

Decision of the Review Division

Number: 2523
Date: October 2, 2003
Review Officer: Nick Attewell
Subject: Reopening on “Application”

The worker requests a review of the decision of the Workers’ Compensation Board (the “Board”) dated April 7, 2003. The worker provided submissions along with his request for review and a further submission from a workers’ adviser was received on June 27, 2003. The employer was invited to participate in the review but made no response.

Section 96(6) of the *Workers Compensation Act* (the “Act”) gives a review officer authority to conduct this review.

Issue(s)

The issue on this review is the Board’s decision not to reopen the claim for a fall downstairs at home on December 9, 2002, and surgery carried out on July 18, 2003.

Background

The worker underwent several lower back surgeries following a work injury in 1992. On August 31, 2002, temporary disability benefits were terminated on the grounds that the worker’s condition had plateaued. On December 9, 2002, the worker fell downstairs at home. In February 2003, it was found that a fusion of the lower back performed in 2001 had failed and that further surgery was needed. The surgery was carried out on July 18, 2003. Reopening of the claim for further temporary disability benefits was denied on the grounds that the fall was a new non-work injury and the surgery was not a result of the prior accepted surgeries.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- The worker injured his lower back at work on July 14, 1992.
- In August, 1995, a fusion of the L4 to S1 levels was carried out.
- On October 10, 2000, Dr. B suggested that it might be of benefit to extend the fusion from the L4 to L2 level but he would first do tests. In commenting in a memo dated November 17, 2000, the Board medical advisor, Dr. G, noted that it was a well known fact that, following any fusion procedure in the lumbar spine, there is an accelerated deterioration of the mobile segments above the fused area, and “this was evidently going on” in this case.

- On July 27, 2001, surgery was carried out. The report referred to a bilateral L3 laminectomy and instrumental fusion from L3 to L5. However, a subsequent x-ray report of October 25, 2001, and MRI report of January 18, 2002, indicate that the fusion must have been extended to the L2-3 level of the lumbar spine.
- Temporary disability benefits were terminated on August 31, 2002, on the basis that the worker's disability had plateaued. Rehabilitation payments then commenced for which the worker provided regular reports of his search for jobs.
- On November 26, 2002, the attending physician, Dr. T., reported ongoing severe back pain and that the worker was incapable of working full duties, full time.
- On the job search report form for December 9, 2002, the worker wrote that he fell down nine flights of stairs and could not get out of bed for three days.
- The attending physician, Dr. H, reported the fall on December 12, 2002, and advised that the worker was completely incapable of working. The worker could not do anything related to standing, sitting, or bending due to constant pain. A similar report was submitted on January 6, 2003.
- A claim log entry for January 13, 2003, by the vocational rehabilitation consultant states that the worker had telephoned the case manager before Christmas to advise about the fall and had been asked to provide a medical report.
- In a letter dated February 13, 2003, Dr. B reported that the worker's back pain was getting progressively worse. The doctor reviewed a bone scan and x-rays taken on February 5, 2003, and suggested further surgery to correct problems with the worker's fusion, notably a loose screw at L2 and movement at L2-3.
- A March 17, 2003 report was provided by Dr. B. He advised that the worker had ongoing back and leg pain as a result of the injury. He had a fall down some stairs because of his ongoing leg problems that resulted in further exacerbation of the pain.
- The April 7, 2003 decision found that a non-compensable fall at home had produced a need for further surgery. Therefore, the claim would not be reopened for further temporary disability benefits. This decision followed reviews of the claim by the Board medical advisor, Dr. A. He concluded that the fall was unlikely to have resulted from the worker's compensable condition, there were no objective medical findings in the reports following the fall and the possible problem at the L2 level referred to by Dr. B was not related to the work injury.
- The proposed surgery was carried out on July 18, 2003. The report refers to a removal of spinal instrumentation (L2, L3, and L4 pedicle screws and rods) and repeat fusion at L2 and L3.
- An opinion dated September 18, 2003, was obtained from the Review Division medical advisor, Dr. P. He suggested that the fall at home could have damaged the previous fusions, but the medical evidence immediately following the fall showed no objective clinical changes. Furthermore, the x-rays taken in February 2003 showed bone resorption around

the screw at L2 that was more typical of a slow process of deterioration. The medical advisor pointed out that a fusion at the L2 level must have been performed in July 2001. This surgery was accepted by the Board and the July 2003 surgery was a consequence of the prior surgery. Finally, because of his prior injuries, the worker's proprioception in his lower extremities was partly compromised. This could make him feel clumsy and more prone to injuries by falling. On the other hand, the fall could have resulted from other causes. The prior medical reports do not support the existence of a weakness in the legs.

Law and Policy

The Act

The law applicable to this review is found in sections 29 and 30 of the Act. These sections provide for the payment of temporary disability benefits for a temporary disability resulting from a work injury.

Also material is section 96 of the Act, which provides in part as follows:

- (2) . . . at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,
 - (a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or
 - (b) there has been a recurrence of a worker's injury.
- (3) If the Board determines that the circumstances in subsection (2) justify a change in a previous decision respecting compensation or rehabilitation, the Board may make a new decision that varies the previous decision or order.

With regard to the jurisdiction of the Review Division, section 96.2(2)(g) states that "no review may be requested . . . respecting . . . a decision to reopen or not to reopen a matter on an application under section 96 (2)." Such decisions are appealable direct to the Workers' Compensation Appeals Tribunal ("WCAT") under section 240(2) of the Act.

Policy

Policy C14-102.01 (Changing Previous Decisions – Reopenings) of the *Rehabilitation Services and Claims Manual* discusses when section 96(2) and (3) apply and when a reopening decision is reviewable.

Reasons and Decision

This case raises two main questions that will be dealt with in turn: whether there is a right of review and, if there is such a right, what should be the decision on the merits of this case.

1. Does the Review Division have jurisdiction?

Section 96.2(2)(g) states that the Review Division has no authority respecting a decision to reopen or not to reopen a matter on an application under section 96(2).

The term “reopening” is commonly used to indicate the administrative act of recommencing payments or starting new payments on a claim at a time subsequent to the initial adjudication. However, there are a variety of circumstances in which this can occur. Section 96(2) does not cover all of these. It is confined to the “reopening of a matter that has been previously decided by the Board.” If a claim is reopened for a reason that is unrelated to any prior decision, section 96(2) does not apply. This requirement of section 96(2) is met in this case as a decision was made to terminate benefits in August 2002 on the basis that the worker’s condition had plateaued. A payment of temporary disability benefits after the December 9 incident would involve a reopening of that decision since it would necessitate a conclusion that the worker’s condition had ceased to be plateaued.

It might be suggested that the payment of further temporary disability benefits would be inconsistent with and involve a reconsideration rather than a reopening of the earlier decision. A reconsideration would not fall under section 96(2) but be covered by section 96(4) and (5). However, as policy C14-102.01 states:

A reconsideration occurs when the Board considers the matters addressed in a previous decision anew to determine whether the conclusions reached about these matters were valid. Where the reconsideration results in the previous decision being varied or cancelled, it constitutes a redetermination of those matters.

In this case, the validity of the August 2002 decision is not being questioned as far as it applied to that time and the time up to December 9. As policy C14-102.01 also states:

The reopening of a previous decision does not affect the application of the decision to the period prior to the significant change in the worker’s medical condition or the recurrence of the worker’s injury. Rather, it allows compensation or rehabilitation to be varied subsequent to, and as a result of, the significant medical change or recurrence. . .

Since 96(2) applies to this case, the Review Division jurisdiction depends on whether the reopening is “by application” or on the Board’s initiative. There is no definition of “application” in the Act or policy. The definition in the *Gage Canadian Dictionary* refers to “a request (for employment, an award, tickets, etc.)” Obviously, for there to be an application under section 96(2), a request must be received from the worker.

The submission of a request differs from a reporting of information. In this case, both the worker and the attending physician submitted written reports of what happened on and following December 9. However, neither of these documents specifically requested the Board to reopen the claim. There is also evidence of the worker telephoning the Board to ask for benefits, but I do not feel that such a general request is an application within the meaning of section 96(2). More is required for this purpose. The worker must specifically refer to section 96(2) or use language substantially similar to that section.

This conclusion may seem technical but is the one that best fits the intent of the system and the general way in which the Board adjudicates claims. Pursuant to section 96(1) of the Act, the Board operates an inquiry as opposed to an adversary system of adjudication. This means that the Board normally takes the initiative to inquire, determine, and pay any benefits to which a worker is entitled. One of the advantages of this is that workers or other persons involved in the system should not need trained representatives or expert knowledge but should be able to rely on the Board to take whatever action is necessary on a claim.

It is often difficult in practice to distinguish the reopening of decisions from reconsiderations of decisions or decisions on issues that have not yet been decided, and in the case of reopenings, to identify if an “application” was made. Different evidence and submissions at different points in the adjudication, review and appeal processes can cause different characterizations of the same matter. Since the jurisdiction of the Review Division and WCAT depends on that characterization, it is important to have a clear definition of these terms. This definition needs to recognize the Board’s normal role of taking the initiative. Limiting the “application” to situations where the worker specifically refers to section 96(2) or uses substantially the same language should meet these purposes.

There is no prejudice to the worker or employer in establishing this definition of “application.” Any decision of the Review Division on a reopening issue is appealable to WCAT.

2. Merits of the Claim

Section 96(2) allows a reopening in two situations: there has been a significant change in the worker’s medical condition that the Board has previously decided was compensable, or there has been a recurrence of a worker’s injury.

There is a question whether this claim falls within either of these situations. With regard to the first, there is evidence that the complaints following the December 9 incident do not represent an objective change from the prior complaints and that the July 2003 surgery is not related to the worker’s surgeries previously accepted under the claim. Furthermore, even if a basic relationship to the previous surgeries were accepted, the April 7, 2003, decision suggests that there was an intervening non-compensable incident at home that was the immediate cause of the problems. Section 96(2)(a) does not explicitly refer to the possibility of a non-compensable injury intervening to cause a change in a worker’s compensable condition. However, the provisions of the Act generally, including sections 29 and 30, require that a disability result from a work injury before benefits are payable.

With regard to whether there is a recurrence, the fact that the December 9 incident may not have been work related also causes a difficulty. In discussing the meaning of “recurrence” policy C14-102.01 states:

A recurrence of injury that entitles a worker to request a reopening of an existing claim is to be distinguished from a new injury that entitles the worker to make a new claim.

“Recurrence” refers to a recurrence of the original injury without a second compensable injury. For example, where a compensable injury is aggravated by a second compensable injury, the first injury has not “recurred”. Rather a new

injury has occurred that will result in a new claim. The decision whether to reopen the existing claim or initiate a new claim will depend upon the evidence in each case.

This would suggest that the occurrence of a new non-compensable injury would not be a “recurrence” for the purpose of section 96(2)(b).

To assist in answering the medical questions arising from the application of section 96(2), the September 18, 2003, opinion was obtained from Dr. P.

As pointed out in Dr. P’s opinion, the July 2003 surgery flowed directly from the 2001 surgery, which was accepted under the claim. It appears that confusion has been caused by the fact that the report for the 2001 surgery does not reference the fact that a fusion to the L2 level was carried out. There appears to be no reasonable basis for separating the worker’s symptoms at the L2 level from the others accepted under the claim. As was pointed out in Dr. G’s memo of October 10, 2000, it is not unusual for a fusion to cause difficulties in the levels of the spine above it.

Even if there is a relationship between the July 18, 2003, surgery and prior compensable surgeries, the decision not to reopen the claim would be correct if the immediate need for the new surgery was caused by the December 9 incident and this is considered a new non-work injury. With regard to causation, support is provided for the December 9 incident not being of causative significance by the reports of Dr. P and Dr. A, stating that the immediately following medical reports provide no objective findings of significant change in the worker’s condition. Dr. P also notes that the x-ray findings in February that first indicated the need for the new surgery were more typical of a slow process rather than a traumatic incident. In his March 17, 2003, report, Dr. B states that the fall worsened the worker’s pain but he did not indicate the fall caused the failure of the prior fusion. With regard to whether a new non-work injury occurred, the worker argues that the compensable disability caused the fall by making his leg give out. Dr. B’s March 17, 2003, report supports this view. The report of Dr. P recognizes this possibility but also points out the lack of clinical observations to support a weakness of the legs. On balance, I have concluded that the fall at home was not a significant cause of the need for the later surgery, which therefore should be accepted as part of this claim.

Conclusion

As a result of this review, I vary the Board’s decision of April 7, 2003. The claim will be reopened for the surgery on July 18, 2003.