WCAT Decision Number: WCAT-2004-00111
WCAT Decision Date: **January 13, 2004**
Panel: Julie A. Brassington, Vice Chair

Introduction

In the *Review Reference #19* decision letter dated June 4, 2003, a Worker's Compensation Board (Board) review officer advised the employer that she confirmed the Board officer's decision of December 17, 2002 that the worker's right inguinal hernia injury of October 30, 2002 arose out of and in the course of his employment. The employer appeals that decision on the basis that he feels there is sufficient evidence to cast doubt that the injury arose out of and in the course of employment. The employer stated that review officer did not apply adequate weight to the employer's evidence in adjudicating the claim.

Issue(s)

Did the worker's hernia injury of October 30, 2002 arise out of and in the course of his employment?

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act). The employer appeals a June 4, 2003 decision of the Review Division.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

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No request was made for an oral hearing and I have determined one is not necessary to determine the matter under appeal.

Evidence

I have reviewed the evidence in the claim file, any submissions made by the worker and the accident employer in support of their respective positions, the Act in effect at the time of the events here in question, and applicable Board policy as set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM). Interested parties have received full disclosure of the claim file, and the medical and claim history will not be repeated in detail here except as relevant to the current appeal.

The worker was employed by the employer as an automotive technician. In 2002, the worker was 40 years old; he began working for the employer on August 7, 2001. On October 30, 2002, the worker stated he was injured while lifting the rear box of a pick-up truck with co-workers. He submitted an application for compensation to the Board on December 17, 2002. However, he had advised the employer of his injury on November 19, 2002.

In a decision letter dated December 17, 2002, a Board entitlement officer advised the employer that the worker's claim for a right inguinal hernia on October 30, 2002 had been accepted. She determined that the worker's hernia was a result of a lifting incident at work.

The worker stated that on October 30, 2002 he and three co-workers were lifting a heavy truck box when he felt a pop/pull in his right groin. He stated that at the time of the incident he thought it was a minor strain and would resolve within a short time frame. However, he reported the pain did not go away and he noted that there was a bulge in his groin area. He was examined by his physician on November 20, 2002 and diagnosed with a right direct inguinal hernia. His physician referred him to a surgeon and on December 7, 2002 the surgeon noted that the worker had bilateral hernias. The surgeon noted that the worker had a symptomatic right hernia and due to the pain he was unable to continue with his work. He noted the worker had an asymptomatic left hernia which he felt may cause problems in the future. The worker was advised to stay off work pending surgical repair of the hernias. He went of work on December 2, 2002.

In the December 16, 2002 claim log entry the Board medical advisor noted that the worker was helping lift a heavy truck box when he suddenly felt a sharp pain in his right groin. The worker noticed a lump as well. He noted the worker has a large inguinal hernia that was symptomatic particularly with any lifting or other work activities. He noted the left side had a small asymptomatic hernia that was only detected because the surgeon looked for it. He noted that people who developed hernias often did so in a

bilateral fashion. He stated this weakness would be considered to be a pre-existing condition that was aggravated on the side where the trauma was operational, in the worker's case the right side. He noted that the subsequent finding of a small asymptomatic hernia on the left side would not have originated form the traumatic event, but would be considered to have been pre-existing. He noted that both the surgeon and the treating physician were of the opinion that the worker would be unable to perform his job duties. He considered that the worker satisfied the "extenuating circumstances" clause of an exemption to the Board policy regarding pre-operative time loss.

On December 10, 2002 the employer sent out questionnaires to employees regarding the worker's injury. One employee noted the worker advised him of the injury at the time of the lift. Three other employees indicated that the lift happened but stated they were not aware of the injury until the worker had been to the doctor. The worker stated that the one employee that witnessed the injury was on the same side of the pick-up box as he was, the others were not.

The employer stated that according to their work logs the lifting incident did not take place on October 30, 2002 but on November 5, 2002. Further, the employer submits that the worker was in the process of doing extensive renovations in his home and that the injury could have just as easily happened at home rather than in the workplace. The employer questioned why only one of the co-workers witnessed the event and noted that the witness had a history of claims with the Board. Further, the employer noted that both the witness and the worker had had problems at work in the months prior to the injury. The employer further submits that the worker was a safety coordinator in his previous job and as such should have known the importance of reporting the injury immediately.

The employers' adviser forwarded a submission on behalf of the employer on September 15, 2003. He noted that on December 11, 2002 the employer held a safety meeting and obtained statements via a questionnaire. With the exception of one employee's statement, the other employees did not indicate any knowledge of the worker's injury prior to November 19. Most of the workers indicated that they were aware of the worker's ongoing home renovations and work in the shop on his personal vehicle from October 29 to November 8, 2002. The employers' adviser noted that the worker would manually push his vehicle in and out of the shop daily in the course of this personal work.

The employers' adviser stated that on December 2nd the employer visited the worker's home to deliver his pay. He was informed that the worker was power sanding in the bedroom of the house. The adviser noted that the employer was granted cost relief under section 39 of the Act. In granting relief of costs the entitlement officer determined that the bilateral hernia was pre-existing and the lifting incident was of minor significance.

The employers' adviser submitted that the delay in reporting, the confusion around the date the box was moved, and inconsistency in the statements collected by the worker, along with the fact that the worker had been involved in home renovations prior to the injury, and continued to take part in them post-injury lead to the questioning of the etiology of the injury. He feels the question is troubling considering the worker continued to work on his vehicle after the alleged date of injury and at least two weeks prior to reporting any injury to the employer or seeking medical attention. Based on this, the adviser stated there was an imbalance in the probability of this injury arising out of and in the course of employment and requested the claim be denied.

The employer submits that the hernia is bilateral and therefore pre-existing and should not be accepted as compensable. The Board officer determined that the left side was asymptomatic and did not accept it as compensable.

In the April 1, 2003 memorandum to file the review officer noted that she had spoken to the worker and he advised her that he was told the date of the incident by his supervisor. The worker stated that after the lifting incident he felt the pain in his groin, but thought that it was a groin pull. He stated the pain went away after a couple of days and then a few days later he noticed a bulge in his groin area. It eventually grew to the size of an apple and he thought he had a tumour. He stated that he continued to work after the incident but when the bulge got bigger, it became painful to the point that he sought medical advice.

Reasons and Findings

Section 5(1) of the Act requires that a worker's injury arise out of and in the course of employment in order to qualify for compensation.

Item #15.50 of the RSCM discusses the Board's policy with regard to herniae. It sets forth several principals in determining whether a hernia claim will be accepted, and the terms of that acceptance. For example, with regard to a direct inguinal hernia:

- There must be increased intra-abdominal pressure or evidence of severe direct trauma resulting from the work or employment preceding the appearance of the hernia;
- There should be no prior hernia at this site;
- The age or general physical state of the worker should be such as to predispose to the formation of a direct hernia;
- The circumstances causing the hernia should be reported to the employer as soon as practicable.

Bilateral hernias are addressed in detail in item #15.50 of the RSCM. Item #15.50 indicates that where a worker suffers a bilateral hernia, it is unlikely that both will have resulted from the same incident and acceptance of the second hernia as Board responsibility is only done when it is not possible to determine which of the two hernias resulted from employment.

Board policy provides that pre-operative wage loss will not be allowed for hernia claims without adequate medical explanation of the reasons. Where an attending physician's report certifies that a worker is disabled as a result of a hernia pre-operatively, other objective evidence, usually a Board medical examination, will be sought. In the opinion of the Board, there is seldom a need to stop work while awaiting surgery for a hernia, as there is no medical evidence to suggest that work generally aggravates a hernia, makes the surgery more difficult or less successful, or increases the risk of post-surgical complications. If the Board has received evidence that a worker is off work due to a hernia, Board policy requires that the worker be contacted and advised that the Board does not usually pay pre-operative wage loss.

The review officer found the questionnaires submitted by the employer all acknowledged moving the pick-up truck box with the worker and only one recalled the worker complaining of discomfort at the time of the incident. The statements submitted by the worker, were completed by the same three employees. They provided less detail, but were consistent in that all the co-workers verified that that the worker assisted with the lifting of a heavy truck box, and one of the co-workers confirmed the worker's complaints of discomfort. The review officer determined that because the other two workers did not recall the worker's complaints of discomfort did not make the statements inconsistent. In reviewing the matter, I also note the worker stated that the co-worker who did confirm his discomfort was lifting the truck box on the same side as he was, while the other two were on the opposite side. I concur with the review officer and find that the statements were not inconsistent. I find it reasonable that the co-worker lifting on the same side as the worker would recall the worker's discomfort, while the others on the opposite side would not.

In reviewing the matter of the date the incident happened. I have placed little weight on the employer's concern that the date submitted by the worker was incorrect and that this should have a bearing on the acceptance of the claim. As the worker had to reflect back to determine the date the incident occurred, I find it reasonable that the date may not have been correct. The employer had the opportunity to review his work log to determine the date and whether there was a lift, while the worker used recall and did not have the information in the employer's log indicating the date of the lift. The important piece of evidence that must not be over looked is that the incident happened. The lift was verified not only in the employer's log, but also by the other workers involved in the lift. Additionally, the worker's discomfort was witnessed and reported by one of the co-workers involved in the lift.

In terms of the ongoing renovations to his home, the worker has not denied this. However, he denied that he had been doing any heavy lifting and stated that trades persons had been hired for the heavy jobs. The worker offered to supply letters from contractors advising that he did not participate in the renovation other than to co-ordinate the contractors. While the employer reported that he was advised that the worker was in the bedroom power sanding, he did not actually witness the worker doing this. Because the employer did not witness the worker doing this, to state that he was doing this is hearsay and not acceptable as evidence. I concur with the review officer and find that while there was renovating going on in the worker's home, there is no evidence to support that the worker had been doing any heavy lifting that may have caused the hernia. To find otherwise would be speculative.

In terms of the employer being given a 100 percent relief of costs, the entitlement officer found that there was evidence of a pre-existing condition. She also reviewed the evidence on the initiating incident and found that the severity was minor. She referred to item #15.50 of the RSCM and noted that the hernia would be considered to be an aggravation of a pre-existing condition and the surgery recognized as an attempt to correct that aggravation.

The employer submits that the worker's hernia was bilateral and therefore pre-existing and not compensable. In the December 16, 2002 claim log entry the Board medical advisor opined that the worker's hernia on the right side was pre-existing and aggravated by the lifting. Like the review officer and entitlement officer, I interpret pre-existing to mean a pre-existing weakness, not a pre-existing hernia as there was no evidence to suggest that the worker had a prior hernia problem on either side of his groin. The worker had not sought medical treatment nor had he complained of pain or a "bulge" in his groin prior to the incident. I find that the evidence supports that the worker had a pre-existing weakness and the lifting of the heavy pick-up box was the significant causative event that caused the hernia on the right side. The left side remained asymptomatic. It was not related to the traumatic event and is therefore not compensable.

I find that the weight of evidence before me supports that the worker's right side hernia arose out of and in the course of his employment and is therefore compensable. There is evidence of a traumatic event resulting from the work or employment preceding the appearance of the hernia and there was no prior hernia at this site.

I find that the left side hernia remained asymptomatic, was not related to the traumatic event and is not compensable.

Conclusion

With regard to the issue of the employer's appeal, whether the worker's right inguinal hernia arose out of and in the course of his employment, I find it did. I deny the employer's appeal and confirm the review officer's decision as set out in *Review Reference #19*, dated June 4, 2003 for the reasons set out above.

The panel awards no expenses in this matter.

Julie A. Brassington
Vice Chair

JAB/hba

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