WCAT Decision Number: WCAT-2004-00095-RB
WCAT Decision Date: **January 12, 2004**
Panel: Eric S. Sykes, Vice Chair

Introduction

The worker appeals a decision made by an officer of the Workers' Compensation Board (Board) contained in a letter dated May 7, 2002. In that letter an entitlement officer recorded the results of a meeting with the worker. The entitlement officer explained to the worker that there was no evidence to support that his low back, upper shoulders, left arm and hand complaints were a result of his work activities of June 2001. The entitlement officer considered the worker's claim under section 53(4) which deals with a worker's failure to report an injury to his employer and under section 5(1) of the *Workers Compensation Act* (Act) that sets out in part that where a worker experiences an injury arising out of and in the course of his employment, compensation is payable. The Board officer noted the worker had not reported his injury to the employer and had reported to the Board two months after the injury occurred. Because the worker had not reported the accident to the employer and because of the delay, the entitlement officer declined to accept the worker's claim under section 53(4) of the Act. The entitlement officer noted that the worker had been performing the work activities in the construction field for some time and therefore he considered the worker to be accustomed to his duties. The worker denied any specific incident or trauma occurring or performing any unusual work activity that may have caused the onset of symptoms. Based on the information available the entitlement officer denied the worker's claim under section 5(1) of the Act.

The worker takes exception to the decision and notes that while he did not lose any wages, his health suffered as a result of his work activity.

My finding is made by way of a review of the Board file, an oral hearing and application of Board law and policy.

Issue(s)

1. Is the worker's claim barred by section 53(4) of the Act.

2. If the answer to issue #1 is no, did the worker sustain an injury arising out of and in the course of his employment?

Jurisdiction

This appeal was filed with the 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.)

File Information

The worker, then a 42-year-old construction worker filed an application for compensation on August 7, 2001. He recorded that in June 2001 he experienced an injury that happened gradually over time. He recorded that he worked until June 18.

On June 19, 2001, Dr. Rohani completed an attending physician's first report and recorded that on June 8, 2001 at 11:00 a.m. the worker lifted a heavy load and felt pain in his left upper shoulder and low back. He then had numbness in the palm of his left hand, and he now had numbness in the left index finger and first digit. He had no neck pain. The doctor diagnosed muscle spasms and carpal tunnel syndrome (CTS).

In an October 26, 2001 administrative log entry an entitlement officer recorded a conversation with the worker who said that he lifted many heavy loads (blocks of cement) over a two-week period when he began experiencing pain in his upper and lower back with numbness in the palm of his hand. The symptoms became noticeable on approximately June 8, 2002. The worker confirmed there was no definite incident. The worker confirmed that he quit his job on June 18, 2001 in order to travel outside of Canada.

On November 2, 2001 the worker completed a Board questionnaire and recorded that he was right-hand dominant. The worker recorded the problems he had experienced were in his left hand and in his back. He described his duties as that of a general labourer, moving construction materials about manually, using a jackhammer and using a hammer.

In a November 6, 2001 letter, hand, arm and neck specialist, Dr. Makin recorded the results of his examination of the worker. The doctor recorded that the worker had been involved in construction. Around June he developed numbness and tingling in his left hand and forearm that initially occurred about five or six times a day and would last for a minute. These symptoms progressed to the point where the numbness in his index finger was constant. He was laid off from work about two weeks later, and his symptoms improved since then. He still has numbness and tingling in the index finger. There was no pain. He did not have nocturnal symptoms. EMG studies confirmed a

diagnosis of left CTS. This condition was improving. Dr. Makin did not recommend a carpal tunnel release at that time. The doctor noted there was no evidence of cervical radiculopathy, thoracic outlet syndrome, or other cause for his symptoms.

In a letter dated February 4, 2002 an entitlement officer noted that in June 2001 the worker identified the onset of pain in both wrists and discomfort in his low back and upper shoulders as a result of lifting heavy loads at work. The worker reported the numbness appeared in his left hand, particularly the left index finger and had come on gradually as did the discomfort in the low back and left shoulder. The injuries were not reported to the employer. An EMG study of the left wrist confirmed a diagnosis of carpal tunnel syndrome (CTS). The entitlement officer decided that the onset of pain appeared coincidental to the worker's employment rather than caused by any feature of the employment. As a result, the entitlement officer decided not to accept the worker's claim for benefits.

On May 7, 2002 an entitlement officer issued the decision letter of May 7, 2002 which is the subject of this appeal.

Hearing Evidence

The worker testified that he started work as a general labourer in February 2001. His duties included putting in the forms for concrete, carrying wood, cleaning concrete surfaces with a vacuum and the use of a jackhammer. In June 2001 he began to feel numbness in his left hand, arm and index finger. The numbness appeared and went away about three times per day. He did not tell anyone about the symptoms except a fellow worker who opined the problem would soon go away. By June 18th the symptoms appeared 10 times per day. He quit work on that date as the job was near completion and he planned a trip outside of Canada. On June 19th he saw his doctor. The worker did not travel until one month later.

The employer testified that the worker attended an orientation before starting the job that included a video. The video stressed the importance of reporting injuries by going to the first aid. The employer described the worker's duties as vacuuming cement surfaces and cleaning up spillage. The employer described the jackhammer work as occasional, using a light, low impact jackhammer. He described the work as not repetitious.

In response to my questions the worker acknowledged attending the orientation for safety rules. He did not remember hearing the directive to report injuries to the first aid. He did not complain about his condition while at work because he wanted to work. He did not know he had to make a report to the employer or visit the first aid. His doctor sent in his report and that triggered a letter to him from the Board together with an application that he completed.

The worker reported that, two years after the injury, he did not have full power in his left index finger. The condition had not prevented him from working.

Reasons and Findings

Section 53(4) of the Act sets out that a failure to provide information required by this section is a bar to a claimant for compensation unless the Board is satisfied that, a) the information, although imperfect in some respects was sufficient to describe the disease or injury suffered, and the occasion of it; b) the employer or the employer's representative had knowledge of it; or the employer has not been prejudiced, and the Board considers that the interest of justice requires that the claim be allowed.

The Board's letter of February 4, 2002 sets out that the worker identified the onset of pain in both wrists. I cannot find any record in the medical treatment nor from the worker's testimony that he experienced symptoms in both wrists. There is one reference in a claim log entry of a bilateral problem but that is not supported by the worker's testimony or the details in the medical records. Accordingly, I make a finding of fact that the worker did not have symptoms in his dominant right arm/wrist.

The worker acknowledged attending a safety orientation. The employer said that orientation included instructions to report injuries to the first aid department. Because the worker acknowledged attending a safety orientation, I accept the evidence that the worker was told the correct procedure with regards to reporting accidents. The worker had a responsibility to listen to and follow the instructions provided. When proper instructions are provided, an excuse of not remembering the instructions is not sufficient to cancel the worker's responsibility to report as directed. The worker, by his testimony felt symptoms that he related to work coming on for at least 10 days but did not tell the first aid attendant as directed. He did not give the employer an opportunity to address the possible causation. The worker certainly believed the symptoms were work-related because he told his doctor that on the day after he quit work. He never did inform the employer and completed an application for compensation seven weeks later when the Board sent out the forms. I find that the worker's lack of reporting the suspected claim to the employer and the lengthy time until the employer knew there was a claim prejudiced the employer's ability to investigate the claim.

Because the worker was instructed in the procedure for reporting injuries and failed to do so when it was practical to do so, I find that the failure to provide such information is a bar to compensation. I deny the worker's appeal.

In case I have overlooked some evidence I adjudicated the claim with regards to the worker's diagnosed carpal tunnel syndrome. As the worker recorded a gradual onset of symptoms rather than a traumatic event I adjudicated on the basis of an occupational disease. Section 6(3) of the Act does not apply because carpal tunnel syndrome is not a disease identified in Schedule B. Section 6(1) of the Act sets out that, where a worker

suffers from an occupational disease and the disease is due to the nature of any employment, compensation is payable.

Policy item #27.32 guides in adjudication of carpal tunnel syndrome. It sets out in part that, work activities utilizing the hand/wrist that involve high repetition associated with high force, prolonged flexed posture of the wrist, high repetition associated with cold temperatures or the use of hand held vibrating tools are more likely to be associated with increased risk for carpal tunnel syndrome. The Board recognizes that where the worker was occupationally performing frequent, repetitive and forceful movements of the hand/wrist, including gripping that are reasonably capable of stressing the tissues of the hand/arm affected by carpal tunnel syndrome, and in the absence of evidence suggesting a non-occupational cause for the worker's condition, a strong likelihood of work causation will exist. These factors are not preconditions to the acceptance of a claim for carpal tunnel syndrome nor are they the only factors which may be relevant.

There is no ergonomic analysis report. However, the worker and the employer sat in the hearing room and did not disagree on the job activities. The work was varied in nature and there was no report of forceful movements of the hand or wrist. There was some use of a jackhammer (vibrating tool) but this was not a principal portion of the worker's activities. There was no evidence presented that any of the worker's job tasks were frequent in nature. Because the tasks were varied and there was no evidence that any task was frequent, I do not find evidence of frequent and repetitive activities as described in the manual. I do not find evidence of forceful movements of the hand/wrist. In the absence of the most common work-related risk factors for carpal tunnel syndrome I do not find sufficient risk factors to reasonably include that the diagnosed condition was caused by the work activities. In addition, I note the symptoms appeared in the worker's non-dominant wrist/hand. With physical activity, symptoms more often first appear in the dominant side. I do note that by November 2001, five months after the worker had left the job, the symptoms had subsided and that is often a sign that the condition is work-related. However, I return to the information on risk factors in the work tasks. Because of the absence of sufficient risk factors I deny the worker's appeal that his diagnosed carpal tunnel syndrome arose out of and in the course of his work activities.

Conclusion

I confirm the Board's decision in this matter. I deny the worker's claim.

No costs are allowed.

Eric S. Sykes

Vice Chair

ESS/jtr/cd

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