

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker, a licensed practical nurse ["LPN"] injured his back while transferring a patient on April 8, 2005. He continues to experience pain as a result of that injury. He was assessed by Phoenix Rehabilitation Services ["Phoenix"] in April 2006 and recommended as a candidate for their rehabilitation program. However, the Worker was also referred for narcotic detoxification, which was to take place before the Worker began the 8 week program at Phoenix, but apparently continued after the Worker began the Phoenix program on January 8, 2007.

The Worker was dismissed from the Phoenix program on February 2, 2007, for non-compliance. The Workers' Compensation Board [the "Board"] closed his claim effective February 4, 2007 as a result of this non-compliance. Under appeal to the Workers' Compensation Appeals Tribunal [the "Tribunal"] is the Hearing Officer's May 18, 2007 decision upholding the suspension of the Worker's benefits pursuant to s.84 of the *Workers' Compensation Act*, S.N.S 1994-95, c. 10, as amended [the "Act"].

In the Notice of Appeal to the Tribunal, his Workers' Adviser requested that the Tribunal consider addressing this appeal by way of a s.251 Reference to Hearing Officer decision. Neither the Board nor the Employer made any submissions on this request or the merits of the appeal.

ISSUES AND OUTCOMES:

1. Is a s. 251 Reference to Hearing Officer an appropriate disposition of this appeal?

Yes, but only for consideration of the Worker's eligibility for benefits and services under the *Chronic Pain Regulations*.

2. Were the Workers' benefits properly suspended under s.84 of the *Act*?

Yes. The success of the Phoenix rehabilitation program was dependent upon prior resolution of the Worker's drug dependency/addiction. The evidence establishes that the Worker began the Phoenix program before the Worker's addiction had been fully resolved. The Phoenix program was doomed to failure due to its premature commencement.

However, the evidence also suggests that, but for the Worker's addiction, which is derived from the pain he experiences as a result of his injury, the Worker would be able to undertake the rehabilitation program and/or return to work. I leave to the Board the determination of the Worker's entitlement, if any, to additional compensation benefits, including, as noted above (but not limited to) benefits and services under the *Chronic Pain Regulations*.

ANALYSIS:

1. Is a s. 251 Reference to Hearing Officer an appropriate disposition of this appeal?

Subsection 251(1) of the *Act* permits this Tribunal to refer appeals back to Board Hearing Officers. The Tribunal may refer an appeal back when the quantity or nature of new or additional evidence, or the disposition of the appeal, merits the referral.

The Worker's Adviser here sought the referral on the basis of the additional report from Dr. Don Brien dated April 29, 2007, after the Hearing Officer had rendered her decision.

At page 2 of his report, Dr. Brien responds to the question of whether the Worker suffers from chronic pain as defined in the *Act*, as follows:

It is difficult to determine the exact source of his pain. It could be from a soft tissue source or it could be from the spondylolisthesis. He does, however, have a pre-existing condition that could leave him at risk for developing low back pain. He certainly has pain disproportionate to the type of injury that precipitated the pain and his pain is continuing well beyond the normal recovery time. There do not appear to be any features in keeping with fibromyalgia or myofascial pain syndrome.

The Worker has not been considered for chronic pain benefits under the *Chronic Pain Regulations* by the Board. A Medical Advisor Opinion of February 19, 2007 dismisses the possibility of a PRI with the comment that it is unlikely given the Worker's refusal to participate in a program designed to evaluate that type of injury. However, this opinion was not incorporated into an appealable Board decision. The Worker is entitled to be considered for these types of benefits on the basis of Dr. Brien's evidence. The determination of the Worker's entitlement to chronic pain benefits is remitted back to the Board.

2. Were the Workers' benefits properly suspended under s.84 of the Act?

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 his failure to properly attend and participate in the Phoenix rehabilitation program.

In the Medical Evaluation section of the Assessment report prepared by the Phoenix team dated April 10, 2006, Dr. Robert MacNeill noted on page 3:

His second problem is Oxycontin abuse. I don’t believe that this was his intent, but this is the pit that he has fallen into in relation to his pain. We discussed detoxification processes and he is willing to begin that assessment. Dr. T. Crawford will be contacted and this case will be discussed with him to see what our options are from that point of view. That should be conducted in the first instance.

A Contact Sheet regarding a meeting held April 10, 2006 confirms that the agreement was that the Worker would meet with Dr. Crawford and begin the detoxification process before starting the Phoenix program. An April 18, 2006 telephone message from Dr. MacNeill confirmed that the program would not begin until the Worker had been “weaned from meds.”

The Worker was begun on a methadone program supervised by Dr. Crawford in June 2006. In January 2007 he was contacted regarding starting the Phoenix program. The Worker agreed, but was concerned about acquiring his usual morning methadone dose when the pharmacy did not open until 9:00 a.m., when the Phoenix program started at 8:00 a.m.

The Worker began the Phoenix program on January 8, 2007. On January 18th, Phoenix contacted the Board to advise that the Worker was disruptive, non-compliant, failed to attend regularly and fell asleep during sessions. At that time the decision was taken to discharge the Worker from Phoenix, even though he was not formally advised until February 2, 2007.

The Hearing Officer’s decision sets out in full detail the course and outcome of the Worker’s Phoenix program. It is clear from this information, which is uncontradicted, that the Worker was non-compliant with the Phoenix program. His difficulty with compliance is acknowledged in Dr. Brien’s April 29, 2007 report, particularly at page 3: “His compliance with the Rehabilitation Program was obviously a major issue. [The Worker’s] excuse for his poor compliance relates to the problems he has been having with his narcotic addiction and other stressors at home.”

Since his injury, the Worker has been prescribed, variously, pain medications including, but not limited to, Endocet, Percocet, Indocid and Motrin, as well as Lyrica. Some of these medications are codeine-based narcotics which are capable of addiction. This is the

situation which has arisen here; the Worker has developed an addiction to medications prescribed for him. There is no evidence to suggest that the Worker has been obtaining these narcotics illegally. I find, similar to *Decision 2003-582-AD* (March 29, 2004, NSWCAT) that the Worker has developed his addiction problem as a result of his repeated use of medications following his compensable injury. *Decision 2003-582-AD* was recently referenced and distinguished in *Decision 2006-1027-AD* (June 14, 2007, NSWCAT). In that case, the worker was using both prescription and street drugs, and became addicted to Percocet, which had not been prescribed for his compensable injury. He sought medical aid for the methadone which was being used to treat his addiction. His request for medical aid was denied, as the Appeal Commissioner found that it was “speculative to attribute Percocet addiction, a drug his doctors apparently did not prescribe for his shoulder, to the compensable injury.”

The instant case is distinguishable from *Decisions 2003-582-AD* and *2006-102-AD*. There is no evidence to suggest anything other than that the Worker developed his addiction as a result of the medications prescribed for him. His use of these drugs is related to his compensable injury; by extension, then his need for methadone is related to his compensable injury.

Dr. Brien’s April 29, 2007 report is explicit with respect to the likelihood of success of any rehabilitation program for the Worker: “I don’t believe that any Rehabilitation Program or return to work programs can be successful, considering his current mental and psychological state.” And earlier: “... it’s my impression that he first needs to get the narcotic and methadone issues dealt with.” This is consistent with the Phoenix reports which acknowledged that the Worker’s addiction was to be addressed as a prerequisite to his admission to the Phoenix program.

There is little evidence on file to explain how the Board came to the decision that the Worker was ready to begin the Phoenix program in January 2007. The basis for this decision is certainly not made explicit in the Hearing Officer’s decision under appeal. There is no report from Dr. Crawford on file which clears the Worker for participation in the Phoenix program based on successful addiction treatment.

I find that the decision to admit the Worker to the Phoenix program was made prematurely and without proper input from the Worker’s treating physicians. As a result, the success of the Worker’s participation in the Phoenix program was doomed from the start. As well, there was no accommodation made for the Worker’s continued methadone treatment after the program’s commencement, an issue which he raised with the Board before the program began.

In short, I find that the Worker’s compliance issues with the Phoenix program were virtually inevitable. His admission to the program in January 2007 was inappropriate.

Therefore, while the Worker was unquestionably non-compliant with the Phoenix program, his non-compliance should not, under the circumstances, have been unexpected.

Therefore, while the Board technically correctly terminated his benefits under s.84 of the *Act*, the Worker's admission to the program which led to his non-compliance was premature and ill-advised. The Board had or could have acquired the information necessary to a reasoned determination of whether the Worker's entry into the Phoenix program in January 2007 was likely to be successful. The Board did not do so. Therefore, the Worker is entitled to reinstatement of his benefits.

However, the evidence also suggests that, but for the Worker's addiction, which is derived from the pain he experiences as a result of his injury, the Worker would be able to undertake the rehabilitation program and/or return to work. I leave to the Board the determination of the extent of the Worker's entitlement, if any, to compensation benefits in addition to those under the *Chronic Pain Regulations*.

CONCLUSION:

The appeal is allowed in part. While the Worker was non-compliant with his rehabilitation program, the Board required his admission to the program without ensuring the prerequisite successful completion of his addiction treatment program. As the Board failed to ensure that the prerequisite conditions were met to promote the optimal opportunity for the Worker's success in the Phoenix rehabilitation program, the Worker may be entitled to reinstatement of his benefits. This shall be determined by the Board subject to consideration of the Worker's current ability to re-enter and complete the Phoenix program and/or return to work, dependent upon his current status with respect to his addiction treatment program.

Determination of the Worker's entitlement to benefits and services under the *Chronic Pain Regulations* is remitted back to the Board.