Noteworthy Decision Summary

Decision: WCAT-2012-00357 **Panel:** H. Beauchesne **Decision Date:** February 7, 2012

Section 96(5) and 221(2) of the Workers Compensation Act –Policy items #34.20 and #99.20 of the Rehabilitation Services and Claims Manual, Volume II – Duration of temporary disability benefits

This decision is an example of the interpretation and application of policy item #99.20 of the *Rehabilitation Services and Claims Manual, Volume II (RSCM II)* when there is uncertainty regarding whether a reconsideration was undertaken within the statutory timeline and the interpretation and application of item #34.32 of the *RSCM II* when the worker experiences a temporary lay-off during a period of compensable disability.

The worker, a roofer, sustained a right ankle sprain and bilateral knee strains when he slipped and fell at work. The worker noted in his application for compensation that he had missed work on April 4 and April 7, 2008 due to his injury, and that he missed some further days of work due to weather. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for the right leg conditions, and notified the worker in an April 21, 2008 letter that he was entitled to temporary disability benefits from April 4 to 7, 2008.

The worker informed the Board in an April 24, 2008 telephone call that the wage rate on the claim was wrong, and that he was still off work due to the injury. In a follow-up letter to the Board on April 26, 2008, the worker noted the additional days of work that he had missed due to his injury. He had also missed some other days due to weather. The Board officer referred the worker's claim to another Board officer, who notified the worker in a July 7, 2008 telephone call and letter of the same date, that temporary disability benefits would not be paid beyond April 7, 2008. The worker sought a review by the Review Division, which confirmed the decision on January 19, 2009. The worker appealed to WCAT.

The WCAT panel concluded that the July 7, 2008 Board decision was a reconsideration of issues from the April 21, 2008 decision that were within the Board's jurisdiction, including duration of temporary disability benefits. The panel then went on to determine whether the reconsideration was made within the statutory timeline of 75 days of the original decision, and thus whether it was open to the panel to consider the issue of the duration of the worker's temporary disability benefits.

The panel noted that while there were 77 calendar days between April 21, 2008 and July 7, 2008, item #99.20 of the RSCM II states that a decision is made, for the purpose of triggering the timelines for reconsiderations and reviews, on the date the decision is communicated to the affected person, either verbally or in writing (see subsection 221(2) of the *Workers Compensation Act*). Where a decision is provided in writing and mailed to an affected person, the decision is deemed to have been communicated on the 8th day after it was mailed. Therefore, the reconsideration timeline starts at the end of the 8-day mailing period. However, the 8-day deemed service can be rebutted with proof of earlier service. As the worker had called the Board to discuss the April 21, 2008 decision on April 24, 2008, the panel concluded that the April 21, 2008 decision was communicated, and therefore made, on April 24, 2008, 74 days before the July 7, 2008 reconsideration.

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The panel concluded that it had jurisdiction to consider the reconsideration decision, and went on to determine the question of whether the worker was entitled to temporary disability benefits beyond April 7, 2008. Policy item #34.32 of the RSCM II provides that "[o]nce the Board has commenced the payment of temporary disability benefits, it does not normally discontinue them, simply because, irrespective of the injury, the worker would not have been working for some period of time." The panel noted that the worker mistakenly believed that he was not entitled to temporary disability benefits on days that he would not have been working anyway due to the weather, and that this misunderstanding led the Board to conclude that the worker's injury had resolved by April 8, 2008. However, the panel found no medical evidence to suggest that the worker was fit to return to work on April 8, 2008 or shortly thereafter. On the contrary, the panel concluded that based on the reports provided by the worker's physician, the worker continued to be disabled beyond April 7, 2008. The panel varied the Board's decision and referred the matter back to the Board to provide the worker with a decision relating to his entitlement to benefits beyond April 7, 2008.

WCAT Decision Number: WCAT-2012-00357
WCAT Decision Date: February 07, 2012
Panel: Hélène Beauchesne, Vice Chair

Introduction

[1] The worker, a roofer, slipped and fell while working on a roof on April 3, 2008. In a decision dated April 21, 2008, the Workers' Compensation Board (Board)[1] accepted the worker's claim for a right ankle sprain and bilateral knee strains. In that same decision, the Board officer set the worker's initial wage rate at $346.04 per week. The Board officer determined the worker was "fit to return to work on April 8, 2008" and paid temporary disability benefits for the period April 4 to 7, 2008. The worker has not, as of the time of writing, successfully requested an extension of time to review the April 21, 2008 decision.

[2] In a letter dated July 7, 2008, another Board officer identified the issues as whether an incorrect wage rate was used to calculate the worker's wage loss entitlement and whether the worker's time loss after April 7, 2008 could be related to the compensable injury. He determined that "…any additional time loss from work cannot be related to your incident of April 3, 2008, therefore wage loss is limited from April 4, 2008 to April 7, 2008."

[3] The worker appeals a January 19, 2009 decision of the Board's Review Division (*Review Decision #R0096109*). In that decision, the review officer denied the worker's request for review and confirmed the July 7, 2008 decision. The review officer stated the issue was "…whether the worker is entitled to temporary wage loss benefits for April 21, 22 and 25, 2008 and May 1 and 2, 2008." He found the worker was not entitled to temporary disability benefits for those days and the issue of the worker's wage rate was not before him as the July 7, 2008 letter had not contained a decision on that issue.

[4] The worker filed his appeal with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act). In *WCAT 2011-01266*, another vice chair granted the worker an extension of time to appeal the January 19, 2009 Review Division decision. The worker has requested that the appeal be decided based on a review of the file and written submissions. There are no significant issues of credibility or factual disputes, nor are there other compelling reasons for holding an oral hearing. I agree that the appeal can be properly decided in the manner requested. The worker was represented by a family member. The employer did not participate in the appeal. Through the WCAT registry, I explained section 96(5) of the Act and requested further submissions from the worker regarding the issues before me on November 24,

[1] The Board operates as WorkSafeBC

2011. The worker provided a submission on January 4, 2012. I requested further information on January 26, 2012 and the worker provided a response the same day.

Issue(s)

[5] I have identified a preliminary issue of whether the July 7, 2008 decision was an unlawful reconsideration of the April 21, 2008 decision. If not, the following issues arise in the appeal:

- Did the review officer properly determine that he did not have jurisdiction to consider the worker's initial wage rate?

- Was the worker entitled to further temporary disability benefits beyond April 7, 2008?

Background and Evidence

[6] The worker saw Dr. Hathorn on April 7, 2008. Dr. Hathorn reported to the Board that the worker was injured on April 3, 2008 when he slipped on his lifeline while working on a roof. The worker lost his balance and landed hard on his feet while rolling on the rope. He was aware of some pain in the right knee but it became much worse overnight. He tried to work the next morning (April 4) but could not due to pain. He saw the first-aid attendant. On examination, the worker had pain mostly over the right patella with some local swelling of the soft tissues. The worker reported grinding of the knee with flexion against gravity, as well as right lateral and anterior ankle pain, which had decreased slightly since the day of injury. Dr. Hathorn noted the worker had a prior compensable knee injury in January 2007. He diagnosed a right knee sprain. He indicated the worker was not medically capable of full duties, full time and estimated it would be one to six days before the worker could return to the workplace in any capacity.

[7] On the worker's application for compensation dated April 16, 2008, he indicated the dates and hours he had missed due to the injury were April 4 (6 hours) and April 7 (8 hours). He stated April 8 to 11 and April 14 to 17 were missed due to weather.

[8] The worker spoke with the first Board officer on April 18, 2008. He indicated that he would try to return to work on Monday, April 21, 2008. He would see his doctor if he did not return to work on that date.

[9] On the employer's report of injury dated April 18, 2008, the employer indicated that the worker had last worked on April 4, 2008 for two hours and had not returned to work.

[10] The first Board officer then issued the April 21, 2008 decision, indicating that the worker was fit to return to work as of April 8, 2008 and was entitled to benefits for the period April 4 to 7, 2008.

[11] Dr. Hathorn assessed the worker on April 22, 2008[2]. He noted that the worker had claimed temporary disability benefits for only two days. The rest was blamed on weather, for which the worker collected Employment Insurance benefits. The worker's right knee was painful with kneeling, and it was not before. The worker could walk "ok" but had pain with descending stairs. The worker planned to try to work the next day. Dr. Hathorn noted the worker would have to quit if his pain was too severe. He recommended a gel pad (which the worker obtained and the Board reimbursed). Dr. Hathorn's diagnosis remained sprain or strain of the knee and leg.

[12] In a memorandum on file dated April 24, 2008, the first Board officer noted that the worker's representative had called to say the wage rate was wrong. The representative also indicated the worker remained off work. In another memorandum of the same date, the Board officer noted the worker was off work April 4 and 7, claimed Employment Insurance to April 20, 2008 and was now claiming further time loss. She referred the worker's claim to another Board officer.

[13] The worker again sought treatment on April 25, 2008[3]. Dr. Hathorn noted the worker lost two days of work, and planned to return to work when the weather was better. He stated:

> Needs a note as he wants to defer RTW [return to work] till May5/08. Has now a good knee pad for both knees and should help general use as kneels a lot @ work. Prepatellar pain mostly, but is improving. Letter RTW given.

[14] On April 26, 2008, the worker wrote to the Board that he had missed additional work on April 21, 22, and 25. He also provided a receipt for the knee pads. In a letter dated May 4, 2008, the worker disputed his wage rate and submitted that he should be paid temporary disability benefits for April 4, 7, 21, 22, 25 and May 1 and 2 at his regular hourly rate of $29.51. He acknowledged he had occasional days off due to weather.

[15] The employer left a message for the Board officer on June 23, 2008, indicating that the worker would not have worked on April 21, 22, 25 and May 1 and 2 as the weather was bad and even those employees with the most seniority did not work. The evidence from the employer on June 27, 2008 showed that the worker was off work from April 7 to May 2, 2008. He returned to work on May 5, 2008, though there were some days thereafter that he was off work. On some of those latter days, the employer indicated the worker was off due to weather; for other days, he did not provide a reason.

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[2] This information was contained in clinical records which the Board received on May 29, 2008. Dr. Hathorn made no progress report to the Board.

[3] This information was also contained in the clinical records received May 29, 2008.

[16] The Board requested clinical records from Dr. Hathorn regarding the worker's prior right knee injury of January 29, 2007. The records were received on June 4, 2008. On review of those records, the worker saw Dr. Hathorn regarding his right knee on February 7 and March 9, 2007. The pain was over the tibial tuberosity and retro patellar site. Despite numerous medical visits in the interim, there was no further mention of right knee pain until the April 2008 injury.

[17] The records also showed that the worker saw Dr. Hathorn on May 27, 2008. The worker complained of sharp pains in his anterior lateral ankle since the April 2008 injury. He also reported that his right knee buckled at times. He was able to squat, but had prepatellar pain with descending stairs.

[18] Dr. Hathorn provided a progress report to the Board on June 9, 2008. He indicated the worker had pain mostly over the medial patellar area and medial joint line. The worker reported episodes of his right knee suddenly giving out with associated pain. He was able to squat and there was no clear history of locking. An x-ray showed no osteoarthritic changes. Dr. Hathorn indicated the worker might have a medial meniscus tear, but there was not enough of a problem to warrant an MRI or consider surgery. He indicated the worker was capable of full duties, full time.

[19] In a file memorandum dated July 2, 2008 entitled "Regarding: Decision – Disallow Additional Wage Loss", the second Board officer noted: "Dictated. Will put on file when returned."

[20] In the July 7, 2008 decision, the second Board officer considered the worker's entitlement to temporary disability benefits beyond April 7, 2008. The officer determined that no further temporary disability benefits would be paid.

[21] The worker provided new evidence with his June 23, 2011 submission to WCAT, consisting of Dr. Hathorn's April 25, 2008 medical note. The note was addressed "To whom it may concern at EI" and states as follows:

> He was unable to work due to a knee injury (WCB accepted for 2 days claim only) and continues to be unable to work due to knee problem. I anticipate return to full duties on May 5, 2008.

Reasons and Findings

[22] The standard of proof is the balance of probabilities as modified by section 250(4) of the Act. That section provides that in compensation cases, where the evidence supporting different findings on an issue is evenly weighted, WCAT must resolve that issue in a manner that favours the worker.

[23] Section 250(2) of the Act requires the WCAT to apply published policy of the board of directors of the Board. The *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) is the policy applicable to this appeal.

Preliminary Issue – Was the July 7, 2008 decision an unlawful reconsideration of the April 21, 2008 decision?

[24] If the July 7, 2008 decision was an unlawful reconsideration, then it is void. As such, I would be required to cancel the July 7, 2008 decision and would be unable to address the merits of that decision. The April 21, 2008 decision would still stand. In order to determine this issue, I will break it down into two sub-issues. First, was the July 7, 2008 decision a reconsideration of the April 21, 2008 decision? If so, was the reconsideration made beyond the 75 days permitted by section 96(5) of the Act?

[25] In the April 21, 2008 decision, the first Board officer indicated that the worker was entitled to temporary disability benefits for the period April 4 to 7, 2008. While that statement on its own does not preclude further consideration of temporary disability benefits, it was preceded by a statement that the worker was fit to return to work on April 8, 2008. Taken together, I consider those statements constitute a decision to terminate temporary disability benefits on April 7, 2008 based on a conclusion that the worker was no longer temporarily disabled beyond that date.

[26] In the July 7, 2008 decision, the Board officer considered whether the worker was entitled to further temporary disability benefits beyond April 7, 2008, and found he was not. He concluded there were "no objective medical findings to support time loss after April 7, 2008." The issue of the worker's entitlement to benefits beyond April 7, 2008 was not a new matter for adjudication (see item #C14-101.01 of the RSCM II), nor was it a reopening (see item #C14-102.01). Item #C14-103.01 provides "A reconsideration occurs when the Board considers matters addressed in a previous decision anew to determine whether the conclusions reached were valid." I find that the July 7, 2008 decision reconsidered the issue of the worker's entitlement to benefits beyond April 7, 2008, which had previously been decided in the April 21, 2008 decision.

[27] The July 7, 2008 letter identified the first issue as whether an incorrect wage rate was used to calculate the worker's wage loss entitlement. The initial wage rate was determined in the April 21, 2008 decision. The review officer found that the July 7, 2008 letter did not contain a decision on that issue. I will address that issue below. However, if the July 7, 2008 letter did contain a decision on the wage rate, that would also be a

reconsideration of the April 21, 2008 decision. The July 7, 2008 letter did not address any other issues.

[28] Section 96(5) of the Act prevents the Board from reconsidering a decision if more than 75 days have elapsed since that decision was made. July 7, 2008 was 77 calendar days after April 21, 2008. However, the question is when each decision was "made" for the purpose of triggering the reconsideration timelines. As provided in item #99.20 of the RSCM II, a decision is made, for the purpose of triggering the timelines for reconsiderations and reviews, on the date the decision is communicated to the affected person, either verbally or in writing. The policy further states "Where a decision is provided in writing and mailed to an affected person, the decision is deemed to have been communicated on the 8th day after it was mailed. Therefore, the reconsideration timeline starts at the end of the 8-day mailing period." While I am not bound by this policy as it was effective April 1, 2010, I consider that it provides useful guidance in this case. The policy in effect at the time of the July 7, 2008 decision did not provide guidance on when a decision was made. The WCAT chair similarly referred to the amended version of item #99.20 for guidance regarding the definition of decision in *WCAT-2010-03113*, despite that she was not bound to apply it. I note the 8-day mailing period is consistent with section 221(2) of the Act.

[29] The 8-day deemed service can be rebutted by proof of earlier service. In this case, the April 24, 2008 log entry shows that the worker's representative called to express disagreement with the April 21, 2008 decision. In the January 26, 2012 submission, the worker's representative indicated that she recalled the conversation, but did not recall when it occurred. I accept the evidence in the claim log that the conversation occurred on April 24, 2008. I conclude this establishes that the worker had received the letter containing the April 21, 2008 decision before his representative called the Board to discuss it. Therefore, I find the evidence supports a conclusion that the April 21, 2008 decision was communicated by, and therefore made on, April 24, 2008.

[30] The July 7, 2008 decision begins, "Further to my telephone message of today, this letter will explain my decision regarding wage loss on your claim." This sentence suggests that the Board communicated the decision to the worker verbally on that date. The worker, in the January 26, 2012 submission, stated that the Board did not tell him about the decision before he received it in writing. He identified the Board officer's statement quoted above; however, he stated he has no record of a telephone message, nor was any indication of a telephone message recorded in the claim file. While it would be preferable if the telephone message was clearly recorded in the claim file, I accept, in the circumstances of this case, that the Board officer left a message for the worker. I acknowledge that there are potentially problems with assuming receipt of a phone message, and in different circumstances, a statement that a phone message was left may be insufficient to show a decision was communicated. In this case, the message of the decision was simple: that there would be no further wage loss benefits paid. It is not surprising that the worker would be unable to recall a phone message left three and a half years earlier. I have also considered that it is to the worker's benefit if I accept that

the Board officer communicated the decision verbally to the worker on July 7, 2008. The merits and justice of the case support taking jurisdiction rather than requiring the worker to seek an extension of time to review the April 21, 2008 decision. Thus, I find that on July 7, 2008, the Board officer clearly communicated the decision that the worker was not entitled to further wage loss benefits. Therefore, the decision was "made" on July 7, 2008. I note, in the absence of this finding, the July 7, 2008 decision would be considered to have been communicated eight days later and more than 75 days would have elapsed. This interpretation is consistent with that contained in the Board's Practice Directive #C14-2. The practice directive is not binding but provides useful guidance. It states that a reconsideration decision is not "made" for the purpose of the 75-day time limit in section 96(5) until the final decision resulting from the reconsideration process has been recorded on the claim file and communicated in some form to the affected party or parties. At that point, the decision making process is complete.

[31] I find that at July 7, 2008, 75 days had not elapsed from April 24, 2008. July 7, 2008 was 74 days after April 24, 2008. Therefore, I conclude that at the time of the July 7, 2008 decision, the Board had jurisdiction to reconsider the April 21, 2008 decision.

[32] In coming to this conclusion, I note item #C14-103.01 provides that a Board officer may only reconsider a decision made by another Board officer where there is new evidence, a mistake of evidence, a policy error or a clear error of law. In this case, I am satisfied that there was new evidence sufficient that the issue of the worker's entitlement to benefits beyond April 7, 2008 could be considered anew. I will therefore consider the merits of the worker's appeal with respect to this issue.

Jurisdiction to consider the worker's initial wage rate

[33] The decision on the worker's initial wage rate was contained in the April 21, 2008 decision. The board officer set the worker's wage rate at $346.04 per week. She used the worker's earnings in the three months prior to injury to calculate the worker's wage rate on the basis that his work was weather dependent.

[34] In the July 7, 2008 letter, a Board officer indicated that one of the issues to be decided was whether an incorrect wage rate was used to calculate the worker's wage loss entitlement. The officer stated:

> Your three-month gross earnings were used to calculate your wage loss instead of the gross hourly rate or gross annual rate, as your work is weather dependent and three-months earnings best reflects your actual earnings at the time of injury. If your wage loss goes past 10 consecutive weeks your gross annual earnings are used at that time.

[35] The Board officer stated the worker's wage rate was based on his three-month earnings as a permanent full-time worker and not as a part-time or seasonal worker.

[36] In the worker's January 4, 2012 submission, he indicated that he wished to pursue the issue of his initial wage rate. He did not directly address whether the review officer had jurisdiction to address his wage rate; however, he stated:

> The July 07/08 decision letter to the best of my understanding did not change the April 21/08 decision letter. What the July 07/08 decision letter did was state a change [in] the wording on how they determined the wage loss rate in the April 21/08 decision letter.

[37] The worker appears to submit that it was inconsistent to base his wage rate on his three-month earnings if he was a permanent full-time worker. He submits there was a change in wording between the two decisions.

[38] Section 1 of the Act provides that "reconsider" means to make a new decision in a matter previously decided where the new decision confirms, varies, or cancels the previous decision. Therefore, a decision to not change a previous decision is a reconsideration. I agree with the review officer that the July 7, 2008 letter did not contain a decision on the worker's initial wage rate. Perhaps more importantly, it also did not contain a decision not to change the wage rate. Rather, it was simply an explanation of the April 21, 2008 decision. The review officer's jurisdiction is limited to the issues decided in the decision under review. As the July 7, 2008 letter did not contain a decision with respect to the worker's initial wage rate, I agree that the review officer had no jurisdiction to review the issue of the worker's initial wage rate. I further note that there is insufficient evidence that the verbal communication on July 7, 2008 included any reference to the wage rate. Given that, if there were a decision on the wage rate contained in the July 7, 2008 letter, it would be communicated, or made, eight days after July 7, 2008 and would therefore be unlawful.

[39] As the review officer had no jurisdiction to consider the worker's initial wage rate, nor do I. I acknowledge that the second Board officer identified the wage rate as an issue before him in the July 7, 2008 letter. It could be argued that the July 7, 2008 letter contains an implicit decision not to change the worker's wage rate. I consider that a reconsideration decision needs to be more than implicit. However, for completeness, I have analyzed the issue in the event that I am incorrect in my conclusion that the July 7, 2008 decision did not contain a decision on the worker's wage rate.

[40] Section 33(1) provides that the Board must determine the worker's average earnings at the time of the worker's injury.

[41] Section 33.1(1) provides that the Board must calculate an initial rate of injury and, if a worker's claim exceeds ten weeks, a long-term rate of injury.

[42] Item #65.00 provides the rule for determining short-term average earnings. For workers who receive remuneration on a standard 5-day workweek, the initial wage rate will be based on the rate of pay on the date of injury. However, the Board recognizes that not

all worker's receive remuneration based on a standard 5-day workweek. Item # 65.01 provides that where a worker has variable earnings, the Board will usually calculate the worker's earnings with reference to the worker's earnings in the three-month period up to and including the day of injury. The Board considers the worker to have irregular earnings if the worker has irregular shifts or has shifts with no repeating patterns.

[43] I accept that the evidence supports a conclusion that the worker does not work a standard 5-day workweek. The evidence, including that of the employer and the worker, demonstrate that the worker's ability to work is at times affected by the weather. The evidence also shows that the worker is not a casual worker, who works for a number of employers or whose work is casual in nature (see item #67.10). Therefore, if I did have jurisdiction over this issue, I would find that the Board had properly calculated the worker's initial wage rate based on his earnings in the three months prior to his injury.

Entitlement to temporary disability benefits beyond April 7, 2008

[44] The worker submits that on April 8, 2008 the Board forced him to go back to work without recovering from the injury. I note that he did not actually return to work on April 8, 2008. I consider the worker means he was not recovered by April 8, 2008, and therefore he remained temporarily disabled and was entitled to further benefits. He argues that the medical evidence shows that he was not fit to return to work on April 8, 2008 and that he remained unfit to return to work until May 5, 2008.

[45] Section 29(1) of the Act provides that a worker who is temporarily totally disabled by a compensable injury or disease is entitled to wage loss benefits. A worker who is temporarily partially disabled by a compensable injury or disease is entitled to wage loss benefits under section 30(1) of the Act. Section 31.1 provides that temporary disability benefits must be terminated if the worker is no longer disabled due to the compensable condition.

[46] Item #34.10 of the RSCM II provides that in order to be eligible for benefits under section 29, a worker must have a temporary total physical impairment as a result of the injury. A temporary physical impairment is one that is likely to improve or become worse and is therefore not stable.

[47] Item #34.32 (Strike or Other Layoff on Day Following Injury) provides that in cases where the injury disables the worker beyond the day of injury and this results in an actual loss of earnings or a potential loss of earnings, wage loss compensation will be paid. Where the disability beyond the day of injury does not result in any actual or potential loss of earnings, no wage loss will be paid. The policy goes on to state:

> It should be made clear that the above rules only apply at the point of the original lay-off. Once the Board has commenced the payment of temporary disability benefits, it does not normally discontinue them simply

because, irrespective of the injury, the worker would not have been working for some period of time.

[48] Item #35.30 of the RSCM II states that the Board will terminate temporary total or temporary partial disability benefits under section 29(1) or 30(1) once the worker's temporary disability ceases. A temporary disability ceases when it either resolves entirely or stabilizes as a permanent impairment.

[49] I find the evidence supports a conclusion that the worker remained temporarily totally disabled beyond April 7, 2008. I acknowledge the worker originally told the Board that he had only missed work on April 4 and 7, 2008. This appears to be because the worker felt he would have missed the other days due to weather, regardless of his injury. This conclusion is supported by the worker's June 23, 2011 submission in which he incorrectly states: "When EI is in place any days that are taken off work due to a WCB injury must be claimed as WCB. All other days where work is not available are then claimed as EI days." This quote shows the worker's misunderstanding of the policy and explains why the worker only submitted that he was disabled from work on certain days and not others.

[50] Item #34.32 provides that once temporary disability benefits commence, it is irrelevant that the worker would not have been working for some period of time. It appears the first Board officer assumed the worker's disability had resolved since the worker stated he was entitled to two days of benefits initially. I find no medical evidence indicating that the worker's disability resolved or that he was fit to return to work as of April 8, 2008 or shortly thereafter. I do not interpret Dr. Hathorn's clinical records to indicate that the worker was no longer temporarily disabled. In the April 22, 2008 clinical record, I consider that Dr. Hathorn seemed skeptical that the worker would be successful in his planned return to work the following day (which did not take place). In the April 25, 2008 clinical record, Dr. Hathorn did not provide a clear opinion on whether the worker remained disabled from work or not. However, in the note provided the same day (which was received in the worker's submission on appeal), Dr. Hathorn indicated the worker continued to be disabled from work due to his knee problem. I find this supports a conclusion the worker was disabled throughout that time. Therefore, I find that the worker was temporarily totally disabled beyond April 7, 2008 and was entitled to further temporary disability benefits. I refer the matter back to the Board to provide the worker with a decision on his entitlement to benefits beyond that date, taking into account item #34.12 of the RSCM II and my findings of fact above.

Conclusion

[51] I allow the worker's appeal and vary *Review Decision #R0096109* dated January 19, 2009.

[52] The review officer correctly determined he had no jurisdiction to consider the worker's initial wage rate as the July 7, 2008 letter did not contain a decision on that issue.

[53] The July 7, 2008 reconsideration of the worker's entitlement to temporary disability benefits was made within 75 days of the April 21, 2008 decision, and was therefore lawful. I find the worker was entitled to temporary disability benefits beyond April 7, 2008. The worker's file is returned to the Board to determine the extent of those benefits.

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

Hélène Beauchesne
Vice Chair
HB/jd