WCAT Decision Number: WCAT-2004-00170
WCAT Decision Date: **January 14, 2004**
Panel: Kulwinder Sall, Vice Chair

Introduction

The worker, while employed as a car mechanic at a railway company, experienced low back pain on August 10, 2002 when he and a co-worker lifted a water pump into the back of a truck. In a decision letter dated December 10, 2002, the Workers' Compensation Board (Board) declined to accept the worker's claim for a low back injury arising out of and in the course of employment. The Review Division conducted a review and in a decision dated July 17, 2003 confirmed the Board officer's finding. The worker appeals this decision and seeks to have his claim allowed.

This appeal was conducted by file review. Interested parties have received full disclosure of the claim file and been provided with the opportunity to make submissions.

Issue(s)

Whether the worker's low back symptoms, constitute a personal injury that arose out of and in the course of his employment as required by section 5 of the *Workers Compensation* Act (Act).

Jurisdiction

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 of directors of the Board 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).

Relevant Information

This 42-year-old male worker was employed as a car mechanic at a railway company. At the time of injury, the worker had been employed with the accident employer since April 6, 1981.

On August 10, 2002 the worker and another employee lifted a pump and hose from a pallet on a forklift to the back of a truck. The tailgate was down and the pallet was level with the tailgate. On the first lift, the worker and his co-worker put the pump onto the tailgate. On the second lift, they lifted the pump into the cargo area of the truck. The

pump weighed approximately 50 to 100 pounds and during the second lift the worker stated he experienced pain in the lower right side of his back. The worker reported the incident to first aid but did not seek treatment as he thought he had only pulled the muscles. The worker indicated he also reported the incident to his supervisor as soon as possible. The worker denied having any previous pain or disability in his low back. The employer's report of injury, dated October 9, 2002, confirmed the worker's report of an injury to his supervisor on August 10, 2002.

In a report from the medical clinic dated September 28, 2002, the attending physician noted the worker presented with shoulder and back pain. The worker advised the attending physician that it was work-related.

The worker's family physician, Dr. O, diagnosed the worker with low back strain. In his physician's first report dated October 24, 2002, Dr. O noted the worker had previous back injuries and other minor strains in the remote past.

In a progress report dated November 7, 2002, Dr. O found the worker had ongoing pain and referred him to physiotherapy. He estimated the worker would be off work for longer than 20 days. An x-ray taken on November 8, 2002, showed L5-S1 spondylolisthesis. A subsequent progress report dated November 21, 2002 indicated no change in the worker's condition.

In an entry to the Board file on November 22, 2002, the Board officer documented that the worker's supervisor was aware of the worker's complaints of back pain in August and curtailed his heavy activities prior to his vacation.

The Board medical advisor provided an opinion on December 5, 2002 that it was not possible, from a medical perspective, to do more than speculate as to the probability that medical attention in October 2002 arose out of an incident in August 2002. He noted the L5-S1 spondylolisthesis present on the worker's x-ray was of uncertain significance and was not likely a result of the incident on August 10, 2002. The medical advisor found no clear medical evidence to link the worker's visit to his doctor on October 24, 2002 to the work incident in August 2002.

A neurosurgeon examined the worker and in a letter dated February 6, 2003, he noted that the exact origin of the worker's pain was uncertain and may have been related to a central disc herniation or to the sacroiliac joint. He also indicated the worker's pain was probably not related to his spondylolisthesis at L5-S1 as this was a longstanding situation.

The Board file showed the worker had a number of compensation claims between 1981 and 1999.

Submissions

In submissions dated March 4, 2003, the worker's representative enclosed letters from co-workers dated February 28, 2003, March 1, 2003 and March 2, 2003. In these letters, the co-workers confirmed the worker worked light duties in August and September 2002. In addition, email correspondence from the worker's supervisor on November 28, 2002, confirmed the worker had completed a first aid slip and placed it on the supervisor's desk. It also confirmed that upon the worker's return to work on August 16, 2002, he advised the supervisor that his back was still sore and he was assigned lighter duties for the next four days. In addition, a second supervisor stated he did not provide the worker with any modified duties between August 10, 2002 and October 4, 2002.

The worker's representative asserted the worker reported the injury to his employer and that the employer had a responsibility to report any workplace injuries to the Board. In this case, the representative stated the worker was not aware of the proper procedures for filing a compensation claim and should not be penalized for the employer's lack of accountability.

In submissions dated August 12, 2003, the worker's representative noted the worker was on light duties for longer than four days. He contended that the employer was aware of the worker's modified duties but did not document them as the worker was scheduled to go on vacation. After the worker's two weeks of vacation and one week of bereavement leave, he returned to his regular duties in the third week of September 2002. As the worker had an opportunity to rest during his leave, his back was feeling better. After returning to regular duties, the worker experienced problems with his back and sought medical treatment on September 28, 2002 at a medical clinic.

According to the worker's representative, the worker continued to work and attempted to perform lighter duties but his back became progressively worse. The representative stated the light duties have been confirmed by his co-workers.

In submissions received November 3, 2003, the worker's representative acknowledged the worker's delay in seeking medical attention but noted the worker was trying to work through his injury. He stated that the worker's injury occurred on August 10, 2002 and upon his return to work from his regularly scheduled days off, the worker worked modified duties. The worker then commenced his vacation and took an additional five days off for bereavement. While off, the representative stated the worker's condition eased as he was not performing any strenuous activities. Upon the worker's return to work on September 17, 2002, the representative submitted that he worked modified duties, even though they were not formally documented, until September 28, 2002 when he sought medical treatment from the clinic.

The representative then noted:

> It wasn't until [the worker] tried to perform his regular duties that the pain grew and he realized the injury was more sever [sic] than first thought, so he attended the clinic with further follow up medical attention on October 4, 2002.
>
> [reproduced as written]

The worker's representative stated the incident on August 10, 2002 was the cause of the worker's back condition and his appeal should be allowed.

In a letter to the Board dated June 11, 2003, the employer attached an attending physician's report dated October 4, 2002, which indicated no heavy lifting and no repeated forward bending for one month. The employer noted that modified duties are assigned to a worker once an attending physician's report is received and that a worker cannot assign himself to modified duties without a supervisor's approval. The employer acknowledged no formal records were kept regarding the worker as he continued to receive his regular salary while on modified duties.

The employer agreed with the Board's decision to deny the worker's claim. In submissions dated October 7, 2003, the employer acknowledged that the worker completed a first aid report for an injury on August 10, 2002. Following this incident, the worker worked four days of modified duties from August 16, 2002 to August 19, 2002. The employer submitted that the worker's appeal should be denied due to the delay in seeking medical attention as the delay provided opportunity for other non work-related causes for the worker's back pain.

Findings and Reasons

The worker's injury occurred after June 30, 2002, the transition date for relevant changes to the *Workers Compensation Act* (Act). Entitlement under this claim is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002.* WCAT panels are bound by published policies of the Workers' Compensation Board (Board) pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual* (RSCM), Volume II.

Section 5(1) of the Act requires that a personal injury both arise out of and in the course of employment for compensation to be paid. It is not necessary that there be a specific incident or accident before the Board can accept responsibility for an injury arising out of and in the course of employment. There must, however, be evidence to show that the work activity in question caused an injury. A speculative possibility is not sufficient.

Item #97.00 of the RSCM2 states:

> It is therefore not uncommon to see that a claim will be denied when a claimant, away from employment, begins to feel some pain and discomfort in the lower back, and seeking to find a reason for this condition, thinks back to the work being done over a period of time and concludes that the problem must have resulted from something which occurred on a certain day when certain heavy work was being performed. The question then arises whether there was anything other than the claimant's hindsight which would allow the Adjudicator to conclude that the work done some weeks or months previously had causative significance. It is at this point that investigation takes place and the evidence is weighed. If there is nothing objective to indicate any activity at work was potentially causative of the condition complained of, at or near the time alleged by the claimant, it can fairly be said that the claim has not been established. The claimant has simply failed to present those fundamental facts, which bring the provisions of the Act into play.

The issue in this case is whether the worker's low back symptoms, for which he initially sought treatment on September 28, 2002, arose out of and in the course of his employment on August 10, 2002.

The worker experienced low back pain at work on August 10, 2002, and reported the incident to first aid. The worker's own evidence is that he did not seek treatment from first aid as he thought he had pulled a muscle. Based on the worker's schedule of four days on and three days off, he would have worked two days after his injury before his regularly scheduled days off. There is no evidence that he reported any pain or symptoms or requested light duties on those days. As the worker continued to have symptoms on August 16, 2002, the worker's supervisor assigned him to lighter duties for the next four days.

Evidence from the worker's second supervisor, indicated he was not given any modified duties until October 4, 2002 when a physician's report was received by the employer outlining work restrictions for the worker. As there is no dispute that the worker worked lighter duties for four days prior to his scheduled vacation due to low back pain, I accept his evidence that he continued to have problems and was temporarily disabled.

The worker's representative submitted that the worker continued to be disabled after his return to work on September 17, 2002 and as a result he worked light duties until September 28, 2002 when he eventually sought medical treatment. The worker's co-workers recalled that he worked light duties in August and September 2002, however, I note that this was only their general recollections and not specific dates. Although the employer acknowledged that no formal records were kept regarding the worker's modified duties, I prefer the employer's evidence, with regard to whether the worker worked light duties upon his return to work on September 17, 2003 as the worker's supervisors confirmed the dates for which they had approved light duties for the worker.

The fact is that although the worker reported the incident to first aid on August 10, 2002, the worker did not seek medical attention for approximately seven weeks. In the intervening period he was off work for three weeks and his back had improved. He returned to work on September 17, 2002 and worked until September 28, 2002 before seeking medical treatment from a clinic. I find it would be speculative to conclude there was a causal connection between the symptoms for which the worker sought medical treatment on September 28, 2002 and the incident on August 10, 2002.

The Board medical advisors found no clear medical evidence to link the worker's symptoms in September 2002 to the work incident on August 10, 2002. The neurosurgeon was uncertain of the exact origin of the worker's pain and provided a number of possible causes. The worker's family physician diagnosed a low back strain in October 4, 2002. I accept the medical opinion from the Board medical advisor and the neurosurgeon and I find it would be speculative to conclude that the worker's low back symptoms in September 2002 were caused by the lifting incident at work in August 2002. I find that as described by the Board in items #14.20 and #97.00 of the RSCM2, the worker has simply not succeeded in presenting those fundamental facts that would meet the provisions of section 5(1) of the Act and speculation that an incident in August 10, 2002 might have caused the worker's symptoms in September 28, 2002 is not enough.

I do not question the worker's credibility in this matter. It is obvious he honestly believes that the work incident on August 10, 2002 must have injured his back and been the cause of the low back symptoms in September 2002. However reasonable this possibility may appear; it is not supported by evidence of a causal connection and remains an exercise in speculation. A speculative possibility is not sufficient to found a claim.

I find the evidence does not show that the worker's symptoms of low back pain arose out of or in the course of his employment pursuant to section 5(1) of the Act.

Conclusion

In accordance with the above reasons and findings, I deny the worker's appeal and confirm the decision of the Board.

Kulwinder Sall
Vice Chair

KS/rbe

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

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