WCAT Decision Number: WCAT-2004-00088-AD
WCAT Decision Date: **January 12, 2004**
Panel: Deborah Vivian, Vice Chair

Introduction

The worker appeals the findings of a Workers' Compensation Review Board (Review Board) panel of January 30, 2003. The Review Board panel found there was insufficient evidence to support a conclusion that the left knee symptoms causing disability that led the worker to leave her employment in October 2001 were related to her work activities on July 10, 2001.

Issue(s)

Whether the worker suffered a left knee injury which arose out of and in the course of employment on July 10, 2001.

Whether the worker suffered a work-related aggravation of her pre-existing left knee condition on July 10, 2001.

Jurisdiction

This appeal was filed with the Appeal Division. On March 3, 2002 the Workers' Compensation Appeal Tribunal (WCAT) replaced the Appeal Division and the Review Board. As an Appeal Division panel had not considered this appeal before that date it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 39).

In the notice of appeal the worker indicated that an oral hearing was not necessary in this appeal. I have reviewed the file, the evidence and submissions as well as the oral hearing tape and have concluded that this appeal can be dealt with fully and fairly without a further oral hearing.

In a notice of participation dated June 9, 2003 the employer indicated their intent to participate in the appeal.

Background and Evidence

The worker is a lifeguard for a city municipality. On July 10, 2001 the worker performed a water rescue from a river. The worker contends that while performing the rescue as part of her work activities on that day, she injured her left knee. In a decision letter of February 8, 2002 the Workers' Compensation Board (Board) denied the claim and

indicated that the weight of the evidence did not support a conclusion the worker had suffered an injury to her left knee at work on July 10, 2001. The Board also indicated the medical evidence on file did not support a conclusion the worker had suffered an aggravation of her pre-existing left knee condition on July 10, 2001.

The worker appealed the decision of the Board to the Review Board. An oral hearing was held on January 6, 2003. As outlined in findings dated January 30, 2003 the panel of the Review Board denied the worker's appeal and confirmed the decision of the Board. The panel found that:

- There was a lack of confirmatory evidence that the rescue performed at work on July 10, 2001 was a significant contributing factor to the worker being unable to continue her work in October 2001.
- There was concrete evidence that the worker had chronic left knee pain initiated by activities outside of work and the chronic left knee problems preceded the July 10, 2001 incident.
- The worker described no twist or specific event or acute symptoms aside from swelling. She continued to work and did not receive medical treatment for two weeks. At the time of the first medical the worker did not feel her injury was serious enough to report it to the Board.
- Although the worker stated her knee condition continued to progress she did not document the continuity of symptoms with her employer.
- Medical evidence in October 2001 indicated a flare-up of knee problems after three days at work with no mention of an incident in July.
- As documented by the Board medical advisor it would seem there was no significant change in the left knee in relation to the incident on July 10, 2001.
- It was just as likely the worker's condition in October 2001 was due to her chronic left knee condition.
- A progressive systemic condition was also supported by the fact that the worker's right knee had also deteriorated to the point of surgery.

The Review Board panel indicated that the *Workers Compensation* Act (Act) and policy required the evidence to warrant a conclusion that there was something exceptional in the employment that was of causative significance in producing disability. In this case there was insufficient evidence to support a conclusion that the worker's symptoms in October 2001 which caused her to leave her employment, were the sole responsibility of the July 10, 2001 rescue.

The background, relevant information and evidence have been set out in comprehensive detail in the Review Board findings of January 30, 2003. I have reviewed this information and confirmed it is a reflection of the information and evidence recorded on the claim, therefore there is no need for the information to be repeated in its entirety here.

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Submissions

The worker filed a notice of appeal dated February 17, 2003 indicating the Review Board panel did not fully consider all of the evidence as the rescue attempt did aggravate the worker's pre-existing condition. In support of the appeal the worker's representative put forward a submission dated October 30, 2003. The worker's representative indicated their position that the worker did suffer a left knee injury/aggravation of a pre-existing left knee condition while performing her work activities as a lifeguard on July 10, 2001. The worker indicated they were seeking outstanding wage loss and health care benefits. The worker's representative requested the panel review the tape of the Review Board hearing of January 6, 2003 as well as the representative's pre-hearing notes. The representative indicated that after the Review Board hearing he asked the worker to write down any concerns and/or errors. The representative indicated he had included a letter dated March 3, 2003 where the worker had provided additional details and clarification of the events surrounding her injury. The representative argued that:

- The Review Board panel accepted that the worker's testimony of the rescue was credible and that she aggravated her knee on July 10, 2001. However, the panel also noted the opinion of the Board medical advisor of no significant change in the medical condition of the left knee and that with the lack of continuity of reporting and treatment it was just as likely the worker's condition was as a result of the progression of the underlying left knee condition.
- While there was no dispute the worker had a pre-existing knee condition, there was a problem with the above analysis by the Review Board panel as the worker was able to perform both her work and non work-related activities for a good number of months before the July 10, 2001 incident.
- The worker had a cortisone shot on February 16, 2001 which provided relief, but approximately five months later she had her aggravation by the water rescue with symptoms which continued for the next three months, eventually causing her to leave work. The representative therefore submitted that there was a significant change after July 10, 2001.
- The Review Board panel was not convinced that the events of July 10, 2001 constituted an exceptional strain capable of triggering disability in October 2001. The representative disagreed citing the chain of medical events stemming from the rescue, the detailed description of the event itself given by the worker, the support of the victim with the affected knee which was the mechanism of injury as well as the fact there were no outside work activities that contributed to the increase in symptoms.
- With respect to the expectation by the Board medical advisor of a significant deterioration of the knee following the work incident, the representative submitted that the evidence did show an additional deterioration and questioned what else had caused the increase in symptoms.

- The worker had performed her duties with no problems prior to the incident and it was only after the rescue that the left knee became problematic. Therefore, it is reasonable to conclude the rescue was the trigger that caused a further accelerated deterioration which led to the worker leaving work in October 2001.

The representative concluded by indicating the worker's left knee condition significantly changed after the July 10, 2001 rescue attempt and that this event was the trigger that caused the pre-existing condition to worsen up to her physician having to remove her from work in October and as such the worker was entitled to compensation.

A response to the worker's submission was received from the employer dated November 26, 2003. The employer argued:

- There was still no evidence that an exceptional strain capable of triggering disability occurred.
- The procedures performed on the day of the rescue were not beyond the normal physical requirements for the job.
- The fact that the worker was able to perform all work and non-work activities prior to July 10, 2001 and got relief from cortisone on February 16, 2001 showed the length of time the left knee had been problematic and indicated that this was a long-term degenerative condition. It was also not until three months after the July rescue that the worker indicated she was totally unable to perform her work activities.
- The fact that she did not report this incident immediately to the Board indicated the worker was not in any greater pain than what she usually experienced off and on prior to the incident.

Reasons and Findings

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

The *Rehabilitation Services and Claims Manual* (RSCM), Volume 1, item #15.10 refers to cases where the worker has a pre-existing condition and provides that 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 chance or coincidence whether it happened at work, at home or elsewhere. The disability is one which the worker would not have escaped regardless of the work activity and hence the causative significance of the work is so slight that the disability is treated as having arisen 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.

Policy item #26.55 in the RSCM is relevant to an aggravation of a pre-existing disease and provides that where a worker has a pre-existing disease which is aggravated by work activities to the point where the worker is thereby disabled, and where such pre-existing disease would not have been disabling in the absence of that work activity, the Board will accept that it was the work activities that rendered the disease disabling and pay compensation. Evidence that the pre-existing disease has been significantly accelerated, activated, or advanced more quickly than would have occurred in the absence of the work activity, is confirmation that a compensable aggravation has resulted from the work.

This must be distinguished from the situation where work activities have the effect of drawing to the attention of the worker the existence of the pre-existing disease without significantly affecting the course of such disease. For example, a worker who experiences hand or arm pain due to an arthritis condition will not be entitled to compensation simply because they experience pain in that limb from performing employment activities. To be compensable as a work-related aggravation of a disease, the evidence must establish that the employment activated or accelerated the pre-existing disease to the point of disability in circumstances where such disability would not have occurred but for the employment.

Policy item #97.00 in the RSCM states that while there is no burden of proof on a claimant, the Act contains pre-requisites for benefits. The worker to show that there is a proper claim must submit some basic evidence. If there is nothing objective to indicate any activity at work had been potentially causative of the condition reported, at or near the time alleged, it can be fairly said that the claim has not been established. The claim fails when the claimant has simply failed to present those fundamental facts which bring the provisions of the Act into play.

In this appeal I have reviewed all the evidence submitted and have considered the arguments raised in light of the law and policy as outlined. I see no reason to disturb the findings of the Review Board panel of January 30, 2003. I find the preponderance of the evidence does not support a finding that the worker suffered an injury at work on July 10, 2001 during her work activities in the form of a significant aggravation of her established pre-existing left knee condition.

With respect to the worker's pre-existing condition of the left knee, I note as recorded in an emergency report from an acute care facility, that the claimant presented on September 2, 1999 with left knee pain and the accident details record that the worker was running the night before and felt her knee "pop". At that time chondromalacia patella was diagnosed. I also note from the medical information on file and as recorded in the chart notes of the worker's attending physician on September 14, 2000, the worker was seen on that day for left knee pain which was reported as increasing with activity and there had been pain and swelling for two to three days.

In a report dated October 26, 2000, an attending physician with an interest in sports medicine, saw the worker at a sports medicine clinic. At that time the worker presented with left medial knee pain, left peripatellar knee pain and left lateral hip pain. The worker stated she had started a running program in April 1999 where she was running about four kilometres a week and worked up to eight to 12 kilometres three times a week. In October of 1999 she was running on the flat and felt a pop sensation under the medial aspect of the left knee. There was very little swelling and the pain was in the suprapatellar area. In April of 2000 she started running again and by May of 2000 she started to get left lateral hip pain. The report indicated at that time the worker continued to have left medial knee pain with periodic swelling. The specialist reported the worker had a sensation of buckling preceded by pain, but no true locking. At that time the worker was booked to see a specialist with a possibility of arthroscopy and the specialist strongly recommended the use of a patellar immobilizing brace.

In a report dated November 27, 2000 the attending physician with an interest in sports medicine, indicated he had seen the worker in follow-up with regard to her left hip and left knee pain. At that time he indicated the working diagnosis before then was left greater trochanteric bursitis and left gluteus medius insertional tendonitis along with early osteoarthritis of the left knee and a possible patellar plica and pes anserine bursitis. At that time the worker indicated she had been doing water running three to four times per week and had been tolerating this.

In a report from an orthopaedic specialist dated December 5, 2000, Dr. B indicated the worker's left knee had been bothering her for some years. At that time the worker indicated her pain had been intermittent but over the last two months she had had more pain in her knee and the knee did seem to be aggravated by some activity she was doing, particularly some skating lessons that she took. In the assessment the specialist indicated the worker did have some chronic anterior knee pain related to her patellofemoral joint but the more recent more acute pain was related to some bursitis of the pes anserinus. At that time the specialist indicated the worker should have physiotherapy and anti-inflammatory medications.

The specialist also indicated that should the worker's medial pain recur a steroid injection into the pes anserinus area might be considered. The specialist indicated the worker would also benefit from the use of orthotics to try to improve the mechanical axis of her knees.

I have reviewed and presented this evidence as it demonstrates that the worker has a significant pre-existing condition of her left knee, which is not disputed. However, to my mind the importance of the evidence is that it also establishes the variable nature of the pre-existing condition and the fact that it is activated or enhanced by activities in general and not specifically by work activities.

The evidence outlined also tends to support the finding of the Board medical advisor that he did not find the medial evidence that there was a significant aggravation of a pre-existing condition to be very persuasive. He highlighted prior problems with the knee including pes anserinus bursitis and osteoarthritis. He notes the history of ulcerative colitis and significant obesity as well as the history of the popping injury in 1999 as well as the fact that in 2000 the knee was sufficiently troublesome to contemplate arthroscopy.

I note that while the supervisor confirmed the worker complained of knee pain after the rescue, the worker did not report anything to the Board until the end of October 2001, some three months after the event, which the worker is now alleging was causative of the final triggering event in the deterioration of her left knee condition. However, I note the worker's own evidence is that she did not go home after the event but put equipment away as she felt the pain would go away. She did not complete any documentation and did not seek the assistance of first aid. Furthermore, she went on vacation and did not seek medical attention for at least two weeks initially and then not until some time later at or around the end of September 2001.

I would also state in passing that I share the concerns expressed by the Board medical advisor over the altered date in the chart notes of the attending physician of a purported entry of July 27, 2001, especially when viewed in the context of the later dates of all the other documents submitted to the Board or to the employer when contact with the Board was made on or around late October, 2001. However, while I note this as a concern, in any event this would not affect the outcome based on all the other evidence available.

The worker's representative has argued, as the Review Board found the description of the incident to be as the worker described and found the worker did aggravate her knee on July 10, 2001 there was an inconsistency with accepting the opinion of the Board medical advisor that there was no significant change in the worker's knee after the incident. The worker's representative argued that the problem with the analysis was that the worker was able to perform both her occupational and non-occupational activities for some months prior to the incident in July 10, 2001.

With respect I cannot accept this argument, as I note the Review Board panel indicated the worker's left knee was swollen but confirmed with the worker that her knee often swelled. I find this is referring to a similar situation as given by way of example in policy item #26.55 in the RSCM that there is not an entitlement to compensation simply because a worker suffers symptoms at work from a pre-existing condition. I also note

with respect to this argument the worker continued to work on the day of the incident and afterwards and there was no significant time loss on the claim until October 2001, some three months after the event and the worker failed to initiate any contact with the Board until that time. I accept the employer's argument as I find it persuasive that the fact that the worker did not report this claim to the Board or file any documents with respect to the alleged injury until approximately three months after the event, leads to a conclusion that the worker was in no more pain than she often experienced on and off prior to the incident.

I concur with the Review Board panel the worker's evidence is that there was no twist or traumatic event associated with the worker's onset of knee pain. I also concur with the Review Board panel that although the worker indicated after July 10, 2001 her knee continued to worsen she made no effort to document any continuity of symptoms with her employer and also in October 2001 the attending physician in his report merely stated the left knee had flared up after three days at work with no reference to any precipitating event on July 10, 2001.

I conclude the evidence reveals on a balance of probabilities, that it is more likely than not that the worker's left knee condition which caused her to stop working in October 2001 was a result of her underlying pre-existing condition. I concur with the Review Board panel that this is supported by the fact that the worker's right knee also deteriorated to the point of surgery.

With respect to the relevant policies, I am of the view from the evidence that as per item #15.10 in the RSCM that the disability is one which the worker would not have escaped regardless of the work activities and concur with the Review Board panel that the events of July 10, 2001 did not constitute an exceptional strain capable of triggering the disability in October 2001.

I also concur with the Board medical advisor and as per policy item #26.55 that the evidence does not establish that the employment activities on July 10, 2001 activated or accelerated the worker's pre-existing left knee condition to the point of disability where such disability would not have occurred but for the employment activities. In my view the pre-existing condition was drawn to the attention of the worker but the incident did not affect the course of the disease.

Conclusion

I deny the appeal and confirm the findings of the Review Board panel of January 30, 2003. No costs are awarded.

Deborah Vivian
Vice Chair

DV/rbe

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