**WCAT Decision Number:** WCAT-2004-00093-AD
**WCAT Decision Date:** **January 12, 2004**
**Panel:** James Sheppard, Vice Chair

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## Introduction

The employer's representative appealed the July 29, 2002 Workers' Compensation Board (Board) decision which denied the employer relief of costs under section 39(1)(e) of the *Workers Compensation Act* (Act). The case manager found there was no evidence to support the conclusion that the worker had a pre-existing disease, condition or disability.

## Issue(s)

Did the Board err in law, fact or contravene published policy by denying relief of costs under section 39(1)(e) of the Act to this claim?

## Jurisdiction

This appeal was filed with the Appeal Division. On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). Section 39(1)(a) of the transitional provisions contained in Part 2 of Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, provides that all appeal proceedings, pending before the Appeal Division on March 3, 2003, are continued and must be completed as proceedings pending before WCAT (except that no time frame applies to the making of the WCAT decision). This means that WCAT will consider this application under the former section 96(6) or (6.1), including application of the grounds of error of law or fact or contravention of a published policy of the governors, but the new WCAT provisions also apply (policy is binding pursuant to sections 250(2) and 251, and section 42 of the transitional provisions, WCAT precedent decisions are binding under section 238(6) and 250(3), and independent health professional assistance may be obtained under section 249).

The employer's representative has indicated on the notice of appeal that the ground of appeal is based upon an error of fact.

## Procedural Matters

The employer's representative has indicated that no oral hearing is required. The employer was provided with updated disclosure from the Board of the worker's electronic claim file. Although the worker was invited to participate in this appeal no response was received by WCAT from the worker. The employer's representative did

provide a written submission dated November 21, 2003. I find that I can render a decision based upon a review of the evidence and the submission filed without an oral hearing.

**Reasons and Decision**

On September 1, 1999 the worker, then a 59 year janitor maintenance worker, was hammering rebar into pavement with a sledgehammer for approximately 4 hours. The worker reported that this was not part of his regular work duties. The assistant maintenance manager confirmed that the activity of hammering rebar to install parking curbs was not something that was done on a regular basis. He stated that the force of hammering the rebar was somewhat limited as the holes were pre-drilled, the rebar was approximately two feet in length, and the sledgehammer would not have to be swung overhead. The worker suffered a gradual onset of discomfort in the right side of his neck and right shoulder as a result of this work activity. His injury was subsequently diagnosed as right shoulder rotator cuff tendonitis and right elbow lateral epicondylitis, and a soft tissue strain to the neck.

The claim was initially accepted for a right neck and shoulder strain. The worker was subsequently diagnosed with a right rotator cuff tendonitis and right lateral epicondylitis. The claim summary form indicates that the rotator cuff tendonitis was accepted under this claim. The worker received temporary wage loss benefits from September 2, 1999 to September 12, 1999. He returned to work and went off work again on November 17, 1999. He received further temporary wage loss benefits between November 17, 1999 and November 12, 2000, further temporary partial disability wage loss benefits between November 27, 2000 and February 25, 2001, and further temporary total disability wage loss benefits between February 26, 2001 and May 13, 2001. The worker returned to his pre-injury employment on May 14, 2001.

Relief of costs of a claim is available under section 39(1)(e) of the Act to an accident employer where their worker's disability is enhanced by reason of a pre-existing disease, condition or disability. Guidelines for determining how this type of relief was applied at the time the July 29, 2002 Board decision was made were found in Decision #271 of the former Commissioners (4 WCR 10) and items #114.40 to 114.50 of the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM*)*. Item #114.40 of the RSCM stated that in deciding the applicability of this type of relief of costs it was necessary to ask two questions:

1. Was there a pre-existing disease, condition or disability and, if so, to what extent?

2. How severe was the incident initiating the claim in question?

Item #114.40 of the RSCM stated that if the worker suffers an injury and there is no evidence of any pre-existing disease, condition or disability, this form of relief of costs did not apply. By the same token if there existed a pre-existing problem of a minor nature and the accident was severe, relief would not apply. On the other hand, if the injury was relatively minor and evidence exists that an underlying problem enhanced the condition or prolonged recovery then relief would clearly be applicable. Item #114.41 of the RSCM indicates that the pre-existing condition, disease or disability, which is prolonging and/or enhancing the worker's temporary disability, might well be in a different part of the worker's body.

*The Concise Oxford Dictionary* (9th Edition) contains a number of definitions of the word "condition". In the context of section 39(1)(e) of the Act, the most applicable definition appears to be "an ailment or abnormality (a heart condition)". "Abnormality" is defined to include a "physical irregularity". The word "abnormality" has also been taken to include not only a physical abnormality, but also a mental abnormality, such as a recognized psychological disorder outlined in the *Diagnostic and Statistical Manual of Mental Disorders*. It is debatable whether pre-existing factors, such as the stressors that have arisen in an individual's life, constitute pre-existing conditions for the purposes of applying section 39(1)(e) of the Act.

A pre-existing condition does not have to be symptomatic prior to the current injury, nor does there have to be a history of medical treatment or disability related to the pre-existing condition, for it to be considered for purposes of relief of costs under section 39(1)(e) of the Act. The evidence needs to show that a pre-existing condition, disease or disability enhanced and/or prolonged the worker's temporary disability. Enhancement means more than just prolongation. For example, *Appeal Division Decision #98-0833* (15 W.C.R. 91) (not binding but persuasive) found that relief under section 39(1)(e) of the Act is available where the pre-existing condition or disease was a major factor, in combination with a subsequent work injury, in producing the worker's injury and disability. In other words, section 39(1)(e) of the Act can apply, not just whether the period of disability is prolonged by a pre-existing condition, disease or disability, but also where the initial disability is affected (made worse, contributes to the occurrence of, enhances it) by it.

Dr. Moccia in his first medical report for September 2, 1999 indicated the worker had had a previous injury to his right neck and right shoulder. A November 13, 1999 x-ray report for the right shoulder showed no fracture, dislocation or bony abnormality, nor periarticular soft tissue calcification.

The entitlement officer's claim log entry for September 14, 1999 states: "Worker denies any recent neck or shoulder complaints prior to work activities on Sept 1,99. He confirms prior claims (most recent is Sept 97) but states he has not had any ongoing problems in time leading up to Sept 1,99." (Reproduced as written.)



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Dr. Kokan, an orthopaedic surgeon, in his November 17, 1999 report states: "he told me that in Sept 97 he fell from a scaffold, an 8 foot height, hit his head and sustained a laceration to the top of the head and injured his right shoulder." Dr. Kokan indicated that x-rays of the neck and shoulder were taken and the worker was off work for 6 months. Dr. Kokan further states: "This patient's main problem is the lateral epicondylitis of the right shoulder [he must mean elbow] which is related to the injury in September of this year. He also has mild rotator cuff tendonitis of the right shoulder and **chronic** strain of the neck on the right side." I note in the summary of interdisciplinary findings dated February 1, 2000 for the pain clinic that the worker indicated he had also injured his neck and elbow in 1997. The findings also state (under physiotherapy on page 3): "It appears that the client is experiencing an aggravation of a previous injury that occurred back in 1997. He indicated that since that initial injury, he has been having problems with his right upper extremity "off and on".

Dr. Sharma, a Board medical advisor, in her July 26, 2002 opinion states: "I have not been able to identify any pre-existing medical condition delaying the recovery of the compensable condition covered under this claim." It does not appear that Dr. Sharma reviewed any of the worker's prior claims.

I find that the case manager erred in fact when concluding there was no evidence (as opposed to insufficient evidence) of a pre-existing condition, disease or disability. There are prior claims for the neck, right shoulder and the right elbow/arm.

Further, the Review Board, in findings dated August 22, 2002, dealt with the worker's appeal of a November 16, 2000 Board decision which limited the worker's temporary wage loss benefits because the Board found that the worker could engage in suitable employment for up to four hours a day. The Review Board panel took the November 16, 2000 decision as the first notification of the Board's acceptance of the worker's right lateral epicondylitis and defined this as one of the issues under appeal. The panel found that this condition was not related to the work activities on September 1, 1999. Although he recognized that the worker was principally limited by his non-compensable right elbow complaints he found that the medical evidence established that the worker continued to experience right shoulder and neck complaints that resulted in employment restrictions. He stated:

> I undertook a brief review of [prior 1997 claim] and note that [the worker] did seek a reopening of that claim in 1999 for right elbow complaints. Of interest, according to a July 21, 1999 decision that was issued under the 1997 claim [the worker] also sought a reopening at that time for right shoulder and neck complaints that he indicated were ongoing since his March 1998 resumption of work. The Board declined to reopen [the worker's] 1997 claim and concluded that he had recovered from his injuries under that claim and that his continued symptoms were due to cervical degeneration.

The Review Board panel also noted that the worker could not recall if he had right elbow complaints prior to September 1, 1999.

I find that it would be appropriate at this point to vary the case manager's July 29, 2002 decision to the extent of referring back to the case manager a request to pull the prior right shoulder, neck and right arm/elbow claims and also the 1997 head claim to be followed by a review by a Board medical advisor to answer the following questions:

1. Do these prior claims indicate that the worker likely had a pre-existing condition, disease or disability which prolonged and/or enhanced (contributed to the occurrence of or made worse) the worker's temporary disability under the 1999 claim which arose from the worker's neck and right shoulder injuries. In particular there is reference by the Review Board as noted above of pre-existing cervical degeneration.

2. I note that the right shoulder injury was diagnosed to be right rotator cuff tendinitis. Is it likely that a pre-existing condition, disease or disability prolonged and/or enhanced this condition?

3. As previously mentioned, relief of costs can be awarded where a pre-existing condition, disease or disability in another part of the body has prolonged and/or enhanced the worker's temporary disability. Is it likely that the worker's diagnosed right lateral epicondylitis was pre-existing? If so, is it likely that it prolonged and/or enhanced the worker's temporary disability arising from his neck and right shoulder?

The employer's representative has emphasized in her November 21, 2003 written submission the delay in the onset of the worker's right elbow epicondylitis and submits that the evidence shows that the ongoing causation of disability was related to the right elbow which was not accepted under this claim. I cannot in the course of a relief of costs appeal readjudicate the duration of the temporary wage loss benefits paid to the worker under this claim. The case manager may want to re-examine this issue in light of the Review Board findings of August 22, 2002 (albeit as I have outlined above the panel still found that the medical evidence established that the worker continued to experience right shoulder and neck complaints that resulted in employment restrictions).

**Conclusion**

The employer's appeal is allowed, in part. I vary the case manager's July 29, 2002 decision to the extent outlined above.

James Sheppard
Vice Chair

JS/gwo



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