

## Decision of the Appeal Division

**Number:** 91-0521  
**Date:** September 27, 1991  
**Panel:** Thomas Kemsley, Walter N. Peain, Alex S. Brokenshire  
**Subject:** Pregnancy

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This is an appeal by the worker from the findings of the Workers' Compensation Review Board dated March 9, 1989. The issue is entitlement to wage-loss benefits from November 30, 1987 to May 1, 1988.

The worker injured her low back on September 2, 1987 in the course of her employment as a health care worker. The injury occurred as she was squatting to help a resident tie up his shoelaces. The injury was diagnosed by her doctor as an acute low back strain. At the time, the worker was about four months pregnant. She had to stop working due to the injury. The Worker's Compensation Board terminated wage-loss benefits effective November 29, 1987 on the basis that the worker would have recovered from her low back strain as of that date, but for her pregnancy. That decision was communicated in a letter dated December 11, 1987.

The worker did not return to work after November 29, 1987. Her baby was born on February 12, 1988. She continued to experience low back pain. The claim was re-opened effective May 2, 1988 and terminated as of August 7, 1988 on the basis that she was fit to return to work on a graduated basis.

The worker appealed to the Review Board which denied the appeal from the decision of December 11, 1987.

The worker's wage-loss benefits were terminated, or interrupted, on November 29, 1987 as the claims adjudicator decided that she would have recovered and been able to return to work by that time if she had not been pregnant. This was based on the opinion of the Board medical advisor, Dr. J, and a report, dated November 9, 1987, from the attending physician, Dr. S. The Review Board found that the medical evidence established that the pregnancy "aggravated her compensable condition and delayed her recovery, so as to bring into play Paragraph No. 22.14 of the *[Rehabilitation Services and] Claims Manual.*" That section provides, in part:

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Where a worker has to undergo surgery, tests, or other treatment for a non-compensable condition or a non-compensable injury occurs prior to the worker's complete recovery from a compensable injury, and there is for that reason, a delay in his recovery or an aggravation of his condition, there are two possible methods for the Claims Adjudicator to deal with the situation.

The two methods that are then set out have the objective of paying benefits to the worker while she is disabled from the compensable condition but not for any extended period that recovery is delayed or prolonged by the effects of the non-compensable condition.

There is no reference to pregnancy in the *Workers Compensation Act* or the *Rehabilitation Services and Claims Manual* ("Manual"). Of course, at any time, a certain percentage of the work force is pregnant. Developments in the areas of human rights, under provincial human rights legislation, and constitutional rights, under the *Canadian Charter of Rights and Freedoms*, indicate that while pregnancy may often be treated in the employment context like an illness, it is not the same as illness and there is a limit to any analogy between the two. While both are common, pregnancy, like non-pregnancy, is a normal state while illness is not.

Since pregnancy receives no special mention in the *Act* or *Manual*, when it co-exists with a compensable condition it is analyzed under Section 22.14, or possibly 22.20, of the *Manual* as a "non-compensable condition" or "non-compensable injury." This must be done with great care as those words can cover illness, injury, pregnancy, and perhaps more. It will not always be appropriate to treat pregnancy as an illness or injury.

The Review Board applied Section 22.14 of the *Manual* as set out, in part, above. On November 29, 1987 the worker did not have to "undergo surgery, tests, or other treatment" for her pregnancy so it seems that the first part of Section 22.14 was not applicable. Thus, the Review Board must have considered that the worker's situation fit into the second part of Section 22.14 which reads, "or a non-compensable injury occurs prior to the worker's complete recovery from a compensable injury." This would seem to treat the worker's pregnancy as both subsequently occurring and an injury, even though it pre-existed her work injury and was not itself an injury.

Section 22.20 of the *Manual* addresses pre-existing conditions and says, in part;

Where a worker has a pre-existing non-compensable condition which is aggravated and rendered disabling by a work injury, the Board does not deny a claim for compensation just because the injury would have caused

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no significant problems if there had been no pre-existing condition. The Board accepts that it was the injury that rendered that condition disabling and pays compensation accordingly.

There is no reason why a pre-existing pregnancy, like any pre-existing non-compensable condition, cannot be aggravated by a subsequent work injury. If that happens, it is appropriate to apply Section 22.20 of the *Manual*, as set out above, rather than Section 22.14.

On October 29, 1987 Dr. J said this worker should be ready for work at the end of November. He did not see her again. In his report of November 9, 1987 Dr. S said she should be covered by the W.C.B. for three more weeks. Dr. S continued to see the worker and noted no improvement in her condition. In his report of December 1, 1987 he said she was not fit to return to work. In his letter of December 2, 1987 he confirmed that. In his letter of December 18, 1987 Dr. S disagreed with some of Dr. J's October 29, 1987 report and said that he erred in his own report of November 9, 1987 when he said that the worker should receive W.C.B. benefits for a further three weeks. Dr. S said he made that statement because Dr. J categorically told him that the worker would be cut off benefits at the end of November. A Board medical advisor, Dr. B, did not examine the worker but on December 9, 1987 he agreed with the decision to terminate benefits at the end of November on the basis that the back pain was not work related at that point. He, of course, could not say whether or not she was able to return to work at that time. His opinion was about causation. This opinion was later confirmed by the director of Medical Services, Dr. D, on January 7, 1988, who also did not examine the worker. Finally, Dr. P, Government Employee Health Services, examined the worker on November 19, 1987 and reported on November 23, 1987 that "it would be medically imprudent to return (the worker) to the workplace at this time in her own occupation in an unrestricted capacity."

Thus, from October to early December 1987, four doctors gave opinions. The most useful opinions are from the doctors who examined the worker closest to the end of November 1987. Dr. B did not examine the worker. Dr. J only saw her in October and speculated about her future return to work. His opinion could not take into account any change in her condition in November so was not current to the end of November 1987. Dr. P saw the worker on November 19, 1987 and Dr. S saw her on November 9, 24 and December 1, 1987. These are the opinions that are based on examinations closest to the relevant time. It is not clear from these opinions whether or not the worker could have returned to lighter duties at the end of November 1987. Both Dr. P and Dr. S said that she could not do her regular work but neither said explicitly that she could do other work. While they seem to have left open that possibility, there is no evidence that other lighter work was available or offered to the worker.

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This panel concludes that the worker was not able to return to work at the end of November 1987. This does not seem to have been seriously questioned by the claims adjudicator, who was mainly concerned about the cause of the worker's ongoing back problems.

As well, we are satisfied on the medical evidence that the worker's pre-existing pregnancy, on its own, would not have disabled her from work on November 29, 1987. This was over two months prior to her expected delivery date and the evidence of the worker and Dr. S was that she expected to work up until about two weeks prior to her delivery date. Thus, we are satisfied that her pre-existing pregnancy delayed her recovery from her work injury. On September 2, 1987 her work injury was disabling on its own. However, by November 29, when medical opinions indicated that the worker's work injury should have recovered, she was still disabled. We find that, at that time, she was disabled by her work injury in combination with her pre-existing pregnancy. Thus, the worker's wage-loss benefits should not have been terminated on November 29, 1987.

However, this panel does not find that the worker should have received wage-loss benefits throughout her pregnancy and post-birth period. There was a point at which her pregnancy, on its own, would have prevented her from working. She also had planned to be out of the work force for a certain period of time and was not disabled from working for that period of time. Thus, it is not appropriate to treat the entire period of pregnancy like a pre-existing condition under Section 22.20.

Since, generally, all pregnancies that result in the birth of a child will remove the mother from the work force for some period of time, it is useful to reconsider Section 22.14 of the *Manual*. The first part of Section 22.14 addresses the situation where a worker has to undergo treatment for a non-compensable condition. When a woman is confined to hospital to give birth to a child, she is undergoing a form of "treatment" for her pregnancy and this could be seen as a delay in her recovery for the purposes of Section 22.14. However, that section does not really fit cases like this worker's very well, where the worker eventually goes back on wage-loss benefits without any further aggravation of her compensable injury. It would be difficult in situations like that to say that the period in hospital *delayed* her recovery.

Another section of the *Manual* which is useful to consider here is Section 34.52. While pregnancy may have little to do with "Workers Undergoing Educational or Training Program" there is a useful analogy that can be drawn between Section 34.52, number 2 "Re-training or Educational Program Arranged Prior to Injury" and the later stages of pregnancy and post-birth period. Generally, when a worker is receiving wage-loss benefits, those benefits are not terminated just because the worker had a regularly scheduled vacation or the worker's place of employment is shut down or goes

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on strike. That is because, but for the compensable injury, the worker could still have worked elsewhere while he or she was on vacation or his or her place of employment was shut down or on strike. Thus the compensable injury has disabled the worker from the work force generally. However, workers who have arranged to undertake a re-training or educational course with respect to career development that will involve time off work, do not receive wage-loss benefits during this planned time off work if, after making these arrangements, they suffer a work injury that disables them from working during this period. The Board's policy as set out in Section 34.52, number 2, says that:

... the worker would be anticipating a period when he will receive no earnings ... (and) ... his financial position while taking the course is no worse because of the injury than if there had been no injury ... therefore, the Board considers that a worker is not disabled as a result of his compensable injury and no wage loss compensation is payable while he is undertaking a training or educational program arranged prior to his injury.

Pregnancy has some similarities to that situation. The worker was pregnant at the time she was injured and thus, necessarily, would have taken time away from the work force. As in Section 34.52, for that period of time she would not be disabled as a result of her compensable injury and her financial position during her planned period of maternity leave would be no worse because of the injury than if there had been no injury. It is not like a strike or vacation, where the worker could work elsewhere.

In the simplest case, where a worker's compensable injury occurred the day before the beginning of her planned maternity leave and she chose to remain on maternity leave for the full period which she had planned in advance, this would mean that wage-loss benefits would not be payable for that full period of maternity leave. This could be six months for some women but much less for others, with a doctor's approval.

However, most situations will not be that simple. In this worker's case, she had planned to take maternity leave beginning some time in January 1988 but she said she was pressured to start her maternity leave at the end of November 1987. She was told that her wage-loss benefits would be terminated at that point and she considered herself unable to return to work. As noted above, Dr. S and Dr. P supported her and Dr. B said nothing about her ability to work. Thus, the fact that she started maternity benefits at the end of November is not an accurate indication of when she planned to be away from work due to her pregnancy. The panel notes that she applied for maternity leave on December 16, 1987 after wage-loss benefits were terminated. Her wage-loss benefits should not have been terminated, in these circumstances, just because she went on maternity benefits at the end of November 1987. Rather, it is necessary to determine what period of time the worker would have taken off work due to her pregnancy, but for her compensable injury.

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Since both the worker and Dr. S said that she planned to work until two weeks before her expected date of confinement, and there is no evidence to suggest that but for the work injury she would not have been able to do that, we conclude that she would have worked until two weeks before her expected date of confinement. At that point she would have stopped working and thus would not have been disabled as a result of her compensable injury, and wage-loss benefits would be properly terminated at that point. The worker would then be eligible for wage-loss benefits again when her absence from work due to pregnancy had ended, provided she still had a compensable condition.

While the worker was entitled to six months of maternity leave, this does not mean that she would have taken or remained on maternity leave for that full period. Therefore, the gap in wage-loss benefits cannot necessarily just correspond with the maximum amount of maternity leave or benefits. In each case it is necessary to try and determine how long the woman would have remained on maternity leave. This will require consideration of the woman's evidence, her doctor's opinion and the maternity leave policy of the employer.

In this case the maximum maternity leave was six months; however, according to the May 2, 1988 letter of the employer, once on maternity leave, a woman could apply to have her maternity leave shortened. Thus, even if the worker had originally planned to take the full six months of maternity leave, that does not necessarily determine that she would have stayed on maternity leave for six months.

On April 26, 1988 the worker attempted in writing to rescind her maternity benefits back to March 26, 1988. She referred to having verbally expressed this in mid-March. This application was rejected, as outlined in the employer's letter. If the worker had made a formal application prior to March 26, 1988 to terminate her maternity leave, and provided proper notice and a medical clearance as required, then it might have been possible to determine that, but for her compensable injury, she would have returned to work on March 26, 1988 and thus wage-loss benefits should have been resumed. However, since the worker only formally applied to terminate her maternity benefits on April 26, 1988, and with no supporting medical evidence, it was appropriate here to consider that her maternity leave terminated on the planned date of May 1, 1988 and recommence wage-loss benefits as of May 2, 1988.

Therefore, the worker's appeal is allowed to the extent that wage-loss benefits are extended from November 30, 1987 until two weeks before her expected date of confinement, which, according to Dr. S's letter of January 25, 1988, was February 9, 1988.

*Editors' note: This decision has been edited for publication.*