

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This appeal concerns the Worker's entitlement to temporary earnings-replacement benefits ["TERB"] between November 7, 2006 and May, 2007 in relation to a compensable right knee injury. The Worker was in receipt of benefits which were suspended on the basis that the Worker's earnings loss was not related to the injury, but to an unrelated medical inability to participate in treatments designed to aid recovery from the compensable injury.

Under appeal to the Workers' Compensation Appeals Tribunal is the Hearing Officer's December 18, 2006 decision which awarded the Worker TERB between September 21 and November 7, 2006, but not beyond that date.

The Worker's benefits were reinstated as of March 29, 2007; therefore, the period for which TERB is sought is November 7, 2006 through March 29, 2007, inclusive.

The appeal to the Tribunal proceeded by oral hearing held October 23, 2007. The Worker was the only witness. Submissions were made on his behalf by his Workers' Adviser, and on behalf of the Employer by their legal counsel. An additional medical report, the July 14, 2007 report of Dr. Douglas A. LeGay, was provided to the Tribunal and the other appeal participants on August 1, 2007.

ISSUE AND OUTCOME:

Is the Worker entitled to TERB beyond November 7, 2006?

No. The Worker's earnings loss between November 2006 and March 2007 was not related to his compensable injury, but was due to a delay in treatment for his compensable injury caused by a non-compensable health condition. The Board properly exercised the discretion under Board Policy Statement 1.3.2R to deny TERB during this period.

ANALYSIS:

Earnings replacement benefits are payable pursuant to section 37 of the *Workers' Compensation Act* S.N.S. 1994-95, c.10, as amended [the "Act"]. Subsection 37(9) of the Act provides that earnings replacement benefits are payable until the Board determines that a loss of earnings has ended or no longer results from an injury.

In *Decision 99-1954-AD* (February 19, 2000, NSWCAT), the Tribunal set out an analysis for a determination of entitlement to earnings-replacement benefits, including TERB. That analysis requires that the worker have suffered a loss of earnings, as a result of the injury, and be less than 65 years of age. A positive finding in response to each of the three points of the analysis entitles the worker to an earnings-replacement benefit, subject to the

determination of whether the worker has a permanent impairment. Entitlement to TERB hinges on the demonstration of a loss of earnings. The worker's earnings capacity is the focus of the inquiry.

The Worker's benefits were suspended pursuant to s. 84 of the *Act* and Board Policy Statement 1.3.2R. Section 84 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..."

Section 1 of Board Policy Statement 1.3.2R provides that:

1. Where a worker is unable to commence, or continue, medical treatment required with respect to the compensable injury for reasons which, in the opinion of the Board, are genuinely beyond the worker's control, compensation benefits will:
 - 1.1 continue to be paid for that period which the worker, in the opinion of the Board, would have been eligible to receive compensation benefits while undergoing treatment, had the treatment not been delayed or interrupted; or,
 - 1.2 be temporarily suspended and reinstated when the worker is once again able to commence or resume medical treatment,

whichever appears to be in the best interests of the worker.

The principal analysis for the provision of TERB requires that the loss of earnings be due to the compensable injury.

Although not expressly stated, nothing in Policy 1.3.2R (nor in any other Board Policy Statement, for that matter) can be interpreted to override this statutory requirement set out in s.37(1) of the *Act*.

The Hearing Officer set out the following explanation of the intent behind Policy 1.3.2R at

page 4 of her decision:

Generally speaking, if a worker suffers a loss of employment income as a result of compensable injury, Temporary Earnings Replacement Benefits (TERB) are payable while that worker is actively participating in the recovery process to help him or her return to the workplace in a safe and suitable manner. If the worker is unable to participate in medical treatment the Board determines is required as a result of the worker's compensable injury for reasons that are genuinely beyond that worker's control, a suspension of benefits normally occurs until the worker is able to resume treatment. This is consistent with Section 84 of the *Act* which requires a worker to seek out and cooperate in medical treatment that facilitates the worker's recovery. However, there are times when the suspension of benefits could cause the worker significant economic hardship. Policy 1.3.2R was developed to address these types of situations. Its intent was to give the WCB Case Worker an opportunity to coincide the timing of the benefit payable to a period that appears to be "*in the best interests of the Worker*". The WCB Case Worker has the option of either suspending benefits then reinstating them when the worker is able to participate or estimating the period of time a worker would have received medical treatment and then pay temporary benefits based on the duration of this estimated treatment period. It was felt that although this approach would not alleviate all the worker's economic hardships, it would provide the worker with notice to make alternative financial arrangements for the period of time when the WCB benefit was not available. Determining the worker's income flow should be a consideration in this decision. If the worker has an alternate income source or sick benefits available, then it might be more beneficial for the worker to receive WCB benefits for the anticipated recovery period at a time when the worker is no longer entitled to sick benefits.

In *Decision 2006-152-AD* (June 29, 2006, NSWCAT), the presiding Appeal Commissioner analysed Policy 1.3.2R as follows:

A decision-maker essentially has the choice of continuing to pay a worker as if the course of treatment had not been "delayed or interrupted", or to temporarily suspend benefits and reinstate them when a worker is able to commence or resume medical treatment. The wording would appear to preclude the Worker's requested remedy of both paying the Worker throughout the period of delay or interruption, and then continuing the benefits once the Worker commences or resumes the medical treatment.

In other words, Policy 1.3.2R does not alter the basic principle that compensation is only payable when the earnings loss is due to the compensable injury. It simply provides the Board with the discretion to pay benefits to which a worker is entitled, during a period of time when the worker would otherwise not be entitled to benefits, if it is in the worker's best

interests to do so. The effect is to substitute the time period during which benefits are paid, not the amount of benefits paid.

This is the interpretation which I will place on this Policy, albeit concurring with the comment of my colleague in *Decision 2006-152-AD* that this policy is “quite difficult to interpret.” This difficulty is exacerbated by the absence of elaboration by the Board in explaining the intent of the policy in the policy itself, or by way of examples.

The Worker’s Adviser has sought to circumvent the policy by adducing evidence that the Worker’s earnings loss during the period for which his surgery was delayed was related to his compensable injury. The only evidence in this regard is the report of the Worker’s family physician, Dr. Nina Makkar. Although there are two copies of this report on file, dated October 2 and November 2, 2006 respectively, a review of these reports confirms that they are, in all respects, identical except for the date. I accept the earlier date as the correct date of the report, and the second report as a reprint of the original on a subsequent date.

Dr. Makkar’s comments concerning the relationship between the Worker’s compensable injury and his development of hypertension were as follows:

It also seems very clear that the anxiety and stress level that the patient has experienced subsequent to his dealings with the Workers’ Compensation Board could have significantly contributed to his hypertension.

... I do believe that the hypertension is most likely related to the patient’s increased stress level. As any medical physician knows, while stress certainly cannot be the sole etiology of the patient’s hypertension given the fact that [the Worker] has a family history of hypertension and has subsequent to his injury become less active with the potential for weight gain the combination of factors may quite possibly have resulted in an exaggeration of his propensity for hypertension.

The argument based on this evidence is that but for the injury, the Worker would not have had dealings with the Board, and but for the injury, he would not have become less active and gained weight, therefore his development of hypertension is due to his compensable injury.

There are two Board Medical Advisor Opinions on file with respect to the Worker’s hypertension. On September 21, 2006, a Board Medical Advisor was asked whether the Worker’s angina was related to his compensable knee injury. She responded: “There is no relation between the workers right knee injury and the condition of angina.”

On November 14, 2006, a second Board Medical Advisor was asked to review Dr. Makkar’s report with respect to the same question. The response was:

There is no causal relation between his work related injury and Hypertension or heart disease. Hypertension is a multi factor disease. Most of the time it is idiopathic with no definite reason. Sometimes it is secondary to renovascular or endocrine diseases.

In the medical document date Oct 02, it is indicated that the family doctor asked the worker to stop the Physio as he was under investigation for his hypertention and heart disease. This suggestion seems reasonable, although his medical problems are non compensable. (*sic*)

The medical opinions all concur that the development of hypertension is multi-causal. It is clear that the Worker had a pre-existing propensity, demonstrated by family history, such that the potential to develop hypertension always existed. The sequelae of the compensable injury may or may not have contributed to the condition requiring treatment. This causal link is tenuous at best.

In making this finding, I have considered two recent Tribunal decisions, *Decision 2006-396-AD* (November 28, 2006, NSWCAT) and *Decision 2006-897-AD* (April 23, 2007, NSWCAT). Both of these decisions dealt with requests for medical aid for prescription medication for hypertension. The workers in both cases had suffered back injuries and attributed their development of hypertension to their inability to exercise and consequent weight gain to their injury.

In *Decision 2006-396-AD*, the Appeal Commissioner did not find the evidence persuasive that stress brought on the worker's hypertension. A Board Medical Advisor's opinion on that file listed many reasons for the development of hypertension, noting "that the stress of having a workers' compensation claim is only a very minor part of the etiology of hypertension... stress has been scientifically documented to play a much smaller role than smoking, diabetes, and hereditary factors." In that case, as here, although the worker did not smoke or have diabetes, there was a family history of hypertension. The worker's family doctor noted that a specific cause was difficult to determine, acknowledged that it was multi-factorial, but considered the worker's disability and sequelae to be a large component.

In *Decision 2006-897-AD*, a Board Medical Advisor noted that both hypertension and high cholesterol "have a mainly genetic etiology. In other words, both conditions are related to genetic factors plus life style choices. They are not related to his compensable injury." The worker's family doctor expressed an opinion to the contrary. While the Appeal Commissioner accepted that the worker's injuries had restricted his ability to exercise, increasing his risk of developing these conditions, she was "unable to conclude that the Worker's compensable injuries materially contributed to his development of these conditions" because "many factors other than weight and exercise play a role in the development of these conditions." She relied on the Board Medical Advisor's opinion that genetic predisposition was the main etiology.

Similar to the findings of my colleagues in these two decisions, I find that Dr. Makkar's opinion, in light of the medical evidence as a whole concerning the etiology of hypertension, to be speculative, and insufficient upon which to base a finding that the stress in dealing with a workers' compensation claim played a significant role in the Worker's development of hypertension. I do not accept that the Worker's development of hypertension is causally connected to his compensable injury so as to warrant the provision of benefits.

Policy 1.3.2R then becomes relevant. The Board had the discretion to pay the Worker during the time surgery was delayed, or to pay the Worker when the surgery took place and his post-surgical recovery period. He is not entitled to be paid for both periods of time. As the Worker testified on cross-examination by Employer's Counsel, he was not without funds during the time period for which benefits are sought. He was receiving short and long term disability payments through his Employer's insurer, as well as Employment Insurance benefits, which were repaid. The Board's exercise of the discretion afforded under Policy 1.3.2R was appropriate. The Worker is not entitled to TERB for the period sought.

CONCLUSION:

The appeal is denied. The Worker is not entitled to TERB beyond November 2006 through March, 2007.