WCAT Decision Number: WCAT-2004-00076-RB
WCAT Decision Date: **January 09, 2004**
Panel: Mike Swetlikoff, Vice Chair

Introduction

In an August 27, 2001 letter a Workers' Compensation Board (Board) entitlement officer informed the worker that his claim for a right wrist injury sustained on July 3, 2001, was denied because, at the time of his accident, the worker was not in the course of his employment nor was he doing anything for the benefit of his employer.

The worker disagreed with the decision and appealed. He said his injury occurred out of and in the course of his employment. He also said he seeks acceptance of his claim, health care benefits and wage loss benefits. The worker requested an oral hearing of his appeal.

In an October 20, 2003 letter the worker's representative requested that the appeal proceed by way of written submission rather than an oral hearing. A WCAT Deputy Registrar decided the appeal could be determined on the basis of review of the claim file, and written submissions and so informed the worker's representative in a letter of December 2, 2003. Following review of the claim file, and the submissions I also am satisfied that this appeal can be fairly decided based on review of the evidence and submissions.

Issue(s)

Did the worker's right wrist fracture on July 3, 2001 arise out of and in the course of his employment?

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.

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Background and Evidence

In his application for compensation benefits, dated August 7, 2001, the worker informed the Board that on July 3, 2001 at 11:30 p.m. he climbed over a fence to get to the boat on which he was living and working. He said while climbing over the fence he slipped, fell, and broke his right wrist. He also said he had to climb the fence because the gate was locked at about 9:30 p.m. He additionally said he initially thought his wrist was just sprained so he continued to work. By July 5, 2003 his wrist was quite swollen so he went to the hospital. He also said that x-rays were taken at the hospital which showed a previous fracture of the wrist. He said that he had injured his wrist two years previously while fishing and he thought that the prior injury had also been a strain.

In a physician's report of August 18, 2001 the attending physician said the worker advised that he fell while climbing over a fence on his way to the boat on which he was working on July 3, 2001.

In an August 24, 2001 memo the entitlement officer said that at the time of his accident, the worker was not in the course of his employment as required by section 5(1) of the *Workers Compensation Act* (Act). She also said although the worker is a fisherman who was living on the boat, he was coming back from eating. She concluded that the worker was not injured on the boat and also that he was not doing anything for the benefit of his employer or the boat when the accident occurred. She decided that the worker's claim did not meet the requirements of section 5(1) of the Act.

In a written submission dated November 26, 2003 the worker's representative said that the worker had been living and working on the boat since July 1, 2001. She said the worker and his co-workers were preparing the boat for the salmon season. She also said that on July 3, 2001, after work, the worker went out to eat and when he tried to return to the boat, he found the gate to the wharf locked. She said that there was no other available access to the boat. She also said the worker could not telephone the harbour authority to have the gate opened because the phone booth was located inside the locked fence and no other phone was available. She additionally said the worker climbed the fence to get to his boat and fell breaking his right wrist.

The representative cited item #18.01 of the *Rehabilitation Services and Claims Manual*, *Volume 1* (RSCM). She said this worker's case is similar to that described in item #18.01. She requested that the Board's decision be varied and the worker's appeal allowed.

Reasons and Findings

The worker, at the time of injury, was a travelling employee. His residence and his work were at different locations with many miles separating them.

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

I find that the following items of the RSCM are applicable to the case at hand: #18.01, #18.41, #19.00, #19.10 and #21.00.

Item #18.01 of the RSCM discusses entry to employer's premises. It states in part that it is not considered significant that a worker is injured while seeking to gain access to the employer's premises by a method that is probably different from that which the employer intends. It states that in a Board decision it was irrelevant that the deceased fisher attempted to jump aboard his employer's boat rather than use a ladder that was available. It also states that the outcome might be different if the method used has been specifically forbidden by the employer and the worker was aware of this.

In this case the worker was trying to access the harbour authority's dock as opposed to his employer's boat. While the phone at the location of the dock was behind the locked gate, the community where the boat was moored is relatively small and there were phone booths and businesses with phones available in close proximity to the dock. Moreover, the harbour authority has signs posted forbidding access to anyone without a key. Consequently, I find that it was not necessary for the worker to climb over the fence or gate to access the dock where his employer's boat was moored. I find that the worker could have used a pay phone or he could have gone to a local business and used a phone to contact the harbour authority to unlock the gate. Further, I would assume that the harbour authority would provide the boat's owner and/or caretaker with a key to the locked gate.

Item #18.41 of the RSCM pertains to personal activities during business trips. It provides that employees whose work involves travel away from the employer's premises are held "…to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown". It states that this principle covers the activities of travelling, eating in restaurants, and staying at motels overnight where these are required by a person's employment. It also states that everyday activities such as eating, sleeping or washing which, in the case of most non-travelling employees would be regarded as personal activities outside the scope of the employment when performed outside normal work hours. Such activities will normally be regarded as within the scope of the employment of an employee who is required to travel. On the other hand, if, for example, a person on a business trip attends a theatre or spends the evening in a public house, these would probably not be regarded as activities in the course of employment.

In this case the evidence, which I accept as fact, is that the worker, went out to eat after a day of work and on returning to where the boat, on which he was working, was moored he found the gate locked. I find that the worker was in the course of his employment when he accidentally fractured his right wrist as provided for in item #18.41 of the RSCM.

Item #19.00 of the RSCM discusses the use of facilities provided by the employer. It states where a worker is injured in the course of using some facilities supplied or provision made by the employer, the use of such facility or provision may be part of the employment relationship; and injuries resulting therefrom may be injuries arising out of and in the course of employment. Item #19.10 of the RSCM states that the use of residential premises by a worker is considered as part of the employment where the worker is required to use those premises by the employer, where there is no reasonable alternative accommodation, or their use is encouraged or contemplated by the employer.

In this case the evidence that I accept as fact is that the employer provided accommodation to the worker aboard the employer's vessel while the worker and his co-workers were preparing the vessel for the salmon fishing season. Therefore I find that the worker was in the course of his employment in accordance with items #19.00 and #19.10 of the RSCM.

Item #21.00 pertains to personal acts. It provides that where the common practice of an employer or an industry permits some latitude to employees to attend to matters of personal comfort or convenience in the course of employment, compensation for injuries occurring at those moments is not denied simply on the ground that the employee is not at the crucial moment in the course of production. This is within the scope of the established doctrine relating to acts which, though not in themselves productive, are nevertheless a normal incident of employment.

While I find that the worker may well have accessed a telephone within close proximity to the location of the dock where the employer's vessel was moored, nonetheless in accordance with the stated items of the RSCM I must find that the worker was in the course of his employment when he was returning from his meal following his workday. Accordingly, for reasons different than those cited by the worker's representative, I find that the worker's right wrist fracture on July 3, 2001 did arise out of and in the course of his employment.

I return the file to the Board to determine the extent of health care benefits to be provided under the claim, and to determine the duration of disability benefits to which the worker may be entitled, following consultation with the worker's caregivers.

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

Conclusion

I vary the Board officer's decision and allow the worker's appeal.

Mike Swetlikoff
Vice Chair

MS/cmm

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