WCAT Decision Number: WCAT-2004-00074-RB
WCAT Decision Date: **January 09, 2004**
Panel: Mike Swetlikoff, Vice Chair

Introduction

In a March 12, 2002 letter a Workers' Compensation Board (Board) case manager informed the worker he was unable to relate a left L5-SI disc herniation, seen on a CT scan dated November 9, 2001, to the described incident at work on August 15, 2001. Accordingly, the case manager denied the worker's claim.

The worker disagreed with the Board's decision and appealed. He said that his different language and culture were not considered by the Board officer in making his decision. He also said his witnesses' statements had not been considered. The worker additionally said he seeks acceptance of his claim, health care benefits and wage loss benefits.

Issue(s)

Did the worker's low back problems which resulted in surgery on January 31, 2002 arise out of and in the course of his employment on August 15, 2001?

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and 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 January 16, 2002 the worker filed a claim for compensation benefits in which he informed the Board that on August 15, 2001 he hurt his back while lifting a heavy patient. He said at the time of the incident he experienced back pain with radiation down his left leg. He also said, "the injury seemed not relevant at the time".

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

In an October 24, 2001 chart note the worker's attending physician said that the worker complained of pain in his lower back on and off for the past year. He also advised that for the past two months the pain had been radiating to the left buttock and down the left leg.

In an employer's report of injury or occupational disease completed on January 17, 2002 the employer's representative said that on January 7, 2002 the worker reported that on August 15, 2001 he lifted a patient and twisted injuring his lower back.

In the decision letter of March 12, 2002 the case manager said he decided to deny the worker's claim for the following reasons:

- The worker did not report a back injury to his employer until January 7, 2002.
- A co-worker recalled the incident on August 15, 2001. However, she could not recall the worker saying he pulled something in his back or of feeling back pain after moving the heavy patient.
- The co-worker said she was first aware of the worker's back problems when he required a Morphine injection in late December 2001.
- On October 24, 2001 the worker described pain in his back off and on for the past year. There was no reference to any specific back injury.
- The clinic where the incident occurred was contacted. They said the worker had made no reference to any work related injury.
- On November 9, 2001 the worker told Dr. H. that he started to develop pain in his back two months prior with radiation down to the left leg. There was no reference to any lifting activity at work.
- On January 7, 2002 the worker told Dr. A., chiropractor, that he had been bothered by back pain for about six months, and that this was caused by lifting patients. There was no mention of a specific injury.
- The duration of symptoms (six months) pre-dated the August 15, 2001 incident.
- Dr. K., attending physician, recorded no reference to any specific injury. He documented that the worker advised that he had experienced low back pain about eight years prior, after four months of very heavy labour.
- There were repeated references in the reports of the worker experiencing back discomfort prior to August 15, 2001.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

- On January 10, 2002 the worker told Dr. F. that he injured his back while lifting an extremely heavy gentleman who had been involved in a motor vehicle accident.

In a February 26, 2002 memo Board medical advisor, Dr. Jarman, said the earliest medical report on file was a chart note for a visit to the attending physician on October 24, 2001. At that time the worker advised his physician that he had pain in his lower back on and off for the past year, with pain radiating to the left buttock and down the left leg for the past two months. The physician diagnosed a prolapsed disc, and referred the worker for a CT scan. A February 5, 2002 letter from Dr. F. stated that the worker had been his patient since 1996, and that he had not seen the worker for any back related problems prior to August 15, 2001. Dr. Jarman said the October 31, 2001 CT scan revealed a left-sided L5-SI disc herniation, impinging on the left SI nerve root. He also said that on January 18, 2002 Dr. H. stated that symptoms had been present for several months and, therefore, surgery was indicated. Dr. Jarman also said:

> It is not known what causes disc herniations. Many patients present with signs and symptoms of disc herniation who do not recall any traumatic injury or unusual activity. It has been the custom of the WCB to accept disc herniations as caused by work activities if the onset of symptoms coincides with a work activity that places stress on the spine. If this man did in fact develop left leg pain while performing a heavy lift, or within 24 hours of performing a heavy lift, it would be compatible with the usual WCB practice to accept that this heavy left [sic] caused the disc herniation. If the leg pain did not occur until several weeks after the lifting incident, it is likely that this was a spontaneous disc herniation, not caused by the work activity.
>
> [reproduced as written]

In a March 7, 2002 memo the case manager said that there were no witnesses to the worker experiencing back discomfort on August 15, 2001. The worker's co-worker, at the time, Ms. M., was not aware of the worker having back problems until late December 2001. To complicate matters, the worker did not report the August 15, 2001 injury to his employer until January 7, 2002 even though he informed the Board officer on January 16, 2002 (log entry) that he was aware of the reporting requirements of the employer when he first started working for them. The case manager concluded that he was unable to relate the worker's lumbar disc herniation to any incident at work on August 15, 2001.

In a July 9, 2002 letter Dr. Hill, orthopaedic surgeon, said the worker was seen on November 9, 2001 for complaints of back pain with radiation to his left leg. He said the worker advised that he developed the pain approximately two months prior, after helping to lift a patient. He also advised that although his pain was initially more of a discomfort, he found that over the next several weeks it progressed to back pain and left-sided sciatica. He also said that the worker said in January 2002 he had a severe

exacerbation of back pain and another CT scan was done which revealed a sequestrated L5-SI disc. Consequently an urgent discectomy was performed on January 31, 2002. Dr. Hill said, in his opinion, it was entirely "possible" that the original cause of the herniation at the L5-SI level was the injury sustained by lifting a patient in the early fall of 2001.

Submitted into evidence during the appeal hearing and marked exhibit #1 was a December 12, 2003 letter from a registered nurse, Ms. W. Nurse W. said she met the worker in January 2001. In August 2001 she travelled to the community where the worker was working. When she arrived the worker was at the hospital assisting the other nurse, Ms. M., in the management of a trauma patient. She waited for him to finish and then she and the worker went out for dinner. During dinner the worker told her that his back was stiff and he felt that he had pulled a muscle in his left leg while treating the patient in the hospital.

Ms. W. said that over the following months the worker's condition deteriorated. He could not sit for long periods and found the drive to the North Island difficult. She said, to the best of her knowledge, the worker did not participate in any physical or contact sports. She also said by December 2001 the worker's lifestyle was greatly affected by his back and leg pain. Ms. W. also said the worker frequently mentioned that he had a hard time believing that the incident on August 15, 2001 caused his problem. However, on reflection he reviewed when his pain started, and related this to the August 15, 2001 incident.

The worker's appeal was heard on December 16, 2003. He was represented by a workers' adviser. The respondent employer did not attend the appeal hearing and did not forward any evidence or submissions on appeal. In response to questions and of his own volition the worker described the incident on August 15, 2001 in detail including the fact that he was the tallest person of the four individuals who lifted the patient from an ambulance stretcher onto a trauma stretcher. He said two of the individuals were ambulance attendants whom he did not know and the other was his co-worker, nurse W. He additionally said the patient was a 200 plus pounds drunk logger who was combative. He said he and nurse M., and the two ambulance attendants lifted the patient from the ambulance stretcher onto a trauma stretcher. The worker said he recalled that "while lifting the patient I had to twist and that is when I felt a sharp pain in my back". When asked why he did not provide statements from the ambulance attendants, the worker said that he did not know the attendants nor which north island community their ambulance was located in.

In response to a question about why he had not informed his employer of the incident on August 15, 2001, the worker said in his culture one does not report injuries unless the injury prevents one from working. The worker also said when he could no longer work he reported his injury to his employer.

With regard to his symptoms on August 15, 2001, the worker said he experienced very mild back symptoms and mild symptoms down his left leg to his knee. He continued to work. The worker also said culturally, it is his background to tough it out and not see a physician until it is absolutely required. The worker also said in the beginning he had a few minor difficulties but was able to continue working.

With regard to the surgery in January 2002, the worker said he believed that lifting of the patient on August 15, 2001 was the activity that led to his need for surgery.

With regard to sports or recreational activities, the worker said he played no sports from mid-2001 to January 2002. He said he did some hiking with his brother in September 2001 on Mount Washington which has relatively flat hiking trails. He also said he had not been involved in any motor vehicle accidents, had no prior work injuries and had taken no time off work previously for sickness. The worker also advised that he spent a lot of his time studying in order to be certified as a physician in Canada. He said he had been a physician in his country of origin. The worker also advised that he travelled weekly from his home to three different communities where he worked as a registered nurse. He said after driving for one to one and a half hours he would have to stop his vehicle get out and stretch in order to relieve his lower back and left leg symptoms. He said the drive from his residence to the three communities took between three and four hours, and that the drive from his residence to his brother's residence took about 2.5 hours. He also said because of slowly and progressively increasing symptoms he eventually went to see his physician. The worker also said in December 2001, while he was on call and working, his symptoms increased significantly.

In summarising the worker's appeal his representative said the worker reported his injury when he could no longer work. He did not report the injury while working because of his cultural belief that one does not report an injury until he or she can no longer work. The representative also said it was the worker's evidence that both culturally and personally he does not seek medical attention until it is absolutely necessary. The representative additionally said a number of witnesses, as documented in the claim file, stated that the worker had complained of lower back and left leg symptoms which he attributed to an incident at work on August 15, 2001. She additionally stated that Ms. W., in her letter of December 12, 2003, said that on August 12, 2001, the date of the incident, the worker complained to her of a stiff back and symptoms in his left leg. She also said the worker's physician stated that he knew of no back problems that the worker had between 1996 and August 15, 2001. The representative additionally stated that two physiotherapists and a physician, Dr. A., each said that they felt that the worker's need for surgery was work related.

The worker's representative also said on the basis of item #97.32 of the *Rehabilitation Services and Claims Manual*, *Volume 1* (RSCM) the panel should accept the worker's statements and accept his claim.

Reasons and Findings

Section 5(1) of the *Workers Compensation Act* (Act) provides that where a personal injury arising out of and in the course of employment is caused to a worker, compensation shall be paid by the Board.

Section 53(1) of the Act provides that in every case of an injury or disabling occupational disease the worker shall as soon as practicable after the occurrence inform the employer by giving information of the disease or injury to the employer.

Item #97.31 of the RSCM states that where a matter requires medical expertise, the decision must be preceded by consideration of medical evidence, which includes medical advice and medical opinion.

Item #97.32 of the RSCM discusses statements of workers about their own condition. It provides that a statement of a worker about his own condition is evidence insofar as it relates to matters that would be within the worker's knowledge, and it should not be rejected simply by reference to an assumption that it must be biased.

In this case I found the worker to be credible. He responded to questions and provided information in an open and frank manner without hesitation, and without any evasion. I accept that the worker, because of his cultural and personal background, did not report an injury to his employer until he was disabled from carrying out his employment tasks. I also believe that the worker does not seek medical attention until it is required. I also accept the worker's evidence that from the lifting incident on August 15, 2001 onward he experienced symptoms in his lower back and his left buttock and left leg which slowly and progressively intensified and increased. I also accept that the worker's symptoms significantly increased in December 2001 while he was on call and working.

On the basis of the expert medical opinions of Board medical advisor, Dr. Jarman, and that from Dr. Hill, orthopaedic specialist, I find it more likely than not that the cause of the disc herniation at the L5-SI level of the worker's back and his need for surgery in January 2002 were his work tasks on August 15, 2001 when he, with three other individuals, lifted a 200 pound plus patient. I also find that the employment-related driving continued to aggravate the worker's condition.

I return the file to the Board to determine the period of disability, following consultation with the worker's caregivers. I also order the Board to provide health care benefits under this claim.

In accordance with the *Workers Compensation Act Appeal Regulation*, section 7, I direct the Board to pay to the worker 12 hours of wage loss benefits for his attendance at the appeal hearing. I award no additional expenses for the mounting of this appeal.

Conclusion

On the basis of the expert medical opinions provided by Board medical advisor, Dr. Jarman, and by orthopaedic specialist, Dr. Hill, coupled with the worker's evidence and the provisions of items #97.31 and #97.32 of the RSCM I find that the most likely cause of the worker's need for discectomy surgery on January 31, 2002 and his preceding and subsequent disability from employment were his employment tasks on August 15, 2001. Consequently I vary the Board officer's decision and allow the worker's appeal.

Mike Swetlikoff
Vice Chair

MS/cmm

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898