the effective date of that reopening if he considered that his claim should have been reopened at an earlier date.

- [31] The review officer went on to state that she did not consider the Board's July 20, 2010 decision addressed whether the worker's condition had plateaued. She noted that a Board's February 9, 2011 letter informed the worker that his claim had been referred to Disability Awards Department for assessment. The review officer therefore concluded that the issue of when the worker's injury became permanent was still an open matter before the Board.
- [32] The review officer concluded the worker's entitlement to temporary disability benefits were properly concluded on June 14, 2009 and denied the worker's request.

Submissions to WCAT

- [33] In a June 17, 2011 submission, worker's counsel confirmed the worker returned to work on June 15, 2009. However, counsel argued that the worker also sustained a period of disability in February 2010, resulting directly from the compensable conditions accepted under his 2003 left ankle claim. Counsel argued the worker was thereby entitled to the payment of a further period of temporary disability benefits. Counsel enclosed a copy of the worker's pay stubs for the period of February 7, 2010 to March 6, 2010 as evidence that the worker missed a total of 25 hours of work during this period.
- [34] In a June 25, 2011 submission, the employer argued the worker was not entitled to further temporary disability benefits as he returned to work in June 2009. The employer argued that as provided by the review officer in the February 10, 2011 decision, it was open to the worker to seek a reopening of his claim in February 2010.
- [35] Worker's counsel did not provide a rebuttal to the employer's June 25, 2011 submission.

Reasons and Findings

- [36] Subsection 250(4) of the Act provides that if the evidence is evenly weighted in a WCAT appeal concerning the compensation of a worker, the WCAT member must resolve the issue in a manner that favours the worker.
- [37] Subsection 96(2) of the Act states that the Board, at any time on its own initiative, or on application, may reopen a matter that has previously been decided by the Board if there has been a significant change in the worker's medical condition that the Board has previously decided was compensable, or there has been a recurrence of a worker's injury.
- [38] Board policy at *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) item #C14-102.01 provides that a significant change is a physical or psychological change that would, in its face, warrant consideration of a change in compensation, or rehabilitation benefits or services. In relation to permanent disability benefits, a "significant change" would be a permanent change outside the range of fluctuation in a

condition that would normally be associated with the nature and degree of the worker's permanent disability. A claim may be reopened for recurrences of temporary disability, regardless of whether a permanent disability award has been provided. A recurrence of an injury may result where the original injury, which had either resolved or stabilized, occurs again without any intervening new injury.

- [39] Sections 29 and 30 of the Act provide for temporary disability benefits resulting from a worker's injury.
- [40] I also note that policy item #102.01 of the RSCM II (Changing Previous Decisions – Reopenings) states that a claim may be reopened for recurrent periods of temporary disability, regardless of whether a permanent disability award has been provided in respect of the compensable injury.
- [41] I agree with the review officer and find that the circumstances of the worker's appeal, and specifically whether he is entitled to temporary disability benefits in February and March 2010, constitutes a new matter to be decided.
- [42] I consider the Board has not made an implied or expressed decision respecting the worker's entitlement to additional benefits and I concur with the review officer that the Board had yet to determine whether the worker's compensable condition had plateaued. Further, worker's counsel confirmed there is little dispute the worker returned to full-time work in June 2009 when his temporary disability benefits were concluded.
- [43] I find I am without jurisdiction to decide whether the worker is entitled to temporary disability benefits in February and March 2010 as this does not form part of the Review Division decision under appeal or the underlying Board decision.
- [44] I also consider it would have been open to me to have invoked subsection 246(3) of the Act and to have directed the Board to adjudicate whether the worker was entitled to temporary disability benefits for the 25-hour period in February and March 2010. I note the Board was aware that the worker sought temporary disability benefits for this period as he had contacted the Board to inform same as documented in the Board's February 12, 2010 telephone log.
- [45] However, I have not invoked subsection 246(3) of the Act. That it was open to me does not mean I was required to invoke it. In declining to invoke it, I have taken into account that the worker could have approached the Board for adjudication of this matter.
- [46] The review officer reminded the worker that he could contact the Board. Yet I note that subsequent to the review officer's decision, it appears from the worker's file that he has not followed up with the Board. Further, the worker is represented by experienced counsel who would be able to raise the matter with the Board on the worker's behalf.

[47] Subsequent to my decision, it will still be open to the worker and/or his counsel to raise this matter with the Board. That I have not invoked subsection 246(3) of the Act in no way impairs the worker's ability to raise this issue with the Board.

[48] Accordingly, and for the reasons cited above, I deny the worker's appeal.

Conclusion

[49] I deny the worker's appeal and confirm the February 10, 2011 Review Division decision.

[50] I find that the decisions giving rise to this appeal, specifically the July 20, 2010 Board decision and the February 10, 2011 Review Division decision, did not include an appealable decision with respect to the worker's entitlement to temporary disability benefits in February and March 2010.

[51] As such, I make no finding respecting whether the worker is entitled to temporary disability benefits beyond June 14, 2009 and specifically, in February and March 2010.

[52] I agree with the review officer that it is open to the worker to approach the Board for an initial adjudication of this matter as a reopening.

[53] The worker did not request reimbursement of any expenses in relation to the appeal. There is no order for reimbursement.

Shelina Shivji
Vice Chair

SS/hb