

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker injured his right shoulder and chest on July 5, 2004 while pushing a wheelbarrow of asphalt. He was diagnosed with a pectoral strain and low back pain and referred for physiotherapy.

The Workers' Compensation Board [the "Board"] suspended the Worker's compensation benefits as of June 26, 2006, when he did not attend at his workplace on the first day of an ease-back return to work program with his pre-accident Employer. Under appeal to the Workers' Compensation Appeals Tribunal [the "Tribunal"] is the August 28, 2006 Hearing Officer decision confirming the suspension of his benefits pursuant to s.84 of the *Workers' Compensation Act* S.N.S. 1994-95, c.10, as amended [the "Act"].

The appeal to the Tribunal proceeded by oral hearing held in Coldbrook, N.S., on January 17, 2007. The Worker testified at the hearing and oral submissions were made on his behalf by his Workers' Adviser. Neither the Board nor the Employer participated in the appeal.

Before the hearing, a September 5, 2006 report from the Worker's family doctor, Dr. Jane Brooks, was submitted into evidence for the Tribunal's consideration, in addition to the Worker's testimony at the hearing and the Board claim file.

ISSUES AND OUTCOMES:

Were the Worker's benefits appropriately suspended under section 84 of the *Act*?

No. While the Worker did miss several physiotherapy and psychologist appointments, reasonable explanations were provided for most of those absences. The more salient point is that the Worker did attend at his pre-accident Employer's job site on June 27, 2006, (one day late) to commence his return-to-work program. This fact is overlooked in the Hearing Officer's decision. The Worker's compliance with the return-to-work program as soon as his confusion regarding the start date was clarified belies the Board's assertion that the Worker was non-compliant.

The Worker is entitled to reinstatement of his compensation benefits as of June 26, 2006.

ANALYSIS:

Section 84 of the *Act* requires every worker to:

- take all reasonable steps to reduce or eliminate any permanent impairment and loss of earnings resulting from an injury;
- seek out and cooperate in any medical aid or treatment that ... promotes the worker's recovery;
- take all reasonable steps to provide the Board with full and accurate information relevant to their claim; and
- notify the Board immediately of any change in circumstances affecting continuing compensation entitlement.

Failure to do so allows the Board to "... suspend, reduce or terminate any compensation otherwise payable to a worker pursuant to this Part..."

The Board suspended the Worker's benefits on the basis of missed physiotherapy and psychiatric appointments and a failure to begin a return-to-work program with his pre-accident Employer on June 26, 2006, after the original start date had been delayed by the Employer.

The June 28, 2006 Case Manager decision, which was appealed to the Hearing Officer, itemizes the information concerning the Worker's missed appointments at pages 3 and 4.

Physiotherapy Appointments

The Worker received physiotherapy treatments primarily at two clinics. He began treatment at Greenwood Physiotherapy, which he testified was about a fifteen to twenty minute drive from where he was living at the time, on August 4, 2004. A review of the reports from Greenwood Physiotherapy reveals the following:

- The Worker cancelled an appointment on October 26, 2004 because he was in too much pain to drive due to carrying wood into the house. This was after 34 treatments.
- The Worker cancelled an appointment due to illness on November 12, 2004. An appointment for November 15, 2004 was cancelled due to a power outage affecting the physiotherapy clinic. The physiotherapist noted: "When I saw him today, he was complaining of much increased pain after having to clear snow. [The Worker] lives out in the country and had [approximately] 3 feet of snow."
- Progress Reports dated November 30, 2004 and December 14, 2004 indicate that the Worker had plateaued and was being referred to Beaverbank Physiotherapy in Lower Sackville. By this time the Worker had 45 and 50 treatments, respectively.

- The Progress Report dated January 11, 2005 indicates that the Worker was unable to keep December 29 and 31, 2004 appointments at Beavercreek Physiotherapy, the latter due to weather, and his appointment had been rescheduled for January 12, 2005. "In the meantime, ... he got a Bow-flex weight training machine for Christmas and has been doing similar exercises to the ones done in the clinic."
- On January 27, 2005 it was noted that the Worker had only had one treatment since the last report, in part due to snowstorms and the appointment at Beavercreek Physiotherapy.
- The Progress Report dated February 22, 2005 indicates that the Worker did not attend between February 10 and 21, 2005 due to other health issues including influenza. Nonetheless, by this time the Worker had completed 61 treatments.
- The next report dated March 15, 2005, continues to indicate intervening health issues which required hospital investigations and led to the cancellation of physiotherapy appointments. A March 3 appointment was cancelled due to bad road conditions; a March 4 appointment due to the effects of medication; and March 8 and 11 appointments due to the lack of a vehicle.
- The April 25, 2005 report reflects that the Worker cancelled an April 18 appointment due to car trouble. His wife cancelled an appointment for the following day; no reason given. By this time the Worker had completed 78 treatments.
- Greenwood Physiotherapy's May 27, 2005 Discharge Report reflects that the Worker had completed his work conditioning program but not his last functional scan. The Worker had cancelled his last visit due to health reasons and failed to provide a reason for not attending the final rescheduled appointment. The Worker had completed 88 treatments.

The Kings Physiotherapy Clinic in New Minas is located approximately a one hour drive away from where the Worker was living at the time of treatments. The Reports from Kings Physiotherapy Clinic Ltd. indicate the following:

- According to a report dated July 8/12/15, 2004, the Worker attempted to return to work in June 2005. On June 27, 2005 he attempted a return to his regular duties which exacerbated his symptoms. He went back to transitional work until July 6, 2005.
- A treatment record dated August 4, 2005 indicates that the Worker had attended

9 treatments, missed one, and cancelled two on July 18 and 28. No reason is stated on the report.

- A treatment record dated August 25, 2005 indicates that the Worker had attended 11 treatments, but had not attended since August 11 due to illness and a death in the family. He had also missed one appointment with no reason given.

The Worker confirmed in his testimony that he had been ill at that time and that his aunt, with whom he had lived in Ottawa for ten years, had died.

- The September 8, 2005 report indicates that despite the Worker not attending between August 11 and September 8, 2005, his compliance was good. This report notes that the Worker had pneumonia. The next report dated September 23, 2005, after 17 treatments, rated the Worker's compliance as excellent.
- The Worker's Functional Capacities Evaluation was performed November 14 and 15, 2005: "It should be noted that strength-testing was not performed during the physical examination due to time constraints, as the client arrived one hour and fifteen minutes late for his 9:00 am appointment on Day One of his FCE. On Day Two, [the Worker] arrived promptly for his appointment." The report later indicates that at one point during the testing the Worker was physically ill, but continued with the testing.

The total number of treatments at Kings Physiotherapy is not noted on the file.

Psychology Appointments

- According to the psychologist's first letter on file, dated November 26, 2004, there was some difficulty in arranging his first appointment, through no fault of the Worker. His first appointment was October 8, 2004, with follow-up appointments on October 15 and November 1, 2004. The Worker got married after that appointment; a November 8, 2004 appointment conflicted with his physiotherapy, and on November 15, 2004 the clinic was closed due to lack of power.
- There is no mention of attendance problems in the psychologist's next letters, dated April 21 and July 9, 2005.
- The psychologist's December 23, 2005 letter indicates that the Worker had cancelled an appointment since July but kept appointments on September 28, and October 7, 2005.

- A letter dated October 20, 2005 indicates that the Worker did not arrive for his appointment or call to reschedule the appointment.
- A letter dated January 13, 2006 indicates that the Worker failed to schedule an appointment following his FCE, despite being called nine times.

The Worker testified that he did return her calls but that she did not return his calls.

Documents on File

A Summary Report and Decision dated January 24, 2006 indicates that the Worker's Case Manager met with the Worker on January 19, 2006. Attendance issues were discussed at that time, particularly concerning the Worker's failure to see the psychologist following his FCE. The Worker was warned that his benefits would be terminated if any further breaches occurred.

The Worker's return to work plan was first discussed on March 29, 2006. At that time the Employer indicated that it would 6-8 weeks before the position would become available. Another meeting on June 15, 2006 set a return to work date of June 21 at the Worker's request.

The Hearing Officer's August 28, 2006 decision indicates that the Worker stated in his Notice of Appeal to Hearing Officer that he was contacted by his Employer on Tuesday June 20 and was told that the position would start a week later.

The Worker testified that he interpreted the week's delay to mean Wednesday, June 28, rather than Monday, June 26.

Contact Sheets on the Worker's Board Claim File provide the following evidence:

- On August 23, 2005, the Worker contacted the Board to advise that he had pneumonia and would not be attending physiotherapy that week.
- Contact by telephone with the Board on July 19, 2005 reflects that the Worker was in sufficient pain to cancel his physiotherapy the previous day. The record includes discussion of the Worker's experience on an earlier attempt to return to work.
- The Worker contacted the Board on January 6, 2005 to advise that he had missed two appointments in Lower Sackville with Beaverbank Physiotherapy, due to a snowstorm in one case and a missed travel connection with his daughter in the other. The Contact Sheet notes that the Case Worker responded: "...these things

happen. He was obviously very sorry about missing these appointments.”

- A Contact Sheet dated September 6, 2005 notes that Kings Physiotherapy was contacted and the Worker’s missed appointments for August 16 and 18 were confirmed. On October 6 it was noted that the Worker had cancelled his September 30 and October 3 appointments but had attended that day.
- A Contact Sheet dated June 30, 2006 records a conversation between the Worker’s Case Manager and the Employer. The Employer “...was sure he told [the Worker] to come into work on Monday, not Wednesday.” The Employer had already spoken with the Worker. There is no indication that the Worker had returned to work on the Tuesday.
- An attachment to the Worker’s Notice of Appeal to Hearing Officer, dated July 12, 2006, indicates that the Worker returned to work on June 27. The letter describes the Worker’s return to work experience from June 27 to July 13, 2006.

Reasons for Decision

The information on file indicates that the Worker did miss or cancel several physiotherapy and psychology appointments. However, the same information also demonstrates that for many of these missed appointments, there were legitimate and reasonable explanations for the appointments being cancelled. In some cases this was even acknowledged by the Case Worker. The Worker made no attempt, in his testimony, to suggest that he did not miss or cancel the appointments as noted in the file record. His testimony was forthright in that regard.

I find that the Worker did miss a sufficient number of appointments to cause the Board’s Case Worker justifiable concern regarding his commitment to his program. The Worker was appropriately reminded, in January 2006, of his obligations under s.84 and the outcome of a future failure to meet those obligations. It is particularly concerning that, given the Worker’s apparently ongoing pain-focus and emotional state, that there is no record on file that he had the follow-up appointment with his psychologist after his FCE.

However, I do not find that the incident of June 26, 2006 was sufficient to warrant the action taken by Board. The return to work date had be delayed once, at the Worker’s request, for two days, and then once at the Employer’s request, to the following week. The Worker misunderstood the new start date after the Employer’s request. The Worker returned to work the day after the new start date; as soon as it was possible for him to return to work after learning of his error. Had he failed to return to work at all, or if he had failed to return to work on June 27, 2006, after direct contact on June 26 with both his

Case Manager and the Employer, suspension or termination of his benefits would have been warranted. However, that is not the case.

There is no independent corroboration from the Employer or the Board concerning the Worker's return to work on June 27; however, applying s.187 of the *Act*, and given the absence of evidence to the contrary, I accept that the Worker did return to work that day for approximately 2 weeks.

A suspension under s.84 implies a temporary break in provision of benefits. In this case, the Worker's benefits were, in fact, terminated. They were not reinstated even when the Board was advised, in the Worker's Notice of Appeal to Hearing Officer, that he had returned to work only one day later than had been anticipated. There is no evidence on file that the Board sought corroboration from the Employer to determine whether reinstatement of benefits might be appropriate.

Given the circumstances, I find that the merits and justice of the case, in accordance with s.186, warrant reinstatement of the Worker's compensation benefits. He is entitled to TERB from June 26, 2006, as well as medical aid from that date, for any prescriptions or treatments as had been previously covered by the Board before his termination.

The Worker's Adviser asked that the Worker's TERB be extended until such time as the Worker be assessed for a permanent medical impairment or pain-related impairment. He also requested that the Worker be considered for a vocational rehabilitation plan including an appropriate return-to-work program. These matters are properly remitted back to the Board for determination.

CONCLUSION:

The appeal is allowed. The Worker is entitled to reinstatement of his benefits as of June 26, 2006.