

Noteworthy Decision Summary

Decision: WCAT-2003-00254-ad **Panel:** Marguerite Mousseau **Decision Date:** April 25, 2003

***Wasp sting - Policy item #17.00 of the Rehabilitation Services and Claims Manual -
Presumption under section 5(4) of the Workers Compensation Act***

The worker, a fork-lift driver at a lumber store, was stung by a wasp when grasping some wood in a load of lumber. The Workers' Compensation Review Board (Review Board) concluded that the injury was compensable. The issue on this appeal is whether the sting sustained by the worker arose out of and in the course of his employment.

By operation of section 5(4) of the *Workers' Compensation Act*, since this accident occurred in the course of employment it is presumed, unless the contrary is shown, that it arose out of the employment. Item #17.00 of the *Rehabilitation Services and Claims Manual* addresses hazards arising from nature and defines when an insect sting will be recognized as a hazard of the employment and compensable.

In this case the injury occurred as the worker was performing an employment activity which exposed him to certain specific risks associated with reaching into a load of wood where an insect might not be visible. Accordingly, the panel found that the evidence did not rebut the presumption in section 5(4) as it did not indicate that the worker was at equal or less risk than the general population. By virtue of the activity he was performing, the worker was at greater risk of injury by insect sting than the general population. The Review Board finding was confirmed.

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Introduction

This appeal involves a claim for compensation for a wasp sting. The worker's claim for compensation for the wasp sting was accepted by the Workers' Compensation Board (the Board). The employer appealed this decision to the Workers' Compensation Review Board (the "Review Board"). In findings dated October 31, 2002, the Review Board denied the employer's appeal.

The employer appealed the Review Board findings to the Appeal Division under section 91 of the *Workers Compensation Act* (the "Act"). 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 an Appeal Division panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 39).

A management consultant is representing the employer and has provided a submission on its behalf. The worker is not participating in this appeal.

Issue(s)

The issue on this appeal is whether the wasp sting sustained by the worker on August 29, 2001 arose out of and in the course of his employment.

Background, Evidence and Submissions

There is no dispute as to the facts in this case. The worker was employed as a fork-lift driver at a retail lumber store. On August 29, 2001 he was lifting a load of lumber with the forklift. He got off the forklift to remove the dunnage and when he reached in to grasp the wood used as dunnage he was stung by a wasp on his left ring finger in the area of his second knuckle. The following day his forearm was swollen. He reported to the emergency department of the local hospital where his wedding ring was cut off of his finger and he was treated with antihistamines and an anti-tetanus injection. The worker stated that he had no prior history of allergic reactions to bee stings.

An entitlement officer decided that the bee sting injury was compensable and the worker was entitled to compensation in the form of 2 days of wage loss benefits. In the decision letter of October 11, 2002 she explained that she had considered the policy at item #17.00 of the *Rehabilitation Services and Claims Manual* (the "Manual") and she

had concluded that the worker was at greater risk than the general public because his work duties required him to work outside at times, the worksite was close to a bog, and because insects have a propensity for lumber and they are not always visible. In arriving at this conclusion, the claims adjudicator was apparently relying on information provided by the worker that there were a lot of wasps around the work site because of the cedar products and the proximity to a bog.

The employer protested acceptance of the claim on the basis that the job did not place the worker in a greater position of hazard to insect bites as compared to the public at large.

In a submission to the Review Board dated November 16, 2001 the employer's representative expanded on this point. The representative stated that the worker does sometimes work outdoors but most of the population spends some time outside every day for some reason or other. The employer submitted that the additional time spent outside did not expose the worker to any greater risk than the general population.

The employer's representative also submitted that, although the business was located close to a bog, this would result in more "water oriented bugs such as mosquitoes" but not wasps since they "do not gravitate to water". In addition, the employer's representative submitted that wasps' nests are occasionally found in old fallen logs because of the softness of the wood but fresh cut cedar would not have this advantage.

Finally, the representative submitted that wasp stings were not a regular occurrence at the job site, and, in fact, the manager could not recall more than 3 or 4 wasp stings to all employees throughout his career which spanned more than 30 years.

The Review Board found that the policy at item #17.00 of the Manual provided for compensation in the circumstances of this case.

Law and Policy

Under section 250(1) of the Act (as amended on March 3, 2003) WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. 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.

Under section 254 of the Act (as amended in 2003), 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 5 of the Act provides that compensation is payable where a worker suffers "personal injury...arising out of and in the course of employment..."

Section 5(4) of the Act provides that “where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out the employment”. (emphasis added)

Section 1 provides the following definition:

“accident” includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause;

Item #14.10 of the Manual discusses the effect of an accident and the meaning of the presumption. It states that the presumption is not conclusive and “it is rebutted if opposing evidence shows that the contrary conclusion is the more likely.”

The policies at items #17.00 and 17.20 of the Manual address insect bites and other hazards arising from nature. These policies provide:

#17.00 HAZARDS ARISING FROM NATURE

An injury may result from natural elements. For instance, a worker may be stung by an insect or plant or suffer from exposure to extreme weather conditions. Compensation in these cases is limited to situations where the job is of such a nature as to place the worker in a greater position of hazard to these elements as compared with the public at large.

Some examples of the application of this rule are set out below.

#17.10 Insect Bites

A logger stung while working in the bush would have a claim accepted, as would a letter carrier who is stung while walking through a flower garden in summer to deliver a letter. Claims have also been accepted from people bitten by tropical insects while unpacking bananas.

On the other hand, an office worker stung by a bee in the course of office work would not generally qualify.

Discussion of Law and Policy

The application of the presumption under section 5(4) of the Act and the policy at item #14.10 vis-à-vis the policies related to insect stings is not clear. This has been noted in a number of Appeal Division decisions and it is apparent that this has also been an

issue for Review Board panels and the adjudicative staff within the Board. The following decision illustrates the difficulty.

Decision #94-0793 is an unpublished decision of the Appeal Division which has been quoted extensively in Appeal Division decisions which are posted on the worksafe appeal decision website. It dealt with the case of a truck driver who was stung by an insect while driving his truck. Shortly thereafter he went into cardiac arrest and died. According to the brief adjudicative history provided in the Appeal Division decision, a claims adjudicator denied the claim on the basis of the policies in items #17.00 and #17.10 of the Manual.

A Disability Awards manager who performed a managerial review overturned the adjudicator's decision on the basis that the bee sting met the definition of "accident" in section 1 of the Act and, as a result, the presumption in section 5(4) should have been applied.

This decision was appealed to the Review Board where a majority of the panel declined to overturn the manager's decision. The employer appealed the Review Board findings to the Appeal Division where a panel of the Appeal Division concluded that the presumption applied. It is evident from an excerpt of the employer's submission that the employer was requesting the Appeal Division panel to apply the policy at item #17.00 of the Manual. The Appeal Division panel, in responding to this submission, made the following comments:

The mere existence of board policy such as that contained at Item #17.00 of the Manual cannot preclude the use of section 5(4). In other words, policy cannot preclude the application of the statute.

The panel therefore finds that section 5(4) of the Act is applicable to this claim. The bee or wasp sting leading to [the worker's] death arose in the course of his employment and therefore must be considered to have arisen "out of" his employment unless the contrary can be shown. That is, the presumption must be rebutted and it must be shown there is a greater possibility that [the worker] was not placed "in a greater position of hazard" to bees or wasps "as compared to the public at large."

(emphasis in original)

Further in the decision, the panel elaborated on the evidence necessary to establish work causation as follows:

The panel finds insufficient evidence to conclude that the presumption under section 5(4) of the Act has been rebutted. We would also have found there is insufficient evidence to reach a conclusion that [the worker]

was put in a "greater position of hazard to bees or wasps than the general public at large." That however is not the test in this case. In this case, it must be presumed that [the worker] was so exposed unless the contrary can be shown, that is, the presumption must be rebutted. In order for that to be the case, there must be sufficient affirmative evidence that [the worker] was in the same or lesser risk position than the public at large to be convincing.

A similar approach was used in subsequent Appeal Division decisions including decision #97-0208, "Federal Worker No. 1 Insect stings", published at 13 WCR 379 and in various Appeal Division decisions published on the worksafe appeal decision website.

Reasons and Findings

Since an "accident" as defined by section 1 of the Act, includes "a fortuitous event occasioned by a ... natural cause", an insect sting would be considered an accident and the injury is viewed as having been caused by an accident. Since this accident occurred in the course of employment, it is presumed, unless the contrary is shown, that it arose out of the employment by operation of section 5(4) of the Act.

Items #17.00 and #17.10 of the Manual are applicable because the worker's injury was caused by a wasp sting. If the worker's hand had been pierced by a nail when he reached in to remove the dunnage or a splinter had entered his finger, it is unlikely there would have been any dispute as to whether the resulting injury was compensable. Given that the incident however involved an injury by insect sting, the policies regarding insect injuries must be considered and applied.

Generally speaking a work connection is established when a worker is injured as a result of exposure to a hazard of the employment, although this is not usually expressly stated. This relationship is obvious in cases such as lifting heavy items, tripping over obstacles, or falling from a height. If a worker suffers a back strain while moving heavy boxes at work, it is usually accepted that the strain was caused by that activity.

Where insect stings are involved, there is a particular need to consider the link to employment because insect stings are such a common occurrence. Accordingly, the fact that the sting occurred while the worker was at work may be merely coincidental and not due to any hazard of his employment. As I understand the policy at item #17.00, it addresses this problem by defining when exposure to insect stings (and consequently the insect sting) will be recognized as a hazard of the employment and compensable. It is unfortunate, however, that the policy does not explain the relationship between the presumption under section 5(4) and the risk assessment required under the policy.

The question to be answered, after taking into account section 5(4) and the policies on insect stings, is what evidence will rebut the presumption that the wasp sting arose out of the employment. Is there evidence showing that the contrary conclusion is more likely?

If the worker had merely been driving the forklift when he was stung then evidence as to whether there were more wasps at the work site than in other areas frequented by the general population would be relevant. In this case, however, the injury occurred as the worker was performing an employment activity which exposed him to certain specific risks. The risk associated with reaching into a load of wood in order to remove dunnage and placing one's hand in a position where an insect or other hazard might not be visible is not a risk to which the larger population is exposed. Accordingly, the evidence does not rebut the presumption. It does not indicate that the worker was at equal or less risk than the general population. By virtue of the activity he was performing, the worker was at greater risk of injury by insect sting than the general population. In that regard, the worker's situation is analogous to the example in the policy of the worker who is bitten by a tropical insect while unpacking bananas.

The wasp sting sustained by the worker on August 29, 2001 arose out of and in the course of his employment.

I confirm the decision of the Review Board.

Marguerite Mousseau
Vice Chair

MM/gw