WCAT Decision Number: WCAT-2005-06495
WCAT Decision Date: December 06, 2005
Panel: Renee Miller, Vice Chair

Introduction

The worker is a self-employed charter boat operator who applied for compensation for a left thigh/leg injury. On September 13, 2004 the Workers' Compensation Board (Board) denied his application as there had been no traumatic personal injury. The worker appealed that decision to the Review Division. On May 2, 2005 a review officer confirmed the decision of the Board to deny compensation as it was speculative to relate the worker's left thigh/hip symptoms to contact with the gunwale of his boat. The review officer concluded that there was insufficient evidence to warrant a conclusion that something in the employment had causative significance in producing the worker's injury. The worker appealed that decision and seeks acceptance of his injury as compensable.

Issue(s)

The issue is whether the worker's left thigh/hip condition arose out of and in the course of his employment.

Jurisdiction

This appeal was brought under section 239(1) of the *Workers Compensation Act* (Act) which permits appeals from Review Division findings to the Workers' Compensation Appeal Tribunal (WCAT).

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (subsection 250(1) of the Act). WCAT must make a 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.

The worker did not request an oral hearing. I am satisfied that this appeal can be determined on the basis of the information on the claim file and submissions without an oral hearing. The employer did not participate in the appeal, although advised of its right to do so.

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Background and Evidence

The worker applied for compensation in December 2003 for pain in his left thigh which he said was due to impact over a prolonged period of time. He wrote on the application that while on his boat he is continually trying to keep his balance and his body often slams against the gunnel of the boat. He has continuous impact with the left leg and hip against the fibreglass edge of the gunnel, at exactly the height of his symptoms. He said that he had bruising and a large acutely sensitive ganglion in the muscle of his leg which resulted in continuous pain and numbness in the left leg.

The first medical report filed to the Board was from Dr. Hanton, dated November 18, 2003. He diagnosed the worker with neurasthesia of the left leg and wrote that the worker continually hit his left leg on the gunwale in rough weather and gradually developed pain and numbness in his thigh. The doctor observed wasting of the vastus lateralis muscle of the left thigh. Dr. Hanton also included an x-ray of the worker's low back and hip joints, which showed no abnormality.

The next medical evidence is a report of Dr. Waterman, a neurologist, dated April 23, 2004. Dr. Waterman wrote that the worker got pain in his left thigh with repetitive trauma against the gunnel. The pain usually settled in the winter, but had not done so for the past two years. Dr. Waterman observed that the worker was tender about four inches below the greater trochanter of the left thigh, with pain radiating down his leg. He had full range of motion and no muscle wasting or weakness. There was also no numbness. The doctor did not think that the worker had a neurological problem. He accepted the worker's explanation of repeated trauma, but doubted a defined pathology could be demonstrated on any test.

Dr. Hanton reported to the Board again on May 25, 2004 and diagnosed the worker with left leg pain. He wrote that the worker's pain was worse after driving the boat, and now was so severe that he could no longer operate the boat. He confirmed that EMG studies were non-contributory. He ordered an x-ray of the worker's thigh, which showed no abnormalities. Dr. Hanton referred the worker to see Dr. King, and wrote in his referral letter that the worker had severe pain in his left thigh due to repeated trauma. He had mild to moderate wasting of the vastus lateris muscle and hypersthesia of the lower leg.

The Board ordered Dr. Hanton's chart notes. They include the following information:

- On July 10, 2003 the worker saw the doctor, who observed wasting of the muscles of the thigh;
- On November 18, 2003 the doctor filed the WCB report;
- On December 16, 2003 the doctor wrote that the worker now had hyperesthesia on the lateral border of the left lower leg; and,

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- On May 25, 2004 the worker complained that his left leg had not improved, and he was not impressed by the examination of Dr. Waterman. He told Dr. Hanton that the pain was present all the time, was worsening, and had been aggravated by four days on his boat;

The Board officer spoke to the worker on August 9, 2004 and documented the conversation in a log entry. The worker explained that while driving his boat he used his left thigh for balance and leaned against the gunnel. Because the water was rough he got hit repeatedly at the same spot on his leg. Sometimes he really got slammed against the boat. He initially had symptoms only during the summer months when he was driving the boat; they would abate during the winter. In 2002 and 2003 the symptoms did not settle down during the winter as he was very busy and his off season was shorter. The worker confirmed that he was no longer able to skipper his boat because of leg pain and his leg was still sore.

The Board officer denied the worker's claim for compensation. The worker appealed to the Review Division and wrote a long letter complaining about his medical treatment and his treatment by the Board. He also wrote that he had been to see a physiotherapist who had diagnosed damage to the lateral femoral cutaneous nerve.

The review officer with conduct of this appeal requested a review by the Review Division medical advisor (RDMA). The RDMA wrote on April 22, 2005 that the main problem with this claim for compensation was that there was no diagnosis explaining the worker's symptoms and thus explaining the pathology of his condition. The doctors who had reported only described the worker's symptoms but provided no diagnosis. Although it was clear the worker had pain, it was not clear what was causing the pain. The RDMA considered the potential diagnosis of damage to the lateral femoral culaneous nerve and wrote that the problem with this diagnosis was that the lateral femoral cutaneous nerve does not extend to four inches below the greater trochanter (the area of contact with the gunnel), that it is located at the anterior of the thigh, and that the area of innervation is also at the anterior of the thigh. Therefore it was unlikely that the nerve could be injured by repeated contact as described by the worker and also that diagnosis would not explain the pain in the lower leg and foot. The RDMA wrote that there were other possible explanations for the worker's pain and thus it was speculative to attribute his symptoms to a work cause. On the basis of this medical opinion the review officer denied the worker's appeal.

The worker's representative sent submissions to WCAT including a letter from two more doctors. The representative argued that there was now a diagnosis of the worker's condition from a specialist who accepted the proffered explanation of causation. In addition, there was no other explanation for the worker's condition. The representative included a letter from Dr. Deutscher, a rehabilitation medicine specialist, dated August 31, 2005. Dr. Deutscher diagnosed the worker with chronic focal traumatic tibial band syndrome and repeated the same mechanism of injury as described by the worker. The representative also included a letter from Dr. Parton, a neurologist, dated October 17,

2005, which said that the worker had no neurological problems. The worker's symptoms pointed toward discomfort in his illio-tibial tract which the worker had related to banging on his boat. The doctor wrote "indeed one wonders if there may not be some repeated trauma here that may have exacerbated this".

Law and Policy

Section 5(1) of the Act provides that compensation is payable when a worker suffers a personal injury that arises out of and in the course of the employment.

Item #15.20 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) provides that compensable injuries may arise from the repetition of a particular motion over time, perhaps weeks or years. If the motion is one that the worker undertakes in the course of employment, or predominantly in the course of employment, it is an indication that the injury would be compensable.

Reasons and Findings

The review officer denied the worker's appeal on the basis that there was insufficient evidence to conclude that something in the worker's employment had causal significance in producing his condition. The review officer relied in part on the observations of the RDMA, who pointed out that it was difficult to make a conclusion about the causation of a condition when there was no definitive diagnosis of that condition. The worker's symptoms could be the result of a variety of different conditions, each with their own particular factors of causation. Without a clear diagnosis it was difficult to arrive at a conclusion regarding eligibility for compensation based on evidence as opposed to speculation.

I have the benefit of further medical evidence which was not before the Review Division. Dr. Deutscher provided a diagnosis which explained the worker's symptoms and he accepted the worker's explanation as to causation. In addition, Dr. Parton also accepted that the worker's condition could have been caused by the repeated banging of his left thigh on the gunnel of his boat over the course of many years. Policy item #15.20 specifically provides for compensation for injuries that arise out of the repetition of a particular motion, predominantly done at work, over the course of time. Thus, on a balance of probabilities I accept that the worker's condition is the result of the repeated banging of his thigh on his boat over time.

I find that the worker did suffer a personal injury arising out of and in the course of his employment. The requirement of section 5(1) was met.

Conclusion

I allow the worker's appeal and vary the decision of the Review Division dated May 2, 2005.

Section 7(1) of the *Workers Compensation Act Appeal Regulations* allows WCAT to order the Board to reimburse the parties for the expense of obtaining evidence submitted to WCAT, including the cost of the letter of Dr. Parton. The worker has made that request and I order the Board to do so.

Renee Miller
Vice Chair

RM/dw

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