An amendment was issued for WCAT-2004-00071 and is attached to this document.

WCAT Decision Number: WCAT-2004-00071-RB
WCAT Decision Date: **January 09, 2004**
Panel: Nora Jackson, Vice Chair

Introduction

In a decision letter dated February 21, 2001, a Workers' Compensation Board (Board) entitlement officer advised the worker that no new injury to the worker's back and neck were accepted as having resulted from the work conditioning program in which she had participated. Her wage loss benefits were terminated effective January 26, 2001. The worker appeals that decision (Appeal A).

In a decision letter dated January 16, 2002, a manager of the Board's entitlement unit advised the worker that the grounds for reconsideration of the February 21, 2001 decision had not been met. The worker appeals that decision (Appeal B).

Issue(s)

Were the worker's neck and upper back symptoms, which she attributed to activities at the work conditioning program, compensable, either as a new injury or as an aggravation of the worker's pre-existing condition? (Appeal A)

Was the worker still temporarily disabled as a result of her compensable injury after January 26, 2001? (Appeal A)

Should the Board's February 21, 2001 decision be reconsidered, based on the new evidence submitted by the worker? (Appeal B)

Jurisdiction

These appeals were filed with the Workers' Compensation Review Board (Review Board). Pursuant to Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, the former Review Board and Appeal Division have been replaced by the Workers' Compensation Appeal Tribunal (WCAT) effective March 3, 2003. Section 38 of the legislation provides that all Review Board appeals are to be transferred to WCAT to be completed as WCAT appeals, unless a panel of the Review Board had completed an oral hearing, or unless written submissions were completed and a panel of the Review Board had commenced deliberations, before March 3, 2003.

As these appeals were not considered by a Review Board panel by March 3, 2003, they were transferred to WCAT and have been considered as a WCAT appeals except that

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no statutory time frame applies to the making of this decision. One effect of this change is that WCAT must apply policies set by the board of directors and the former governors of the Board.

Background and Evidence

I have reviewed the evidence in the claim file, the evidence presented at the oral hearing held in Nanaimo, British Columbia on November 18, 2003, the *Workers Compensation Act* (Act) in effect at the time of the events here in question, and applicable Board policy as set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM). Interested parties have full disclosure of the claim file available to them, and the medical and claim history will not be repeated in detail here except as relevant to the current appeal.

The worker was employed by the employer as a registered nurse. The worker had a facet joint injury in 1980, a motor vehicle accident in 1992, a lumbar strain in 1997, from which she apparently made a full recovery, and a compensable injury in 1999, accepted for a back strain. The worker advised that she had been having ongoing neck and back discomfort for a number of years, although she had not sought any medical attention for those areas since 1997 (see memo to the claim log dated January 19, 2001).

In 2000, the worker was 58 years old; she began working for the employer in March 1988. On November 16, 2000, the worker suffered an acute episode of low back pain while assisting a patient. She was crouching by the bed to remove a catheter; the worker swung her legs over the bed, and the worker bent forward suddenly to avoid the patient's swinging legs. The worker submitted an application for compensation to the Board, and her claim was accepted for a lumbar strain of her low back. Wage loss and health care benefits were paid, and the worker attended Board-sponsored physiotherapy. The physiotherapist recommended a work conditioning program, which the worker began on December 20, 2000.

The worker saw Dr. Benson on December 19, 2000, the day prior to the start of the program. Although Dr. Benson did not examine the worker on that date, the worker advised him that her exercise program was exacerbating the symptoms in her upper back from a previous motor vehicle accident in 1992. The intake assessment report of the work conditioning program was dated December 20, 2000, the first day of the program. On examination, the worker was found with full range of motion of her lumbar spine, with mild tightness on the outer limits. It was estimated that she would engage in work conditioning and a graduated return to work beginning in early 2001, with the goal of a return to her pre-injury employment by January 19, 2001.

The program's occupational therapist advised the Board that the worker attended the program for three days, after which she left the program due to neck and mid back pain. The worker had later advised the therapist that she had injured herself – specifically, had

hurt her neck and caused rotation in her thoracic spine - while walking on the treadmill for six minutes during a fitness test. The worker thought that her activities at the work conditioning program had aggravated her previous upper back and neck injury caused by the 1992 motor vehicle accident.

The worker sought medical attention on December 28, 2000, and it was recommended that she rest for one week, without doing any exercises which involved her mid back or upper body. The worker returned to the work conditioning program on January 8, 2001 doing lumbar stabilization on a mat and limited stretches, but, because of her pain complaints, could not fully participate in the work conditioning program. However, the worker's examination at the work conditioning program indicated full range of motion, with some low back pain at the extremes.

The worker saw an acupuncturist on January 14, 2001. Dr. Yu noted that the worker had begun a work conditioning program on December 20, 2000, but had advised that she re-injured her neck and upper back on the third day of the program. Dr. Yu recommended that the worker have acupuncture three times a week.

In the intermediate report from the work conditioning program, dated January 19, 2001, the therapist confirmed that the worker claimed she had injured her neck when walking on the treadmill "during a fitness test which lasted 6 minutes". The therapist noted that, on observation, the worker moved well and did not appear to be in any distress. He concluded:

> … I also recognize that she may have some irritation of the neck and her upper back but her program was carefully modified from day 1 to exclude any exercise that could be harmful to those areas. I do not believe that walking on a treadmill for 6 minutes on a slight incline or stretching could cause "'an injury' in the neck or upper back". … It is my opinion that [the worker] would be capable of return to work following completion of the work conditioning program … on January 26, 2001. The fact that she declines to perform anything but the most simple stabilization exercises because of her neck and upper back complaints does not change the expected recovery of the low back injury. I find this situation very frustrating and complicated by the involvement of Dr. Frobb and the passive approach he recommends for her management. [The worker] has stated that she is planning to take vacation days from February 7, 2001 to look after her breeding dogs … I have advised [the worker] that her work conditioning program for her low back injury will end on January 26, 2001 and she will be discharged as fit to return to work with respect to her low back injury only.

The memo to the claim log dated January 18, 2001 details the worker's activities at the work conditioning program, as do the reports from that program, and a letter from the worker dated July 10, 2001. The worker had advised the attending therapist of her pre-

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existing problems with her upper back, and that she had "4 -5 unstable vertebrae". She reported pain in her upper back and neck after the first day of the program. "The worker states that the pain was not too intense and was similar to the ongoing "acting-up" discomfort that she has been experiencing for the past 3 years". She continued with that discomfort for the second day. On the third day of the program, she was on the treadmill doing a level 1 grade; as she was on the treadmill, she began to experience "excruciating and intense pain in her neck and upper back". She reported that since that time, her back and neck discomfort.

The worker's claim file was reviewed by a Board medical advisor. Dr. Zacher's opinion is documented in a memo to the claim log dated January 22, 2001. Dr. Zacher made a thorough review of the worker's medical and claim history. He found it difficult to accept that a work conditioning program consisting of active stretching interspersed with six-minute intervals on the treadmill would cause injury to an otherwise healthy person.

The discharge summary report from the program, dated January 26, 2001, states the therapist's opinion that the worker was doing more at home with daily living tasks than her much modified exercises in work conditioning. She noted that the worker had an essentially normal examination of her lumbar spine, and thought that the worker was capable of returning to work with respect to the low back injury accepted under her claim. The therapist reiterated her opinion that although the worker may have had some very mild irritation in her neck and upper back, she could not have incurred any injury through stretching or walking on a treadmill for six minutes.

A January 26, 2001 report from the worker's acupuncturist indicated that the worker showed improvement, with the worker describing reduced pain. She had gone to exercise on January 26, 2001.

Dr. Zacher asked for and received chart notes and other information from the worker's attending physicians. The March 1995 x-ray report submitted indicated that the worker had a moderate degree of degenerative change affecting the C5/6 and C6/7 levels. The attending physician's chart notes indicated that the worker had a long-standing history of chronic, recurrent neck and upper back problems, dating from at least 1995. It was Dr. Zacher's opinion that the recurrence of the worker's neck and upper back symptoms in December 2000 and January 2001 represented the natural fluctuation of her chronic neck problem, rather than a new injury or an aggravation of her underlying condition (see memo to the claim log dated February 12, 2001).

In a decision letter dated February 21, 2001, a Board entitlement officer advised the worker that the Board did not accept as compensable any neck or upper back symptoms that were experienced at the work conditioning program. The worker's wage loss benefits were terminated effective January 26, 2001, the date she was discharged from that program.

The worker was involved in a motor vehicle accident on June 29, 2001, the details of which were not provided in the claim file.

In a letter dated July 10, 2001, the worker requested a manager's review of the February 21, 2001 decision. In a letter dated August 8, 2001, a manager of the Board's Entitlement Unit advised the worker that the February 21, 2001 decision would remain unchanged. It was the manager's opinion that the worker had not submitted any significant new medical information which would cause a change in the entitlement officer's decision, nor had the entitlement officer made any error in law or policy.

The worker submitted further medical information, including an MRI of her lumbar and thoracic spine, and in a letter dated December 4, 2001, requested reinstatement of her benefits. The new information was submitted to a Board medical advisor for review. Dr. Cervenko's opinion is documented in a memo to the claim log dated January 4, 2002. Dr. Cervenko noted that the studies showed a left L3/4 far lateral disc herniation impinging on that nerve root, and gave his opinion that it would be difficult to relate the left-sided disc herniation with the low back pain and right-sided sciatica complained of by the worker.

Dr. Cervenko also noted the chart notes provided by the worker's attending physician would not indicate that there was any disability that could be attributed to the L3/4 disc herniation. He cited the discharge report from the Board's work conditioning program, which indicated that the worker had good range of motion, good straight leg raising and normal neurological findings, all of which he thought indicated that there was no active problem with the worker's L3/4 nerve root at the time. Dr. Cervenko also noted a disc herniation at T5/6 on the right, but did not think that the worker's activities could have caused the conditions reflected on the MRI. He thought that Dr. Zacher's opinion, set out in memos to the claim log in December and January, indicated the important factors to be considered in making the determination whether the worker's neck and upper back symptoms had been caused by, or significantly aggravated by, her activities at the work conditioning program.

In a decision letter dated January 16, 2002, a manager of the Board's Entitlement Unit advised the worker that there would be no change in the February 21, 2001 decision. She was unable to relate the conditions reflected on the MRI to the worker's activities at the work conditioning program, nor was the manager of the opinion that there was any ongoing disability related to the original injury.

In support of her appeal of the February 21, 2001 and January 16, 2002 decisions, the worker has submitted a medical-legal opinion dated March 10, 2003 from Dr. Alan Yorke, a rheumatologist. Dr. Yorke saw the worker on four occasions, beginning on March 5, 2001 and ending on August 14, 2002. In his report, Dr. Yorke described the worker's motorcycle injury (probably referring to the worker's motor vehicle accident in 1992), in which she strained her upper thoracic spine, which caused her intermittent neck

pain every two months. With regard to the worker's injury on November 16, 2000, his description of that injury reflected that the worker was in a crouched position removing a catheter when she made a sideways move and something popped in her lower back.

It was Dr. Yorke's opinion that the exercise activities were significantly greater than those understood by the Board medical advisor. Dr. Yorke also thought that the degree and persistence of the worker's neck complaints after the work conditioning program were "markedly different" from those which she had reported previously. As such, he thought they were a result of a new injury, rather than "the natural fluctuations of her chronic neck problems.

In response to the question presented by the worker's representative as to whether the work conditioning program could have resulted in an aggravation of the worker's neck, upper and lower back condition, he thought that it possible that it did so. He also thought it possible that it was a new injury. If the worker developed a disc bulge during the exercise program, that could account for her symptoms and might represent a new injury. Dr. Yorke went on to say:

> … My working diagnosis when I first … examined [the worker] was that she had developed a localized myofascial pain syndrome at the neck and the upper back. The cause of such a syndrome remains uncertain. While moderate to severe osteoarthritis and disc bulges sufficiently protuberant to contact the thecal sac could be explanations for a flare of neck pain, the cause of the persistence of the syndrome is unknown.

In Dr. Yorke's opinion, it appeared that the work conditioning program caused an aggravation of the worker's pre-existing neck condition, leading to her ongoing symptoms and continued disability from working. He thought that the aggravation was likely permanent.

Also submitted were two letters from Dr. Mark Frobb, the worker's acupuncturist. The first, dated April 11, 2001, outlined the worker's medical history. Dr. Frobb noted that, following participation in the work conditioning program, the worker developed paravertebral muscle spasm affecting her upper back and neck. When she presented to his office in January 2001, Dr. Frobb diagnosed "dysfunctional movement syndrome" affecting the lumbosacral, dorsal and cervical spines. Dr. Frobb noted the worker's degenerative changes, the loss of normal cervical lordosis, the bifasic curve, and the encroachment of the foraminal exits shown on the x-rays. He thought that the worker continued to be disabled by that condition, which he also called myofascial pain syndrome, and noted that while the natural history of such problems was to show a gradual improvement, the worker's underlying degenerative spinal changes "may be somewhat responsible for a prolonged course of recovery".

The second letter from Dr. Frobb was a medical-legal opinion report dated August 2, 2002. Dr. Frobb noted that after the worker's discharge from his office in December 1995, where she had been treated for myofascial pain affecting the upper dorsal and cervical segments of her spine, she had not been seen in his office until January 2, 2001. In response to the question as to whether the worker's neck and upper back symptoms developed secondary to the work conditioning program, Dr. Frobb noted that he could only comment that the worker had related to him that this was so. However, if the worker had attended as many aerobic sessions over the short time documented [the worker's representative documented two 20-minute sessions the first day and one 20-minute session on each of the second and third days, as well as a cardiovascular increase to two degrees of inclination], the worker would be predisposed to fatigue and the triggering of her myofascial pain syndrome. He did not believe that to be, as suggested by the Board medical advisor, “a natural waning and ebbing of a predisposing condition”.

On the other hand, he did not consider this a new injury, but rather an exacerbation of the worker's pre-existing condition triggered by the activities of the work conditioning program.

The worker submitted copies of a number of investigations undertaken after the events in question. All indicated moderate to severe degeneration of the neck and upper back. In most examinations, no disc herniations were noted. An April 5, 2001 CT scan showed no disc herniation. An April 19, 2001 CT scan of the thoracic spine found that a disc herniation could not be excluded, although none was specifically reported. A November 2001 MRI of the thoraco-lumbar spine showed disc herniation at L3/4 on the left; however, I note that this image was taken after a June 2001 motor vehicle accident, and is consequently of minimal assistance here. A February 8, 2002 MRI of the worker's cervical spine was also presented. Again, this image was taken more than one year after the events here in question.

The employer provided a submission in support of its position on the worker's appeal, received by WCAT on November 5, 2003. The employer's representative had provided to the therapist at the Board's work conditioning program a copy of the worker's notes indicating her remembrance of the extent of the exercises performed at the work conditioning program. The worker's representative asked the work conditioning program therapist to supply his treatment notes, and give his comments regarding the extent of activities which the worker was involved in.

The work conditioning program therapist responded in a letter dated November 3, 2003. He noted that on the date of the worker's initial assessment, December 20, 2000, the worker had made him aware of her 1992 motor vehicle accident and the injury it had caused to her neck and upper back. She advised that these areas were still problematic, and the therapist advised that for this reason care was taken not to prescribe exercises that would exacerbate her pre-existing conditions. He described in some detail the exercises provided, and noted that the worker performed on the treadmill for one set on December 20 and December 21, and two sets on December 22, 2000. On

December 22, 2000, the worker performed a fitness test on the treadmill which lasted six minutes only because she had achieved 70 percent of her maximal heart rate in this time frame, indicating a poor cardiovascular capacity. The fitness test was discontinued after six minutes but the worker was encouraged to continue on the treadmill for a full 20 minutes for her cardiovascular component. The worker left the program on December 22, and did not return for two weeks.

The therapist went on to describe further contact with the worker, and her activities on her return to the program. He concluded:

> … As I have commented on her intermediate and discharge reports, it was my opinion that [the worker] would be performing more activity through daily living tasks than what was completed in the later stages of the Work Conditioning Program. Although I felt that [the worker] was sincere in having pain and discomfort in her neck and upper back I still am unable to logically follow a soft tissue injury occurring from use of the treadmill or any of the light upper limb exercises performed in our Work Conditioning Program. According to the clinical notes there was no mention of aggravation of neck and upper back while she was on the treadmill or on the day of December 22, 2000 … It was not until December 27, when I spoke with [the worker] on the phone that she claimed she had injured herself on that Friday, December 22, 2000 using the treadmill. At the time of discharge she was still complaining of neck and upper back pain but it was determined that she was recovering from her low back strain which was accepted under this claim, to return to work full time …

Clinic notes from the work conditioning program were provided, and I note that they did not in fact indicate any report of injury on December 20, 21 or 22, 2000. Also included were the Intake Assessment Report, the Intermediate Report and the Discharge Report, which had all previously been submitted to the claim file.

Oral Hearing

The worker told the panel that she had been a nurse since 1962, working for the accident employer since 1988. She also worked for a second employer, for about six to eight eight-hour shifts for a month. Her position for the accident employer was a critical care float on the night shift. The worker described the November 6, 2000 compensable injury, and her description did not differ substantially from that in the claim file.

After her compensable injury, the worker was advised to attend physiotherapy, and she did so, but it was her evidence that several of the exercises she was given to perform aggravated her pre-existing upper back and neck conditions. These pre-existing symptoms had been caused by a 1992 motor vehicle accident. It was the worker's

evidence that although she had flare-ups of upper back and neck symptoms from time to time since the motor vehicle accident, these symptoms were not ongoing.

It was the worker's opinion that the postural traction and bridging she was required to perform by the physiotherapist in November and December 2000 caused her upper back "to go out". It was the worker's opinion that she bulged a disc in her neck and/or her thoracic spine at that time. The physiotherapist recommended a CT scan or an MRI, but when she tried to see her doctor, she was unable to do so. Instead, she saw Dr. Benson. It was the worker's evidence that when Dr. Benson called the physiotherapist to get information, he intimidated the physiotherapist into "backing down" from the request for an MRI or CT scan. In the event, none was done at that time.

During this time, the months immediately after her compensable injury, the worker advised that her low back was still painful and her left leg would drag. It was the worker's evidence that she has never had right-sided sciatica. The worker referred to the memo to the claim log dated January 4, 2002, and advised that the Board medical advisor was mistaken; she had never had nor had she ever reported right leg and buttock pain.

Addressing the issue of her neck and upper back complaints, it was the worker's evidence that prior to her compensable injury, she was able to work with her upper back and neck injury by being careful, doing maintenance exercises, and using Ibuprofen, heat. It was her evidence that she had not been treated for those symptoms between 1997 and 2000, and continued her non-occupational activities as well as working. These activities included breeding bearded collies. She did the grooming, kennel maintenance and lawn maintenance. She carried large bags of dog feed, and in fact did all the activities required in breeding dogs.

It was the worker's evidence that she missed no time from work as a result of her upper back and neck symptoms prior to the November 2000 compensable injury. However, she several times got what she described as cramps in her rhomboid muscle. It was for that reason that she started seeing a massage therapist and then Dr. Frobb, a specialist in acupuncture.

With regard to the work conditioning program, on the second day, December 21, 2000, it was the worker's evidence that she was getting a burning pain in her upper back, and her back was "popping out" more than usual. By the evening of day three [December 22, 2000], she was "in excruciating pain", couldn't nod her head or move her head at all. The worker described feeling as though she had a steel bar between her shoulder blades. It was the worker's opinion that several of the exercises aggravated her neck and upper back, in particular, the stretches she was asked to perform, the arm exercises, and the treadmill. On the third day, the cardio exercises were begun. Each exercise had a number of repeats, there were several rotations. She was on the treadmill twice a day.

The worker also thought that the work conditioning program caused an aggravation to the low back injury accepted as compensable under her claim. These aggravations to her low back condition included the exercise bike and some of the floor exercises, and, she noted "the treadmill didn't seem to help". It was the worker's evidence that she told physiotherapists about her pain, more than once, and that their response was "no pain, no gain". The worker was of the opinion that it was the incline on the treadmill which aggravated her "rotating discs".

The worker told the panel that after the third day of the work conditioning program, she went home and "self-treated" with Ibuprofen and heat over the weekend. On the following Monday, she saw Dr. Kent, her usual attending physician, who said "these things usually go away in five weeks". It was the worker's evidence that she "didn't get much sympathy" from Dr. Kent when she reported her neck and upper back complaints, and Dr. Kent merely asked her if she wished to go on long-term disability. The worker advised that she did not, as she could not afford to do so. Dr. Kent then advised a week off.

The worker advised the panel that she returned to the work conditioning program in January 2001. At that time, she was still doing some exercises and stretches. It was her evidence that within three days after she went back to the program, her upper back/neck symptoms had returned. The worker advised that she completed the program, but the stretches were eliminated. She continued with pelvic stabilization, but had trouble getting up from the mat. She would exercise for 20 minutes and go home.

It was the worker's evidence that when she was discharged from the work conditioning program, she was not fit to return to work. Her lower back was somewhat worse than when she started the program, and her upper back was "a disaster". The worker went to see a rheumatologist, Dr. Yorke, who said she had myofascial pain syndrome. Dr. Kent referred her for a CT scan, which she had in April 2001. The worker acknowledged that the scan showed degenerating disc disease of the cervical spine.

In the summer of 2001, the worker had another motor vehicle accident. She was in an intersection in her car, and got hit by a truck. The motor vehicle accident resulted in tendonitis, and reinjury to her right shoulder and neck. It was the worker's evidence that she had not recovered from her compensable injury or from the injuries which she believed were caused by the work conditioning program when she had the accident in the summer of 2001.

When asked about her current symptoms, the worker advised that she still can't sit, stand or walk for more than 20 minutes. She can't sleep at night. She has difficulty grooming her dogs, an activity which causes pain in her neck and upper back. She can't mow the lawn or keep up with pasture fences. She can't start the gas mower, and even the electric mower bothers her upper back and neck.

In response to questions from the employer's representative, the worker advised that at the time of the compensable injury, she was doing her regular job, although her job description had changed somewhat. She had had a previous rotator cuff injury, and several previous low back injuries. There had been a delay of several days after the November 2000 injury before she sought medical attention because the worker was trying to treat herself, by means of heat and anti-inflammatories. The worker advised that between November 23 and December 11, 2000, she was attending physiotherapy. She acknowledged that she had reported that she was having upper back problems during that period, but was adamant that no neck problems were reported. She noted that she saw her attending physician on December 11 and did not mention any neck problems. She noted that the x-ray undertaken the following day, December 12, 2000, was of her lumbar spine, and acknowledged that it showed that she had degenerating disc disease.

The employer's representative brought to the worker's attention that she had seen Dr. Benson on December 19, 2000 and complained at that time that the exercise program was aggravating her neck and upper back, and that this was the day before the work conditioning program began The worker had no explanation to provide, and acknowledged that the initial assessment at the work conditioning program on December 20, 2000 indicated that she was suffering previous problems with her neck and upper back.

It was the worker's evidence that on the first day of the work conditioning program, December 20, 2000, she had two 20-minute sessions on the treadmill, one in the morning, and one later in the afternoon, with a break in between. The treadmill was set at the lowest level. On the second day, the worker did treadmill in the morning and the stationary bike in the afternoon. On the third day, December 22, 2000, the worker had one regular treadmill session in the morning. In the afternoon, she underwent the cardiovascular test, which required that the treadmill be set from level 0 to level 5 for the duration of the six-minute test, and then remained at level 1 for the remainder of the 14 minutes. In hindsight, it was the worker's opinion that the combination of things, the stretch exercises, as well as the treadmill, caused her distress. At the time, she probably thought that it was probably the treadmill.

When asked to address the discharge report from the work conditioning program, the worker disagreed with the therapist's assessment. She said that at the time of her discharge she could not perform the activities of daily living; she couldn't vacuum or sweep. If she sat for a period of time, she could not move her legs. She had a burning pain in her left buttock and ongoing pain in her low back.

It was the worker's evidence that after the compensable injury, she had to downsize the dog operation. At the time of the injury in November 2000, she had 13 dogs including one puppy. She had to sell the puppy because she couldn't do the leash training, and placed three of the females in new homes. She had to hire a handyman to do some of

the yard work. She had the dog food delivered. She hired someone to do the grooming of the remaining dogs.

The worker advised that after January 2001, she began seeing Dr. Silliers, a new attending physician. She was now having "terrible pain" in her upper back, and "didn't want to go through another argument with Dr. Kent". She noted that she continued seeing a physiotherapist, and in 2002, he told her that her right leg was shorter than the left. That condition was tilting her pelvis and causing pain in her foot.

With regard to her symptoms between January and July 2001, the time of her motor vehicle accident, the worker advised that she went to a walk-in clinic for prescriptions for pain and anti-inflammatories. Between January and July 2001, it was the worker's evidence that she did less and less. She couldn't bend down and had other people doing her chores. She couldn't even read a book because holding an average book and tilting her neck down to read was painful. She was taking Flexeril and Darvon and continued with self-medication until the July 2001 motor vehicle accident.

The worker told the panel that she has never returned to work, and began receiving long-term disability benefits effective April 2001. She began receiving CPP disability on December 2001 or January 2002. She has now lost most of her dogs. With regard to her current neck and upper back symptoms, she advised the panel that she still could not "shoulder check" when driving, and still has symptoms on activity. If she extends her neck, she gets neck pain.

Finally, the worker was at a loss to explain why she had not been believed "from day one". She noted that Dr. Kent would not continue with any further investigations, nor would her new doctor. It was the worker's evidence that she would like to determine the cause of her problem, and to return to work.

In her final submission, the worker's representative argued that prior to the work conditioning program, the worker was able to work and live in spite of her pre-existing neck condition. It was her argument that the work conditioning program did not pay sufficient attention to the worker's pre-existing problem. She noted that the CT scan in the spring of 2001 showed that the worker had extensive degenerating disc disease, and argued that the work conditioning program had caused a permanent aggravation of that condition.

In her final argument, the employer's representative stated that there was no question of the worker's credibility here, and that her complaints were well-documented. However, it was also well-documented that the worker had an extensive pre-existing condition prior to the November 2000 compensable injury and prior to the work conditioning program in December 2000. The employer's representative referred the panel to item #15.10 of the RSCM dealing with pre-existing degenerating conditions. She noted the worker's pre-existing neck and upper back symptoms were discussed with her physician the day

prior to the start of the work conditioning program, as well as being discussed with the therapist at the work conditioning program before the program started. The program was modified as a result. The worker's representative queried whether a six-minute cardiovascular exercise not mentioned until eight days later was significant enough to cause a permanent aggravation of the worker's pre-existing condition.

The employer's representative then referred to the medical-legal opinions submitted by the worker, and noted that they both referred to the extensive nature of the exercise program. The employer's representative argued that the exercise program was not, in fact, extensive. She acknowledged that the worker was suffering complaints, but was not of the opinion that these resulted from the work conditioning program.

In response, the worker's representative noted that the worker's neck and upper back symptoms were not reported earlier because of the intervening Christmas holidays. She also noted that the worker, in hindsight, thought that it was the combination of the exercises and the treadmill which caused her distress. She reminded the panel that the worker reported complaining to the program several times, but the exercises continued.

Reasons and Findings

Were the worker's neck and upper back symptoms, which she attributed to activities at the work conditioning program, compensable, either as a new injury or as an aggravation of the worker's pre-existing condition?

Item #22.00 of the RSCM provides that a consequence of a compensable injury may be compensable if it would not have occurred but for the compensable injury, that is, if it is determined that the compensable injury was a significant cause of the later injury.

Item #26.55 of the RSCM sets out the Board's policy with regard to pre-existing deteriorating conditions affecting a worker. In order for the worker's disability to be compensable, the evidence must establish that the worker's employment activity [or, in this case, her activities at the Board-sponsored occupational rehabilitation program] brought about a disability that would probably not otherwise have occurred, or that the activity in question significantly advanced the development of a disability that would otherwise probably not have occurred until later. This must be distinguished from the situation where the worker's activities have merely drawn the worker's attention to the pre-existing condition without significantly affecting the course of the disease.

In other words, an injury is not compensable simply because it happened at work, or at the rehabilitation program necessitated by the worker's compensable injury. There must have been something in the employment or rehabilitation situation that had causative significance in producing the injury in order for it to be compensable.

Item #15.10 of the RSCM provides, in part:

> There may be cases where an organ of the body is deteriorating, possibly through disease, and it has reached a critical point at which it is likely to become a manifest disability. Some immediate activity might trigger the final breakdown.
>
> But if it had not been one thing it would most likely have been another, so that it is only change or coincidence whether it happened at work, at home, or elsewhere. The disability is one that the claimant would not have escaped regardless of the work activity, and hence the causative significance of the work activity is so slight that the disability is treated as having resulted from the deteriorating condition. The disability is the result of natural causes and is not compensable …
>
> On the other hand, there may be other cases where the deteriorating condition was such that, in the absence of **some exceptional strain or other exceptional circumstance**, it was not likely to reach a critical point and become a disability about the time of the work injury. The worker could well have survived without disability for months or years if something exceptional in the course of his employment had not triggered the disability. Here the employment situation had substantial causative significance and the disability is compensable … [emphasis added]

On this matter, I deny the worker's appeal. The worker had significant pre-existing problems with her neck and upper back resulting from a 1992 motor vehicle accident. She was receiving treatment for that condition. In February 2000, the worker's attending physician noted that she was having upper back and low neck problems, and that her back tended to go out if she moved the wrong way. This was a chronic problem, which had been going on for years. When he saw her again in August, 2000, some three months prior to the November 2000 compensable injury, he again noted the worker as having upper back discomforts. She was contemplating that she would begin acupuncture for that condition, and, in fact, later did so.

In fact, the day prior to the work conditioning program which allegedly caused an exacerbation to her symptoms, she complained to Dr. Benson that the physiotherapist's exercises had caused her neck and upper back symptoms to increase. The worker reported her neck and upper back symptoms to the therapist at the work conditioning program prior to the start of the program, and the program was modified accordingly before the worker's initial participation.

The work conditioning program used by the Board is a reputable one, with experience in tailoring exercises to the needs of its clients. Its description of the exercises provided and the worker's response has been consistent, and I accept its version of what occurred at the program as to the nature and extent of the exercises provided.

I find that the worker falls squarely within the parameters of item #15.10 of the RSCM. That is, the worker had a significant pre-existing condition. Chart notes from her attending physician show recurrent neck and upper back problems dating from at least 1995. I find that the worker suffered no exceptional strain or circumstance as a result of her participation in the work conditioning program, or, in fact, any activity greater than her normal activities of every day living as a dog breeder. She had a cervical and thoracic spine condition which was likely to reach a critical point and become a disability, and it was only coincidence that the worker noticed that occurrence after her minimal participation in the Board's work conditioning program. It does not appear that the worker would have escaped the disability resulting from her pre-existing condition no matter what her activity was.

The worker has provided medical opinions from her rheumatologist and her acupuncturist. Dr. Frobb, the acupuncturist, has qualified his opinion regarding the causation of the worker's neck and back symptoms saying that he relied on the worker's information in her determination that that was the case. Dr. Yorke's opinion, likewise based on the worker's history, is that it is possible that the worker could have developed a disc bulge as a result of the work conditioning program exercises. However, possibility is not the standard of proof to be met here. Rather, in order for me to find that the worker's neck and upper back condition were a compensable consequence of her injury, I must find on a balance of possibilities that they resulted either from the original injury or from the exercise program mandated by the Board.

I prefer the opinion of the Board medical advisor, who, after a thorough review of the worker's medical and claim history, could not accept that a work conditioning program consisting of active stretching interspersed with six-minute intervals on the treadmill would cause injury to an otherwise healthy person. He thought that the recurrence of the worker's neck and upper back symptoms in December 2000 represented the natural fluctuation of her chronic neck problems, rather than a new injury or an aggravation of her underlying condition. I agree.

I also rely on the opinion of the therapist at the work conditioning program, who noted that he was aware of the worker's pre-existing neck and upper back complaints before she began the program, that the program was modified to take these into account, and that no complaints were made during the three days of the program here in question regarding neck and upper back complaints. He was not of the opinion that the worker's neck and upper back complaints, which he considered genuine, were the result of the work conditioning program.

I find insufficient evidence to support the proposition that the worker's neck and upper back complaints were either caused by or significantly aggravated by, the Board-sponsored work conditioning program. I find they are not a compensable consequence of the November 2000 injury accepted under her claim.

Was the worker still temporarily disabled as a result of her compensable injury after January 26, 2001?

Payment for temporary total disability is provided for in section 29 of the Act. The Board's policy regarding temporary total disability is set out in item #34.50 of the RSCM. Benefits payable under section 29(1) of the Act will be terminated when the worker's compensable impairment ceases to be a temporary total disability. That is, if the worker's impairment becomes partial, disappears entirely, or stabilizes, no further temporary wage loss benefits are payable under section 29(1).

On this matter, I deny the worker's claim. In the discharge summary report from the work conditioning program dated January 26, 2001, the therapist found that, with regard to the low back complaints accepted as compensable under her claim, the worker was fit to return to work. When the worker saw her acupuncturist on the same date, he found her improved, with the worker describing reduced pain. There is no medical evidence to indicate that the worker continued to be disabled by her low back symptoms. I find that the worker was no longer disabled as a result of the injuries accepted as compensable after January 26, 2001.

Should the Board's February 21, 2001 decision be reconsidered, based on the new evidence submitted by the worker?

Items #108.11 and #108.12 of the RSCM set out the guidelines for reconsidering a decision based on receipt of significant new evidence or based on mistakes of evidence or law. The requirement that evidence be new means, in the case of medical evidence, that either the medical findings or the opinion based on those findings must be different from those at the time of the original decision. Mere repetition of the same opinion without the support of new medical findings does not constitute "significant new evidence". The same opinion supported by new medical findings, or a new opinion as to the significance of the same findings may, however, constitute such evidence.

A decision will not be reconsidered simply because there was a conflict of evidence.

Other grounds on which a claim may be reconsidered include:

- That certain critical evidence was obviously overlooked;
- That facts were mistakenly taken as established which were not supported by the evidence, for example, if rumour was inadvertently treated as evidence;
- If there was a failure to adopt a valid certificate of a Medical Review Panel; or
- If there was some clear error of law, for example, a failure to follow the terms of the Act.

The new information submitted by the worker was an MRI report of November 2001 and chart notes from her attending physician. These were reviewed by a Board medical advisor, who noted that neither indicated any disability attributable to the L3/4 disc herniation, and noted that when the worker was discharged from the work conditioning program she had good range of motion, good straight leg raising and normal neurological findings, all of which indicated that there was no active problem with the worker's L3/4 nerve root at the time. Thus, he did not think that either the worker's work activities or the work conditioning program had caused the conditions reflected on the MRI.

I find that the grounds for reconsideration of the Board's February 21, 2001 letter have not been met. The MRI and chart notes did not provide significant new information, nor did the February 21, 2001 decision contain any errors in law or policy. The worker's appeal on this matter is denied.

Conclusion

With regard to the issue of whether the worker's neck and upper back symptoms are compensable, I deny the worker's appeal. With regard to the issue of whether the worker was still temporarily disabled as a result of her compensable injury after January 26, 2001, I deny the worker's appeal. The Board's February 21, 2001 decision (Appeal A) is confirmed.

With regard to the issue of whether the Board's February 21, 2001 decision should be reconsidered (Appeal B), I deny the worker's appeal. The Board's January 16, 2002 letter is confirmed.

The panel awards no expenses in this matter.

Nora Jackson
Vice Chair

NJ/jkw

WCAT Amended Decision Number: WCAT-2004-00071A-RB
WCAT Amended Decision Date: February 2, 2004
Panel: Nora Jackson, Vice Chair

Amended Decision

In *WCAT Decision #WCAT-2004-00071-RB,* issued on January 9, 2004, I denied the worker's appeal regarding the compensable consequences of her injury. In a letter of January 16, 2004, the employer requested adjudication of an application for costs. After reviewing the original decision, and based on the common law principles regarding amendment of decisions, I am amending the final paragraph of the original decision as follows:

> **Having relied on the physiotherapist's report provided by the employer, the panel awards costs to the employer's representative in the amount of $195.00 for that report.**

Nora Jackson
Vice Chair

NJ/jkw

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