WCAT Decision Number: WCAT-2004-00127
WCAT Decision Date: **January 13, 2004**
Panel: Nora Jackson, Vice Chair

Introduction

In a decision letter dated May 23, 2003, a Workers' Compensation Board (Board) case manager advised the worker that the June 2002 claim would not be reopened for payment of further benefits. The worker appeals that decision (Appeal A).

Issue(s)

The issue in this appeal is whether the worker's claim should be reopened for symptoms he was experiencing in April and May 2003.

Jurisdiction

Under section 96(2) of the *Workers Compensation Act* (Act), as amended by the *Workers Compensation Amendment Act (No. 2), 2002* (Amendment Act), the Board may, on application or at the Board's own initiative, reopen a matter that has previously been decided by the Board if certain circumstances exist. In cases where the decision has been made on an application, section 240(2) of the Act, as amended, provides that the decision may be appealed to the Workers' Compensation Appeal Tribunal (WCAT), the appeal tribunal established on March 3, 2003 by the Amendment Act.

The decision under appeal is a decision made on May 23, 2003 not to reopen the worker's June 2002 claim. The decision was made on application by the worker, and the appeal was filed with WCAT on September 2, 2003, within the time limit permitted by section 243 of the Act, as amended. The procedural requirements of section 96(2) and 240(2) of the Act, as amended, have been met.

Section 250(2) of the Act, as amended, required that I apply the policies of the Board of directors of the Board, and make my decision based on the merits and justice of the case before me.

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 II* (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 a truck driver. He had a long-standing history of back complaints dating from 1988, which had been attributed to degenerating disc disease in his lumbar spine. Before 2002, the worker had seven claims relating to his low back.

In 2002, the worker was 64 years old; he began working for the employer in July 1967. On June 26, 2002, the worker reported a pain in his lower back after switching trailers in a confined area. He pulled on a rod to unhook a spring-loaded wheel lock and felt back discomfort. He submitted an application for compensation on July 17, 2002, and his claim was accepted for a back strain (the worker also reported knee complaints, and requested Board reimbursement for a knee brace, but the worker's knee complaints were not accepted as a compensable consequence of his injury).

Wage loss and health care benefits were paid, and the worker attended Board-sponsored physiotherapy. An August 19, 2002 CT scan showed no nerve root impingement, although a small disc bulge at L4/5 is noted.

The worker returned to work on October 25, 2002. On that date, he was also examined by Dr. Jurenka, who diagnosed low back pain with a resolving L5 radiculopathy. The worker saw Dr. Dvorak at the Visiting Specialists Clinic, who also noted right referred leg pain, and noted that the worker had pre-existing sequestered small posterolateral right-sided L4/5 disc herniation with resolving right L5 nerve root deficit, and pre-existing lumbar degenerating disc disease. The last medical report on file during this period was dated January 24, 2003, in which Dr. Neumann noted that the worker was still disabled, there had been no change in his condition, he was only working part-time, and Dr. Dvorak referred the worker for six weeks of physiotherapy.

The next medical report received by the Board was dated May 1, 2003. In that physician's progress report, Dr. Neumann, the worker's attending physician, noted that the worker had been experiencing more pronounced pain shooting into his **left** buttock and **left** foot. Dr. Neumann noted straight leg raise test limited to 70 degrees on the **left** with pain inflexion of the **left** heel.

The worker's claim file was reviewed by a Board medical advisor, whose opinion is documented in memos to the claim log dated May 5 and May 23, 2003. Dr. Tan noted the worker's history of degenerating disc disease in his lower spine, and that the nature of that condition was that it waxed and waned in severity, whereas strains resolved in four to eight weeks. Even if a worker experienced symptoms in the same area at a later time, this would be considered a new injury related to an immediate trauma, rather than to an injury months/years prior. Dr. Tan was of the opinion that the worker's recent flare-up of symptoms, and resulting disability, was due to his pre-existing condition, and not pulling a

lever on June 26, 2003. She noted that the new symptoms were on the left side, and could not be explained by the pre-existing right-sided L4/5 herniation.

The worker's attending physician later called Dr. Tan and said that there had been an error in the May 1, 2003 report, and that the left-sided symptoms reported were in fact right-sided.

In a decision letter dated May 23, 2003, a Board case manager advised the worker that his June 2002 claim would not be reopened for payment of further benefits. It was the opinion of the case manager that the worker's then-current symptoms were due to his pre-existing degenerating disc disease, rather than to the back strain accepted as compensable in June 2002.

In support of his appeal of the May 23, 2003 decision, the worker has provided a submission received by WCAT on October 10, 2003. In that submission, the worker argued that he had never fully recovered from the June 2002 compensable injury. He reviewed his medical history, and advised that he had attended physiotherapy three times a week in January and February 2003, and continued with prescribed exercises at home after that time. It was the worker's evidence that in late March and early April 2003, he began experiencing increasing pain on the right side, mainly while sitting.

Although the Board had authorized an MRI for May 30, 2003, the Board informed the worker, in the May 23, 2003 letter here being appealed, that his claim would not be reopened for payment of further benefits. Therefore, a follow-up with Dr. Dvorak was not available until September 10, 2003. A copy of Dr. Dvorak's consultation report was provided. Dr. Dvorak reviewed the MRI, noting a small central and right-sided disc protrusion at L5/S1 and a similar small protrusion at L4/5. He thought that the central disc at L5/S1 might be causing some of the worker's symptoms, as it was more right-sided.

Dr. Dvorak noted that the worker's pain had improved dramatically after six weeks of physiotherapy, ending in February 2003. The most recent bout of pain had been "triggered", in Dr. Dvorak's opinion, by some exercising on a stationary bike, after which the worker developed gradually worse right leg pain. On examination, Dr. Dvorak did not find that he had any nerve root tension signs. He did not think that the worker's problems were amenable to surgical treatment, and would settle in time. He recommended a selective S1 nerve root block, and noted his opinion that the worker's then-current symptoms were an extension of the right hip and thigh pain that the worker had complained of previously.

The employer has made no submission on this matter, although given the opportunity to do so.

Subsequent to the May 23, 2003 decision here being appealed, the worker told the Board that his then-current symptoms were due to pressure on the nerve root caused

by a gas bubble. Dr. Tan, the Board medical advisor, again reviewed the worker's claim file (see memo to the claim log dated June 25, 2003). Her opinion remained unchanged. She noted that Dr. Dvorak's report of December 16, 2002 indicated evidence of "a small gas bubble on the right side under the L5 root … This is highly suggestive of a very small posterolateral sequestered disc herniation".

However, the most recent MRI, on May 23, 2003, did not show a sequestered disc herniation, but, rather, again showed the presence of degenerating disc disease without nerve root impingement. Dr. Tan was still of the opinion that the worker's then-current symptoms were the result of his pre-existing condition. The case manager agreed, and advised the worker of her decision in a letter dated June 25, 2003.

Reasons and Findings

Board policy with regard to reopenings is set out in item #C14-102.01 of the RSCM. It notes that the Board may reopen a matter that has previously been decided if there has been a significant change in a worker's compensable medical condition, or if there has been a recurrence of a worker's injury. If the Board determines that either of the above-noted circumstance has been met, it may make a new decision that varies its previous decision or order.

Board policy provides that "significant change" is a physical or psychological change that would, on its face, warrant consideration of a change in benefits. A claim may be reopened for temporary disability, or for permanent changes in the nature or degree of a worker's permanent disability. "Recurrence" refers to a recurrence of the original injury without an intervening second compensable injury.

The last medical report on the worker's file was dated January 24, 2003. In that report, Dr. Neumann, his attending physician, found his condition the same as it had been previously, noted that the worker was not recovered, that he was only working part-time, and that he had been referred for six weeks of physiotherapy. It was the worker's evidence that he never recovered from his June 26, 2002 injury. Although the May 1, 2003 report from Dr. Neumann reported new symptoms, on the left side rather than the right, that report was later said to be in error; the worker's symptoms continue to be similar to those following his June 2002 injury. In his consultation report, Dr. Dvorak, a Board-sponsored specialist, has provided his opinion that the worker's symptoms in May 2003 were an extension of his previous symptoms. I accept that opinion, and prefer it to that of the Board medical advisor, who had not examined the worker or been involved in his treatment and care.

In this case, I allow the worker's appeal. I find that there has been a significant change in the worker's condition such that a reopening is warranted, for payment of wage loss and health care benefits as appropriate

Conclusion

Section 253(2) of the Act provides that WCAT, on an appeal regarding the reopening of a claim, may decide that the matter must be reopened or that the matter may not be reopened. In this case, I allow the worker's appeal. I find that he worker's claim must be reopened. No expenses are awarded.

Nora Jackson
Vice Chair

NJ/jkw

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