WCAT Decision Number: WCAT-2004-00059-RB
WCAT Decision Date: **January 09, 2004**
Panel: Mike Swetlikoff, Vice Chair

Introduction

In a June 13, 2002 letter a Workers' Compensation Board (Board) case manager informed the worker, a self-employed furniture mover/auctioneer, on the basis of an ergonomist's report, and the opinions of a Board medical advisor, that he decided the worker's left lateral epicondylitis was not due to the nature of his employment.

The worker disagreed with the decision and appealed. He said that his physician of 25 years, the ergonomist and he all believe that his condition is work related. The worker also said he seeks acceptance of his claim, health care benefits, and wage loss benefits from April to September, 2002.

Issue(s)

Was the worker's left lateral epicondylitis condition, diagnosed on April 25, 2002, due to the nature of his employment?

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

Section 250(2) of the *Workers Compensation Act* (Act), as amended, requires that I apply the policies of the board of directors of the Board in reaching my finding which, is required to be based on the merits and justice of the case.

Background and Evidence

On April 25, 2002 the worker attended his physician to whom he described an onset of left elbow discomfort about two months prior. The attending physician said the worker seemed to clearly relate his symptoms to his employment, but it was not clear as to what particular employment activity started the symptoms. He also said there was no history of injury. On examination, the physician found full range of motion of the elbow joint, and tenderness over the lateral epicondyle. There was no obvious swelling and grip strength was normal. He diagnosed lateral epicondylitis and said that the worker was not disabled from work.

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On May 8, 2002 the worker filed an application for compensation. He attributed his "tennis elbow" condition to years of repetitive motions at work. He also said that he was self employed and was continuing to work.

In a May 15, 2002 memo the case manager set out his May 10, 2002 conversation with the worker. The case manager said the worker advised that:

- His left elbow pain resulted from years of repetitive motions on the job.
- There was no traumatic incident or injury that was responsible for the onset of his pain.
- The pain developed gradually in the two months prior to his April 25, 2002 visit with his physician.
- There had been no change in his work or workload when his symptoms had onset.
- He had not been involved in any motor vehicle accidents that produced a physical injury.
- He was not using any medication when his left elbow pain onset.
- He has no history of arthritis, diabetes, or thyroid problems.
- He had no prior problems with either elbow.
- His recreational activities include playing golf once a week and jogging five miles twice per week.

On May 22, 2002, Ms. Ledwidge, a worksite evaluator assessed the worker's employment tasks for occupational risk factors for developing lateral epicondylitis in his dominant left arm. In her report of June 3, 2002 Ms. Ledwidge said she determined that the worker was exposed to forceful gripping (lifting and carrying) of furniture on an occasional to frequent basis (33 to 66 percent of the workday) from Monday to Thursday, more occasional on Fridays (up to 33 percent of the day) and frequently on Saturdays (up to 66 percent of the working time). She also said that exposure time to forearm rotation varied considerably over the course of the week depending on the number and frequency of chair or table legs to be screwed off for storage and on for display. She also said the worker could not recall any changes to his duties or routine that might have contributed to the onset of his forearm discomfort. She also said that static gripping of the clipboard (up to three hours continuously on Friday evenings) using a left-handed vice grip with the wrist extended by 20 to 30 degrees fell within the category of moderately forceful loading of the affected muscles and tendons.

In a May 30, 2002 memo the case manager requested a medical opinion with regard to:

- Was the diagnosis of epicondylitis was confirmed?
- Were the described work activities, from a medical perspective, seen as frequent, repetitive, and forceful movements capable of stressing the affected tendon(s) to the point of producing a lateral epicondylitis?
- Were there any significant non-occupational risk factors?
- Were there any medical factors that may have been overlooked?

In a June 10, 2002 memo Board medical advisor, Dr. Hemmerich responded. He said the diagnosis of left lateral epicondylitis was confirmed. He also said the worker was well-accustomed to his employment duties with no significant changes in the duties over the last few years, and specifically no significant change or mechanism of injury noted at work to explain the onset of the worker's symptoms. Dr. Hemmerich also said, "I do not think work activities can be considered significant with respect to causation of his left lateral epicondylitis."

In a progress report of July 4, 2002 the attending physician reported finding tenderness over the worker's left lateral epicondyle, but not swelling, and a full range of motion of the elbow joint. He said there was some discomfort on extension of the wrist and with gripping. The attending physician also said the worker, "spends very long periods of time holding a clipboard in his left hand, which could easily put excessive strain across the extensors of the forearm."

This self-employed worker's appeal was heard on December 17, 2003. He was not represented. Of his own volition and in response to questions the worker said his symptoms progressively increased causing him to suffer sleep deprivation and the need to hire a helper more frequently and for longer periods of time due to his inability to lift items with his left arm. He said from April 2002 to sometime in June, 2002 he had to hire the helper more frequently and for longer periods. He requested that he be reimbursed the extra wages that he had to pay to the helper because he could not do the work himself. The worker also demonstrated for the panel how he held the clipboard with his left hand prior to and at the time of his symptoms onset. The worker and the panel agreed that the weight of the legal-sized clipboard together with approximately three quarters of an inch of legal-sized papers weighed about five pounds. The worker also advised that, on the recommendation of the ergonomic evaluator, he started to hold the clipboard by cradling it in his left arm, rather than with a vice grip.

The worker also told the panel that in December 2001 he and his wife went to Mexico on holidays. While in Mexico all he did was lay about and enjoy the sun. He played no golf, did no strenuous swimming, did no parasailing, did no playing of beach volleyball, etc. He said they returned from their two week holiday on December 23, 2001. He additionally said that he did not return to work until January 7, 2002 after the Christmas season. The worker additionally stated that he used to play fastball and soccer, both of which he stopped playing in 2000.

The worker also said that as a self-employed owner/operator of a business he could not, and did not seek medical attention or take time off from work each time he had a bruise, ache, sprain, pain, or pulled muscle, etc. He also said a great deal of his work tasks required him to move furniture and appliances much of which involved very heavy lifting, in awkward postures, with awkward gripping of objects and with an arm or arms extended away from the body.

Findings and Reasons

Section 6(1) of the Act provides compensation for occupational disease where the disease is "due to the nature of a worker's employment."

Epicondylitis, both medial and lateral, has been declared an occupational disease by the Board under section 1 of the Act. Chapter 4 of the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) sets out the published policy of the Board concerning occupational diseases. Policy statements concerning some individual diseases are provided. Epicondylitis is one such condition.

Item #27.31 of the RSCM discusses epicondylitis. It states, in part:

> The Board recognizes that where the worker was occupationally performing frequent, repetitive, forceful and unaccustomed movements (including forceful grip) of the wrist that are reasonably capable of stressing the inflamed tissues of the arm affected by epicondylitis, and in the absence of evidence suggesting a non-occupational cause for the worker's epicondylitis condition, a strong likelihood of work causation will exist. These factors are not preconditions to the acceptance of a claim for epicondylitis nor are they the only factors which may be relevant. For example, lateral epicondylitis has been shown to occur in tennis players (some studies showing a strong causative association) who are well accustomed to the motions and forces involved. The issue to be determined in any individual claim is whether the evidence leads to a conclusion that the epicondylitis is due to the nature of the worker's employment.

In this case I accept the worksite evaluator's expert evidence that the worker displayed a tendency to lift smaller or lighter items (less than 20 pounds) with a pronated power

grip or hook grip (palm facing downward) using the left or right arm. As the pieces were lifted, the elbow was extended beyond 110 degrees and the wrist flexed due to the weight of the object. The evaluator also advised that static gripping of the clipboard for up to three hours continuously on Friday evenings, using a left-handed vice grip with the wrist extended by 20 to 30 degrees, fell within the category of moderately forceful loading of the affected muscles and tendons. She additionally said the worker was exposed to forceful gripping (lifting and carrying) of furniture on an occasional to frequent basis from Monday to Thursday and frequently on Saturdays up to 66 percent of the working time. It was the worker's physician's opinion (July 4, 2002 progress report), that the worker spends very long periods of time holding a clipboard in his left hand. He said this could easily put excessive strain across the extensors of the forearm.

On the basis of the worksite evaluator's expert opinion coupled with the opinion of the attending physician and the worker's statements about his employment tasks I find that the most likely causes of the worker's diagnosed left lateral epicondylitis condition were his employment tasks of handling and moving furniture and appliances coupled with his use of a left-handed vice grip for up to three hours for gripping a clipboard weighing about five pounds.

I also accept the expert opinion of the worksite evaluator who said the worker had to handle furniture and appliances with awkward dimensions and heavy weight of up to 150 pounds and greater. He also had to do awkward lifting to various heights from floor level which involved awkward elbow and wrist postures. She said the worker used a vice grip with his fingers flexed and with extended joints in a hook or power grip. I also prefer the expert opinion of the attending physician who had assessed the worker on a number of occasions to the opinion from Board medical advisor Dr. Hemmerich who never interviewed or examined the worker. I find that Dr. Hemmerich had little or no understanding of the worker's employment duties and tasks or of the awkward postures and heavy weights involved in carrying out those tasks. There was no evidence before the Board that some activity, away from employment, caused the worker's diagnosed condition.

In accordance with item #27.31 of the RSCM I find that the worker's diagnosed epicondylitis condition was due to the nature of his employment as a furniture mover/auctioneer.

I accept the worker's statement that he had to hire a helper more frequently and for longer durations between April and June 2002 because of his left elbow symptoms which precluded him from carrying out some of his work tasks.

Item #71.50 of the RSCM discusses payments for substitutes. It provides:

> If a disabled worker pays another person to do the job and the worker performs no functions, a refund can be made to the worker of 75% of the amount paid. … The substitute must normally provide written confirmation of the amounts paid to him.
>
> A claimant may be partially able to perform the normal work or work full-time at other types of work, but pay a substitute to carry out jobs which the claimant is unable to do. Compensation will still be paid in respect of the payment to the substitute but only to the extent of the difference between the value of the work being performed by the claimant and the lesser of his pre-injury earnings and the statutory maximum. Where the value of that work exceeds pre-injury earnings or the statutory maximum, no compensation is paid.
>
> Where the claimant is a principal of a limited company, the amount paid to a substitute may be one indication of the principal's pre-injury earnings level if these earnings are not otherwise clearly ascertainable because, for example, earnings have consisted of sporadic withdrawals from the income or profits of the corporation. If the principal continues to work in the business after the injury while employing a substitute to carry on part of the pre-injury functions, the amount paid to the substitute may, in comparison with the pre-injury earnings, be a factor in computing the value of the principal's post-injury work. Regard would, however, also have to be had to the nature and extent of the principal's activities after the injury compared with before the injury and the continued income received from the business after allowing for the costs of operation.
>
> Where a claimant has personal optional protection, benefits are calculated without regard to the fact that the claimant is employing a substitute to do all the pre-injury work. If, however, the claimant is still doing part of the work, or otherwise participating in the operation of the business, the payment to the substitute may be a factor in determining the value of the claimant's post-injury work for the purpose of computing temporary partial disability benefits under Section 30.

In accordance with item #71.50 of the RSCM I direct the Board to investigate the worker's claim that he had to hire a helper more frequently and for longer durations after his injury than he had done prior to his injury under the claim. I further direct the Board to determine the benefits to which the worker is entitled under item #71.50 of the RSCM and pay such benefits to the worker. I also direct the Board to provide health care benefits to the worker under this claim.

Expenses for mounting the appeal were not requested and I award none.

Conclusion

I find that the worker's diagnosed left lateral epicondylitis condition was due to the nature of his employment as a furniture mover/auctioneer. Accordingly I vary the Board's decision and allow the worker's appeal.

Mike Swetlikoff
Vice Chair

MS/hba/cmm

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