

## **CLAIM HISTORY AND APPEAL PROCEEDINGS:**

This appeal concerns the Board's determination that the Worker had acted unreasonably in failing to cooperate concerning a treatment program sponsored by the Board to promote his recovery. The *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended (the "Act"), applies to this matter.

The Worker injured his back in 1997 and 2000. The Board determined that the Worker's back condition was compensable under the *Act*. As a result, he was awarded temporary earnings-replacement benefits ("TERB") from January 3, 2001 to December 6, 2005.

The decision under appeal, dated March 28, 2006, was rendered by a Board Hearing Officer. The Hearing Officer found that the Worker's benefits for his earnings loss were appropriately suspended effective December 7, 2005. The Worker disagrees with the Hearing Officer's findings and appealed to this Tribunal.

I conducted an oral hearing in this matter. At the hearing, the Worker testified under oath and his representative provided oral submissions. Neither the Employer, nor the Board, were represented at the hearing. For the sake of brevity, only portions of the relevant evidence and submissions will be discussed below. However, I considered, among other things, the following: the decision under appeal; the contents of the Worker's Board files; the submissions and testimony mentioned above.

## **ISSUES AND OUTCOMES:**

Did the Worker fail to cooperate in treatment to promote his recovery? If so, was it appropriate to suspend his benefits under s. 84(2) of the *Act*?

The Worker was not reasonably able to conform his conduct to acceptable standards in order to participate in appropriate treatment to promote his recovery. However, this was due to his painful condition, documented psychological problems and the stress of participating in a pain management program. Under the circumstances, the Worker's failure to fully participate was not unreasonable. Therefore, it was not appropriate to suspend his benefits under s. 84(2) of the *Act*.

## **ANALYSIS:**

### *Burden of Proof and Duty to Mitigate:*

The evidence before me must be considered in light of s. 187 of the *Act*. The Worker is entitled to the benefit of the doubt on any issue involving compensation. Where there is

doubt on an issue and the disputed possibilities are evenly balanced, the issue should be resolved in the Worker's favour. Any participant disputing an inference raised by the Worker is required to meet a greater burden of proof, the balance of probabilities standard generally required in civil matters.

Whether an inference is reasonable is a question of fact that depends upon the circumstances of each case. Expert opinion evidence is often of great assistance in determining questions of fact, including questions concerning co-operation. However, expert evidence is not necessary to a determination of such questions, nor is it always conclusive.

Section 84(1) of the *Act* requires, among other things, that every worker shall take all reasonable steps to reduce or eliminate any permanent impairment and loss of earnings resulting from an injury. A worker must also seek out and cooperate in medical aid or treatment to promote his or her recovery. If a worker fails to do these things, the Board may suspend, reduce or terminate any compensation otherwise payable to the worker pursuant to s. 84(2) of the *Act*.

Factual Background:

The Worker, now 38 years of age, has a history of significant lower back and leg pain following several workplace accidents. These include incidents in January 1997 and December 2000. He was diagnosed with chronic pain and degenerative disc disease in his lumbar spine. There is no evidence that, prior to his workplace injuries, he suffered from a low back condition, chronic pain or psychological problems. Since going off work in 2001, his complaints of pain in his back and legs increased and his range of motion decreased.

The Worker was evaluated by a number of orthopaedic surgeons. I will refer to only two of them, Dr. G. P. Reardon and Dr. D. I. Alexander.

Dr. Reardon examined the Worker in 2003 and provided a medical-legal report dated July 26, 2004. He described the severity of the Worker's back problems, in part, as follows:

It is quite apparent that [the Worker] has a severe problem with his lower back. He is only 36 years of age. I do not believe that the degenerative changes present are due to natural causes. I feel that they are definitely secondary to his series of traumatic incidents. It would appear from his latest MRI that the major problem is at the L4-5 disc level. The other changes are relatively minor compared to this major abnormality. One must remember that he is only 36 years of age and one would not normally expect to see degenerative changes in this age group.

Dr. Reardon felt that the Worker's condition was due to his work injuries and he could not

return to gainful employment at that time.

Dr. Alexander saw the Worker a number of times from August 2001 to December 2005. In a letter to the Worker's family physician, Dr. S. Lassey, Dr. Alexander noted that the Worker said he was depressed and had constant thoughts of suicide. Dr. Alexander concluded his letter as follows:

I reviewed his imaging studies and it is my firm opinion that an operation would be very unlikely to help him. I would recommend against surgery for his problem. It seems to me that his most serious problem from a medical point of view is his emotional state, and I will leave that up to you to deal with.

In addition, the Worker was seen for psychological problems. In June 2004, he was seen by Dr. A. Abbass, psychiatrist, and found to have symptoms including anxiety, panic and depression. Dr. Abbass felt the Worker met the criteria for pain and somatization disorders.

In 2005, following an assessment, the Board proposed the Worker attend a 6 week multi-discipline pain management program. The Worker was concerned about attending this program. In a November 18, 2005 letter to the Board, Dr. Lassey wrote:

[The Worker] is extremely distressed today & is fearful of his upcoming assessment because of pain & his ability to perform physical tasks. . . . Please do not push him since he is in a psychologically vulnerable state & is likely to lose emotional control if pressured. (Emphasis in original)

Dr. Lassey again wrote the Board on November 29, 2005 to "strongly suggest" the Board postpone the Worker's program. He informed the Board that there were complicating factors involved in the Worker's attendance in addition to chronic pain due to multilevel disc disease. These included the use of narcotics for pain, constipation, hemorrhoids, depression, panic attacks and difficulty with stress.

On the other hand, the Board had the benefit of a report dated November 14, 2005 from the program service provider. The report relied upon a detailed review of relevant medical documentation and a two day multi-discipline assessment of the Worker. The writers of the report were optimistic that he would benefit from a 6 week program. However, concerns were raised about the Worker. Among other things, it was felt that he could be a difficult participant to motivate and might not be sincere in his efforts.

A separate section of the report was devoted to the Worker's psychological profile. The Worker acknowledged that he had shifts in his moods and expressed his anger by yelling, but not through physical means. His self-measure for his experience of pain was in the very high range and he scored in the 99<sup>th</sup> percentile (very high range) for fear of re-injury.

His scores also indicated that he had moderate levels of depressive symptoms and significant degrees of distress.

Of note, Dr. Alexander reviewed this report. In his January 19, 2006 letter to the Board, Dr. Alexander approved of the service provider's "psycho-educational and cognitive behavioural approach to management of pain." However, based upon his knowledge of the Worker, he was not optimistic that the Worker would be successful in the proposed program.

The Worker was to attend a program commencing in December 2005, but failed to do so. As a result of his non-attendance and prior history of presenting various obstacles to his participation, the Board suspended his benefits effective December 7, 2005.

At the time of the hearing, the Worker testified that he was under a great deal of stress in November 2005 through February 2006. He felt that it would be too difficult to participate in a pain management program because of the sitting, standing and travelling it required. Among his many difficulties, he noted the following: he was in constant pain from his compensable injury and hemorrhoids; he was not sleeping well; he had very little money; and he had little confidence that the program would help him. He testified that during this time, he experienced considerable anxiety, depression and mood swings. He was also socially isolated, at least partially due to the constant pain he experienced, as well as his emotional state. One of the things the Worker was most anxious about was caring for his dog while he attended a program.

Subsequent efforts were undertaken by the Board to have the Worker attend a pain management program in February 2006. A locum for Dr. Lassey described the Board as having "gone the extra mile" on behalf of the Worker. Assuming the Worker participated in the program, his benefits were to be reinstated.

The Worker's benefits were never reinstated. He attended the start of a program on February 8 and 9, 2006. However, the service provider discharged him from this program at the end of the second day on the basis of inappropriate and verbally abusive behaviour. The Worker acknowledged that he was upset and swore as he was leaving a meeting with his Board Case Manager on February 9, 2006. In addition, I note that documents in his file describe numerous prior incidents of rude communication by the Worker.

*No Breach of Duty Under s. 84:*

I must determine whether the Board acted appropriately in suspending the Worker's benefits pursuant to s. 84 of the *Act*. For the reasons outlined below, I find that the Worker's benefits should not have been suspended.

There is no dispute that the Worker failed to complete a pain management program despite the good faith efforts of the Board. The program appears to have been well

designed to meet his needs.

However, I am persuaded by the evidence from Dr. Lassey and Dr. Alexander that there was little likelihood the Worker could have successfully completed this program at the time. I find that this was primarily due to his psychological problems and the pain associated with his compensable injury.

As noted, Dr. Alexander considered the Worker's most serious problem to be his emotional state. Dr. Lassey, the Worker's family physician for many years, reported in November 2005 that the Worker was psychologically vulnerable, extremely distressed and likely to lose emotional control if pressured. He strongly recommended against requiring the Worker to participate in a program at the time.

There is additional support for my finding from the reports from the authors of the November 14, 2005 for the service provider. They were concerned about the Worker's participation. They noted, among other things, that his fear of re-injury and perception of pain were very high.

As mentioned, the *Act* imposes a duty upon the Worker to take all reasonable steps to cooperate in programs to promote his recovery. The reasonableness of the Worker's actions should be considered in light of his capabilities at the time.

Unfortunately, from November of 2005 through February 2006, the Worker was not reasonably able to conform his behaviour to acceptable standards in order to participate in the pain management programs in question. His treating physicians felt it was likely the Worker would respond in an inappropriate fashion under stress – and that is what occurred. His behaviour was, at least in part, causally related to his compensable injury. Since the basis for suspending the Worker's benefits was his failure to participate in a pain management program, the suspension of benefits from December 7, 2005 was not warranted. It follows that the Worker's appeal must be allowed. I would add that, despite my findings and disposition of this appeal, nothing in my decision should be taken to suggest approval of the Worker's behaviour. The Board Case Manager is to be commended for her tolerance and professionalism in dealing with such behaviour.

#### **CONCLUSION:**

The appeal is allowed. The Board's suspension of the Worker's TERB benefits from December 7, 2005 was not warranted.