

Noteworthy Decision Summary

Decision: WCAT-2003-02227-RB **Panel:** Randy Lane **Decision Date:** August 27, 2003

Occupational disease claim - Whole body vibration – Time Requirements for filing application - Section 55 of the Workers Compensation Act

The worker, then a logging truck driver, suffered a 1989 injury for which the Workers' Compensation Board (Board) paid compensation. Reopening of the claim was denied in a May 30, 1990 decision. In July 2001 the worker filed a claim for compensation for an occupational disease, namely a low back condition, which he linked to exposure to whole body vibrations while operating vehicles and eight compensable low back injuries. The worker sought an April 18, 1990 date of acceptance for the occupational disease claim.

The worker's 2001 application for an occupational disease claim was not an application for reconsideration of the 1990 decision denying reopening of his 1989 claim. The 2001 application sought the establishment of a new claim for an occupational disease and that issue was not raised by the 1989 claim or the 1990 attempt to reopen that claim. The application is not barred by section 55 of the *Workers Compensation Act* as the application for compensation was made within three years after the date the Appeal Division recognized the disease as an occupational disease for this worker's kind of employment. The merits of the claim could not be considered due to an absence of any prior consideration of the issue by the Board.

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Introduction

The worker, then a logging truck driver, suffered a 1989 injury for which the Workers' Compensation Board (Board) paid compensation. Reopening of the claim was denied in a May 30, 1990 decision that found the worker's advanced lumbosacral degenerative changes were not due to his 1989 claim. The worker did not appeal that decision.

In July 2001 the worker and his lawyer filed a claim for compensation for an occupational disease, namely a low back condition, which they considered was caused or aggravated by a combination of exposure to whole body vibration while operating vehicles and eight compensable low back injuries. The worker sought an April 18, 1990 date of acceptance for the occupational disease claim.

In his July 30, 2001 decision the case manager advised that a new decision letter would not be sent regarding the worker's degenerative changes as one had already been sent. He advised that the matter would not be adjudicated as a new claim given that there was no new workplace incident and no new medical evidence. He observed that had the matter been treated as a new claim it would have been decided that the worker did not meet the criteria set out in section 55 of the *Workers Compensation Act (Act)* as there had been an eleven year delay in making an application

With the assistance of his lawyer the worker has appealed the July 30, 2001 decision. A notice of appeal part 1 and a notice of appeal part 2 were provided as well as a March 10, 2003 submission

No employer has been notified.

The worker's lawyer's January 9, 2002 letter indicates a desire to proceed on the basis of written submissions. I consider a fair and thorough decision may be reached on this appeal without holding an oral hearing.

Jurisdiction

This appeal was filed with the Review Board. 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 a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38).

Issue(s)

This appeal raises the issues of (1) whether the worker's 2001 application for an occupational disease claim which he linked to exposure to whole body vibration was an application for reconsideration of the 1990 decision denying reopening of his 1989 claim, (2) whether the application should be viewed as an application for a new claim, (3) whether a 2001 application was barred by section 55 and (4) whether, if a 2001 application was not barred, it is open to WCAT to consider the worker's occupational disease claim on the merits.

Background and Evidence

On February 20, 1989, the worker suffered a low back injury when he slipped and fell while standing on two logs. A claim was accepted and temporary disability benefits were paid from February 22, 1989 to April 9, 1989.

The worker sought a reopening of his claim.

In his May 30, 1990 decision the claims adjudicator denied reopening. He observed that the worker's 1989 claim was accepted for a low back strain. He noted that following April 1989 the worker was next seen by his physician on March 15, 1990 when a lumbosacral facet joint syndrome and a right lumbosacral disc syndrome were diagnosed.

The claims adjudicator noted that he had reviewed the worker's 1989 claim, as well as the worker's other compensation claims back to 1958. He observed that none of the prior claims from 1958 to 1984 resulted in much time loss from work. He noted that the earlier claims had also been reviewed by a Board medical advisor who commented that the worker had advanced lumbosacral degenerative changes which had resulted in multiple incidents of back pain. The medical advisor considered that the worker's symptoms could be related to ongoing degeneration of the discs in his lumbosacral spine and commented that it would be wise for the worker to change jobs for preventative reasons.

The claims adjudicator indicated that the Board did not compensate workers for preventative reasons. He commented that the 1989 claim was accepted for a low back strain that resolved in April 1989. He then offered the following reasons for not reopening the claim:

Your ongoing symptoms can be related to the degenerative changes in your back and not to your work activities. They could not be attributed to any particular work incident or accident. Therefore I am unable to re-open this 1989 claim for compensation.

In his July 6, 2001 letter to the Board the worker's lawyer referred to a June 26, 2001 form 6 application for compensation for an occupational disease, namely low back degeneration caused by or aggravated by a combination of exposure to whole body vibration and eight compensable low back injuries between 1958 and 1984. He commented that the immediate goal was to obtain acceptance of the low back condition on an occupational disease basis from April 18, 1990 and to seek compensation for the worker's change of career at that time. (The worker moved from driving a logging vehicle to being a janitor.) He stressed that the date of acceptance of the new occupational disease claim would be April 18, 1990, the date on which the condition was first brought to the Board's attention, considered, and denied.

A July 17, 2001 the claim log entry documents the results of the case manager's contact with the Board:

When I contacted the worker on July 16, 2001 I asked if he had received the 1990 decision letter. He stated that he had but did not agree with it at the time nor now. He stated that he believed the degenerative changes in his back were due to the fact that he spent his while career in vibrating vehicles. I asked why he didn't appeal the decision or make an application at the time. He replied, "no one would listen to me and I was turned away."

In his July 30, 2001 decision letter the case manager commented that from his review it was clear that the diagnosis remained the same as it was in 1990 at which time a decision letter was sent to the worker stating that the degenerative changes in his back were not a WCB matter. He determined that as the diagnosis remained the same with no new incident or objective medical evidence the degenerative changes had already been adjudicated. He concluded that as the worker had already been sent a decision letter concerning his degenerative changes another one would not be sent. The case manager noted the worker's advice to him as to why he did not appeal the earlier decision.

The case manager quoted part of section 55 of the Act and commented that had the matter been treated as a new claim it would have been decided the worker did not meet the criteria set out in section 55 of the Act as there would have been an 11 year delay in making an application based on the effective date being asserted. The case manager indicated that the worker had applied well beyond the applicable time frame. He noted the worker's belief for many years that the degenerative changes in his back were the result of being exposed to whole body vibration.

The worker appealed the July 30, 2001 decision.

By letter of September 19, 2001 the worker's lawyer asked that the appeal be suspended. He indicated that he had gathered further evidence and felt the Board had

to be given the evidence and arguments to ensure there were no jurisdictional concerns when the matter came before the Review Board. He commented that he was not certain a further decision letter was required and observed it might be very difficult to get the Board to review any of it. By letter of November 19, 2001 the Review Board agreed to suspension of the appeal.

In his January 9, 2002 letter to the Review Board the worker's lawyer indicated that the appeal should proceed. He indicated that he had all the evidence and had sent it to the Board along with a letter.

A January 9, 2002 letter to the case manager provided the Board with an ergonomic assessment and the opinion of an orthopaedic surgeon in support of the claim. The worker's lawyer commented that he did not want to face the argument at the Review Board that the Board did not have an opportunity to consider all of the evidence. He observed that with respect to the section 55 "defence" raised in the decision letter, he was relying on subsection 55 (3.2). He commented that if the Board was interested in conducting a substantive and informed consideration of the claim, which he did not believe it was, he would be pleased to elaborate on the medical and legal underpinnings of his argument.

The January 9, 2002 letter to the case manager was received by the Board on January 11, 2002. The letter bears the case manager's date stamp of January 14, 2002. The Board did not respond to the letter. There is no note in the claim log explaining why no response was made. There is no indication that the worker's lawyer followed up with the Board.

Submissions

The worker submits that the question on appeal is whether his ongoing degeneration is related to his work. He asserts that the very narrow basis of the July 30, 2001 decision should not be taken as restricting the panel's ability to deal conclusively with the merits of the claim. He contends it was unreasonable for the Board to have denied the claim without considering the new evidence and asserts it would be unreasonable to refer the matter back to the Board for substantive consideration.

The worker contends that the case manager's determination that the issue of the compensability of his degenerative low back condition had already been determined by the May 30, 1990 decision fails for two reasons.

The 1990 letter dealt with traumatic antecedents not a claim for an occupational disease. The letter dealt only with the possible causative effects of the worker's eight prior low back claims. The Board's position from the Board medical advisor's opinion is specific to a consideration of possible cumulative effects of the eight prior claims. There was no

mention of the effect of the worker's job duties in general, occupational disease, whole body vibration or any other feature of the current claim.

The worker asserts that even if there had been mention of matters other than the eight prior claims, the new evidence provided would justify a reconsideration of that decision. He cites policy #108.11 of the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) concerning reconsideration based on new evidence. He asserts that the vast majority of the evidence, in the form of epidemiological studies concerning whole body vibration, did not exist until the mid-1990's.

The worker asserts that this is not a section 55 case. A claim for low back disability was filed in 1989 and essentially terminated by letter of May 30, 1990. What is now being argued is that new previously unavailable evidence should lead to the Board to a different decision in that claim. He asserts that a form 6 application for compensation was filed out of an abundance of caution and there is nothing substantive about that. It is asserted that because this is an occupational disease claim under section 6 of the Act and the 1989 claim was a claim for injury under section 5 it is clearer if a new claim is filed and related back to the original claim.

In the alternative, the worker contends that even if this is a proper case for the application of section 55 there are two saving provisions.

He asserts that the first provision is subsection 55 (3.1) concerning special circumstances. It is asserted that while the worker suspected that it was vibration which had ruined his back he was in a minority of one regarding his own case. There was not good epidemiological evidence until at least 1994.

The lack of medical knowledge and overwhelming opposition to the issue of whole body vibration and spinal degeneration amount to special circumstances which prevented the filing of a claim. Simply put, the worker could not file a claim without medical support, and he could not get medical support for a concept that had not received epidemiological support until recently. Put another way, the Board is supposed to look after the interests of injured workers. It did not occur to the Board medical advisor in 1990 to consider the effect of whole body vibration on the worker's back. It would be unreasonable to assume that the worker should have had greater knowledge and responsibility than the Board's doctor. In fact, there was no reason for the worker to pursue a claim until he met with his lawyer on an unrelated matter and was informed of this potential claim.

The second saving provision is subsection 55 (3.2) dealing with the late filing of a claim in occupational disease cases where sufficient medical or scientific evidence was not unavailable earlier. The worker submits that provision raises a number of interesting arguments which need not be reviewed this case. He asserts that the Board has never agreed there is sufficient medical evidence for it to recognize low back pathology due to

whole body vibration exposure as an occupational disease. So arguably the three-year provision in paragraph 55 (3.2)(c) has not yet begun to run. He observes that it might be argued that a 1999 Appeal Division decision (#99-1868 published at 16 *WCR* 265) constituted acceptance by the Board. He observes that surely that decision was countered by an October 21, 2001 memorandum issued by the Board. (The memorandum advised Board officers that there is not adequate evidence in the literature to attribute any low back disorders to vibration over time.) He queries whether a new Appeal Division decision (#2002-2499 found on the Board's website) is the triggering event.

The worker asserts that if the panel takes a contrary view - that section 55 does or might apply - he would appreciate an opportunity to expand on his arguments.

Concerning the merits of the claim, the submission reviews the nature of the worker's employment between 1954 and 1990. It cites literature reviews which were discussed in *Appeal Division Decision #2002-2499*. Also cited is an ergonomic assessment report prepared by Ms. V and a medical-legal report prepared by Dr. L, an orthopaedic surgeon. It is submitted that the worker's low back pathology has been caused or permanently aggravated by exposure to whole body vibration and an occupational disease claim should be accepted as of 1990.

Reasons and Findings

Scope of the 1989 claim and the 1990 reopening decision

The submission that new and previously unavailable evidence should lead the Board to a different decision on the 1989 claim raises the question of the nature of the 1989 claim. There are cases where owing to such circumstances as nature of the symptoms or the incident or the work that it is appropriate for the Board to adjudicate a claim under sections 5 and 6 of the Act. It can be argued that if workers consider that there may be a link between their symptoms and their employment they do not need to specify the applicable section of the Act; they need only file a claim and let the Board conduct the appropriate adjudication.

In this case, the worker filed a claim for a February 1989 slip and fall. Given that such a claim had been filed and the worker then applied for a reopening of the claim established for that injury, one could argue it was reasonable for the Board to have confined its review to the issue of the reopening of that claim and the worker's earlier back claims. The medical reports submitted to the Board in 1990 did not raise the issue of the effect of the worker's work activities from 1954.

Item #107.10 of the Manual notes that where a worker claims compensation in circumstances that could reasonably be alleged either as a recurrence of the previous injury or as a new claim the matter should be treated as if the worker is claiming both in

the alternative. It does not appear that the worker's reopening request raised the issue of a new claim based on his work activities over time.

Thus I consider that the 1990 decision dealt with the worker's 1989 claim and his prior back claims. The reference to "any particular work incident or accident" must be taken to refer to those claims. While the decision only expressly denies reopening of the 1989 claim I consider that, fairly interpreted, the decision also addresses whether the worker's back problems can be related to those other claims. I do not consider that the decision letter concerns the broader issue of the worker's work activities in general. There is no discussion of that issue in the opinion of the Board medical advisor or in the memorandum which sought that medical opinion.

While the decision letter does use the term "work activities," I consider that the claims adjudicator was using that term to refer, somewhat loosely, to the worker's claims with the Board. I do not interpret it as referring to the worker's heavy equipment operation from 1954 to 1990. The 1990 decision partially addressed the compensability of the worker's disabling degenerative changes but it did not address whether they were compensable as being an occupational disease due to the nature of the worker's employment.

I accept that the 2001 decision arguably could be seen as denying a reconsideration of the earlier 1990 decision. As there was no new evidence before the case manager and no other circumstances that raised reconsideration grounds found in item #108.12 of the Manual as it existed at the time, denying reconsideration was not erroneous. Yet the case manager knew that further information was forthcoming and did not wait for it before rendering a decision. However the July 6, 2001 letter did not indicate that the forthcoming evidence would challenge the accuracy of the 1990 decision concerning the 1989 claim. I find the application in 2001 was an application for a new claim.

I consider that what was sought by the worker from the Board in 2001 was the establishment of a new claim for an occupational disease. That was an issue that was not raised by the 1989 claim or the 1990 attempt to reopen that claim. The worker cannot be seen as seeking a readjudication or reconsideration of the 1990 decision. Asking that an occupational disease claim be accepted does not challenge the accuracy of the earlier decision to deny reopening of the 1989 claim. I find the application in 2001 was an application for a new claim.

Section 55

The desire that a 1990 effective date be established for an occupational disease claim filed in 2001 raises the issue of section 55 of the Act. I have proceeded to analyze this issue based on the materials on file rather than invite further submissions. The usual practice is that parties make submissions on the issues and the panel decides the

matter. I do not consider these is a basis to depart from that process and invite further submissions on the basis that section 55 is applicable.

The worker's application in 2001 was more than one year beyond the date of disablement and that raises the question of the application of subsection 55(2) concerning the time requirements for applying for compensation:

Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease, no compensation is payable, except as provided in subsections (3), (3.1), (3.2) and (3.3).

Subsections 55(3) and 55(3.1) concern whether special circumstances precluded filing within the one year after the date of injury or date of disablement due to disease. Subsection 55(3.2) does not concern special circumstances but instead deals with the sufficiency of medical or scientific evidence within the one year after injury or date of disablement due to occupational disease:

The board may pay the compensation provided by this Part if

- a) the application arises from death or disablement due to an occupational disease,
- b) sufficient medical or scientific evidence was not available on the date referred to in subsection (2) for the board to recognize the disease as an occupational disease and this evidence became available on a later date, and
- c) the application is filed within 3 years after the date sufficient medical or scientific evidence as determined by the board became available to the board.

I consider that the language of subsection 55(2) means that if subsection 55(3.2) is applicable there is no requirement that there be special circumstances referred to in the other subsections. Thus there is no requirement that a worker formally satisfy the requirements of subsection 55(3) and (3.1) before obtaining compensation under subsection 55(3.2).

I consider that this is a critical point because in the absence of subsection 55(3.2) there is a strong argument that the worker's claim would be barred by operation of subsection 55(3). The worker's advice to the case manager documented above suggests that he believed that there was a link between his work and his symptoms but did not apply because the Board denied reopening of his claim. I question whether that illustrates special circumstances that precluded him from asking the Board to address the broader issue of whether there was a link between his work and his symptoms. Because of the existence of subsection 55(3.2) I do not need to decide the matter of whether special circumstances existed.

By focussing on the 11 years between 1990 and 2001 the case manager did not examine the applicability of subsection 55 (3.2). I consider that even though this is an appeal of a decision that applied subsection 55(2) I am not precluded from examining subsection 55(3.2). Section 55 deals generally with the issue of time requirements for filing applications and I consider that all of its provisions are relevant in an appeal from a decision applying part of that section.

Policy at Manual item #32.58 notes the following conditions relevant to subsection 55(3.2) that must be met before the Board may consider paying compensation for an occupational disease:

The Board may consider paying compensation benefits for a death or disablement due to an occupational disease if all three of the following conditions apply:

1. At the time of the worker's death or disablement, the Board does not have sufficient medical or scientific evidence to recognize the disease as an occupational disease for this worker's kind of employment (even though the Board may have recognized it as an occupational disease for other kinds of employment).
2. The Board subsequently obtains sufficient medical or scientific evidence to cause it to recognize the disease as an occupational disease for this worker's kind of employment.
3. The application for compensation is made within three years after the date the Board recognized the disease as an occupational disease for this worker's kind of employment.

The policy offers an interesting illustration of the considerations that arise from focussing on a worker's "kind of employment" where there has been earlier recognition that a disease was an occupational disease associated with another kind of employment:

For example, in the 1970s sufficient medical or scientific evidence was not available for the Board to recognize an association between exposure to coal tar pitch volatiles in aluminum smelters and an excess risk of bladder cancer. It was not until the late 1980s that sufficient evidence became available for the Board to recognize such an association. (However, the Board had earlier recognized that there was an association between bladder cancer and prolonged exposure to certain chemicals used primarily in the manufacture of rubber and dyes. In 1980 "primary cancer of the epithelial lining of the urinary bladder" was added to Schedule B,

with a corresponding presumption in favour of causation where the worker had prolonged exposure to any of three listed chemicals.) On March 13, 1989, the Board issued a policy directive recognizing bladder cancer as an occupational disease for workers employed in aluminum smelting, dependent on the concentration and length of exposure to coal tar pitch volatiles.

Section 55(3.2) allows the Board to consider the payment of compensation benefits for any worker disabled by bladder cancer who was exposed to sufficient doses of coal tar pitch volatiles while employed in the aluminum smelting industry if:

- the exposure did not end before January 1, 1974, and
- the Board received the application not later than March 13, 1992.

Section 55(3.3) allows the Board to reconsider any claims for bladder cancer that meet the requirements of section 55(3.2) and to pay compensation for any periods previously denied because of the wording of the earlier section 55 in effect since July 1, 1974. ...

Concerning any earlier Board recognition regarding vibration and disease, I note that item #13.10 of the Manual provides the following of note:

The following are examples of disorders classified as DISEASES:

...

5. A disablement resulting from exposure to vibrations over time.

That comment comes from WCR Decision No. 129 published in 1975, some 15 years before the worker believed in 1990 that his back condition was as a result of exposure to whole body vibration. However there is no indication of what kind of employment was envisioned in connection with that disablement. I do not think that it was heavy equipment operation for reasons which will become clear. Thus I do not consider that the passage in item #13.10 results in the worker not being able to rely on the terms of subsection 55(3.2).

An examination of the evidence and analysis in *Appeal Division Decisions #99-1868* and *#2002-2499* is relevant to the issue of the applicability of subsection 55(3.2). I am familiar with those two decisions which reviewed the literature concerning whole body vibration. It is notable that the panel in *#99-1868*, dated December 6, 1999, found that it needed a further review of the literature from Dr. T which was conducted in 1999. It then found that there was an association in the scientific literature between whole body vibration exposure and back disorders. It was only then that the panel found that the

worker's back disorder was associated with his employment. There is no suggestion in those decisions that there was persuasive literature published in the 1970s or 1980s concerning vibration and operation of heavy equipment.

That was the first decision by the Appeal Division to reach such a conclusion. The Review Board may have issued a decision reaching a similar conclusion a few months earlier.

I consider that the 1999 decision of the Appeal Division can be considered a triggering event for the purposes of 55(3.2). The decision of the Appeal Division was a decision of the Board by virtue of the now repealed, but then applicable, subsection 85.2(6) of the Act; thus one can argue that in 1999 one aspect of the Board considered there was sufficient medical and scientific evidence. The rest of the Board was not required by law to accept the Appeal Division's decision and the Board did in fact conduct a review and issue the 2001 memorandum noted above. I do not need to resolve whether the 2001 Board memorandum means that 1999 decision ceased to be a triggering event for subsection 55(3.2) or whether the 2002 Appeal Division decision then became a triggering event. The worker's claim was filed within three years of the 1999 decision and it predated the 2002 decision.

I find that the worker's claim for an occupational disease is not barred by section 55 of the Act. His claim should be considered on the merits.

While as part of the issue of section 55 it was necessary for me to review the issue of whole body vibration generally, I do not think that I have the jurisdiction to review the issue of whether the worker's exposure to whole body vibration was of causative significance with respect to his back problems.

The 2001 decision by the Board did not expressly consider the worker's occupational disease claim on the merits, and I do not consider that the Board's decision can be interpreted as an implied decision to say "no" to the merits of the claim. There was no new evidence before the case manager concerning an occupational disease claim and thus the decision regarding the disease claim was confined to section 55. I do not consider that a decision by the Board to deny the claim under that section empowers me on appeal to address the merits. That WCAT can only address issues contained in the decisions appealed to it is expressed in item 14.30 of its *Manual of Rules, Practices and Procedures*. While that passage concerns appeals from decisions of the Board's Review Division to the WCAT I consider that the principle is equally applicable to appeals to the Review Board which were transferred to WCAT.

I further do not consider that the failure of the Board to act on the submission of evidence in 2002 somehow changes the nature of the 2001 decision such that on appeal it becomes open to me to address the merits after finding that the claim is not barred under section 55. I appreciate that the worker has been in the appeal system for

two years. However that delay also does not change the nature of my appellate authority.

It may be that some panels of the Appeal Division and the Review Board viewed matters of jurisdiction differently and would have proceeded to address the merits of a claim after finding a claim was not barred by section 55. Those bodies no longer exist save for panels seized of appeals. I find that the change in the appellate structure occasioned by *Workers Compensation Amendment Act (No. 2), 2002* cannot be ignored. I consider that the amendments to the legislation do not envision first and final adjudication of issues on appeal and that is what would result if I addressed the merits of the worker's claim on this appeal in the absence of any prior consideration of the issue by the Board.

While I consider that the worker's occupational disease claim is not barred by section 55 of the Act, the file must be returned to the Board to adjudicate the merits of the claim.

Expenses

I consider that a determination of whether the worker should be reimbursed for the costs of the reports of Dr. L and Ms. V is premature. I have not examined the merits of the 2001 claim. The Board should include the issue of reimbursement as part of its review of the merits.

Conclusion

The worker's appeal is allowed in part.

The worker's 2001 application for an occupational disease claim which he linked to exposure to whole body vibration was not an application for reconsideration of a 1990 decision denying reopening of his 1989 claim. The application should be viewed as an application for a new claim and that application was not barred by section 55. While the 2001 application was not barred it is not open to WCAT to consider the worker's occupational disease claim on the merits.

I vary the case manager's decision concerning the application of section 55 to the worker's 2001 claim and return the file to the Board so that it may be adjudicated on the merits.

Randy Lane
Vice Chair

RL/dwe