

Noteworthy Decision Summary

Decision: WCAT-2003-02715-RB **Panel:** S. Yeager **Decision Date:** September 26, 2003

Request to withdraw appeal – Item #5.60 of the Manual of Rules, Practices and Procedures

Item #5.60 of the *Manual of Rules, Practices and Procedures* establishes that the appeal tribunal has the discretion to decline to grant a withdrawal once it has begun its consideration of the evidence. This may occur in situations where there is evidence of fraud or misrepresentation by the appellant, or where an error in law or policy will result in a favourable decision for the appellant. At the outset of the oral hearing the worker's representative requested that the appeal of an October 16, 2001 decision letter be withdrawn. The worker's position was that there was only one incident, that of July 13, 2001, and the other application for compensation was in fact related to that incident, not a separate incident.

The panel declined to grant a withdrawal finding that the totality of the evidence must be considered in this case as the evidence in the two claim files had substantive differences. The panel considered the evidence and concluded that it was insufficient to find that the worker sustained injury that lead to his disabling symptoms. The worker's appeal was denied.

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Panel: Sherryl Yeager, Vice Chair

Introduction

The worker has appealed two decisions of officers of the Workers' Compensation Board (Board) set out in letters dated October 16, 2001 and April 2, 2002. The letter of October 16, 2001 advised the worker his claim for a low back and shoulder injury on August 7, 2001 would not be accepted. The entitlement officer found there was insufficient evidence to conclude the worker's symptoms resulted from his job duties. The letter of April 2, 2002 advised the worker that his claim for injuries to his back, abdomen and shoulders resulting from a fall on July 13, 2001 would not be accepted. The entitlement officer cited the delay in reporting, lack of medical information, and delay in booking off work as reasons for concluding there was insufficient evidence of a work related injury on that date.

Issue(s)

- 1) Did the worker sustain an injury to his lower back and shoulders arising out of and in the course of his employment in August 2001?
- 2) Did the worker sustain an injury to his lower back, shoulders and abdominal wall arising out of and in the course of his employment on July 13, 2001?

Jurisdiction

These appeals were filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003 the Workers' Compensation Appeal Tribunal (WCAT) replaced the Appeal Division and Review Board. As a Review Board panel had not considered these appeals before that date, they have been adjudicated as WCAT appeals. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

Background and Evidence

The following is a summary of relevant evidence from the worker's two claim files.

The worker was employed as a labourer and electrician for a company manufacturing modular homes in 2001. On August 7, 2001 he returned to work after a two-week vacation. On the morning of August 8, 2001 he advised his supervisor he was seeking medical attention for sore shoulders and a sore lower back.

The employer completed a report of injury form protesting acceptance of the claim on August 13, 2001. The employer noted there was no incident attached to the injury, the worker did not report to first aid, and on August 9, 2001 the worker advised his supervisor that he had shingles. The worker advised another supervisor on August 13, 2001 that there was no incident leading to his injury, rather it was a gradual onset. The employer believed shingles was the cause of the worker's pain.

On his application for compensation completed on August 29, 2001 the worker advised installing drywall panels had aggravated his lower back and shoulders.

The worker's physician, Dr. Paisley, completed a progress report for the Board on September 11, 2001 advising the worker complained of low back pain, and had a tender lumbar spine with paraspinal spasms. He believed the worker was fit for modified full-time work for one to two weeks. The worker did not return to work after this date.

The entitlement officer requested the worker's clinical records relating to the low back and shoulder complaints in August and a physician's first report. Dr. Paisley provided a progress report and a first report, both dated September 26, 2001, advising the worker had right-sided lower back pain and a tender sacroiliac joint. On the first report Dr. Paisley indicated the worker's right shoulder girdle pain was chronic.

The entitlement officer spoke to the worker on September 17, 2001 and advised that he had taken some afternoons off work between August 29 and September 11, 2001 but did not seek medical attention as he thought he would get better. Physiotherapy had increased his pain so he stopped. The worker advised that when he returned from vacation it was busy at work and he did not have the usual number of co-workers to assist him. There was no specific incident or trauma and he attributed his onset of pain to the general nature of his work and having just returned from two weeks off. He first felt pain after approximately five hours. The worker advised his shoulders were not the most problematic, and acknowledged that he had prior shoulder problems and was restricted from prolonged overhead work. The worker advised that Dr. Paisley's next report, on October 11, 2001 mentioned the worker's shoulder pain was unchanged, however the lumbar back pain had worsened since the previous evaluation and he recommended referral to an orthopedic specialist and a CT scan of the worker's back. Dr. Paisley also indicated that the worker's recovery was complicated/delayed by his wife's illness.

The worker's prior medical history was significant for persistent rotator cuff syndrome in 1999.

The entitlement officer concluded there was insufficient evidence to support a conclusion the worker had sustained an injury to his lower back and shoulders arising

out of and in the course of his employment. The decision letter of October 16, 2001 was issued to the worker.

The worker's representative subsequently contacted the Board and provided additional information regarding an incident in July 2001. The worker's representative was advised that this information would have to be considered independently of the August 2001 application, as it pre-dated that reported symptom onset.

A separate claim was established to reflect the worker's application for compensation for abdominal wall and low back injuries sustained on July 13, 2001.

Included in the documentation submitted by the worker's representative was a consultation report by orthopedic surgeon Dr. Oliver dated January 30, 2002, noting the worker reported an injury "he thinks it was in July 2001" when he fell through a wall and damaged his abdomen. Dr. Oliver noted the worker had a disc bulge at L5-S1 on CT scan but did not believe this was significant. He believed the worker had symptoms of soft tissue irritability across the lower lumbar spine and abdomen, and would improve with a conditioning program.

Dr. Paisley provided a handwritten note dated February 2, 2002 confirming the worker had mechanical back pain and anterior abdominal wall pain related to his accident at work, in addition to bilateral rotator cuff injuries for which he was receiving treatment.

The worker also provided two statements dated December 5, 2001 from his co-workers that they had observed him fall through the tarpaper into a house and "clothesline" himself on a ledge. There was no date provided for the incident itself. The worker also submitted payroll records confirming his dates absent from work in September, October and November 2001.

The worker completed an application for compensation on March 12, 2002 for injuries from a fall on July 13, 2001. The worker advised that he was assisting co-workers with moving a home to another area, however the "wall" where he pushed was a doorway covered in tarpaper, and therefore he fell through the space, landing on his chest. The worker described "a terrible blow to my upper abdominal region." In a letter accompanying his application the worker advised that his supervisor witnessed the accident and approached him about attending first aid. The supervisor reportedly said that this was not necessary, as the worker was a "tough guy." The worker said he left work early because of the pain in his back and midsection. He rested over the weekend, and advised the safety manager in first aid when he returned to work on Tuesday that he had injured himself and to record it in the log book. He went on vacation the next week and rested during his two weeks off. When he returned to work on Tuesday, August 7, 2001 he still had very intense pain in his back so he booked a doctor's appointment for the following day. He was off work the remainder of the week,

returning on August 13, 2001 and leaving early the following Thursday due to back pain. He missed a number of other shifts before booking off on September 11, 2001.

The employer protested acceptance of the claim on the basis the worker did not report to first aid and did not complain about pain in his chest. The supervisor recalled seeing minor scratches on both of the worker's arms after the incident. In a protest letter dated March 8, 2002 the employer's representative submitted that there was no strong evidence to support an event on July 13, 2001 as the two witness statements did not provide any date for the event and the supervisor recalled it may have been in June. There was no log entry of an event in the first aid book. The worker reported varied symptoms in the months following his booking off work, ranging from pain in his low back to the shoulders. There were no reports of pain in the abdominal wall until January 2002. The employer's representative believed the worker's symptoms were related to his shingles.

The worker attended at a pain clinic on March 21, 2002, where specialist Dr. Salhus believed the worker had bilateral lumbar myofascial pain and was possibly developing chronic pain syndrome. He noted significant psychosocial issues were affecting the worker.

The entitlement officer determined the claim would be disallowed and issued the decision letter of April 2, 2002.

Oral Hearing

At the oral hearing the worker said that he injured his back when he attempted to move the prefabricated home on July 13, 2001 and fell through the tarpaper covered doorway. His supervisor asked if he wanted to attend first aid, and then commented that he was a "tough guy" and did not need to. Although the supervisor suggested again later that he report to first aid, the worker said it was clear he did not want him to report. The worker said he scraped his forearms on the floor of the home and his knees on the ground because the unit began to move after he fell through it. He went home early that day because of back pain. This was a Friday, and he was regularly off work for the weekend.

The worker said that he advised his employer about falling through the doorway on his next day back at work, he believed it was a Tuesday, and requested that this be entered in the first aid book. The worker said that he had approached the employer in the past about injuries and requested they be recorded, and the employer had done so. He also told the employer that he believed the practice of covering the doorways and windows with tarpaper and not marking or cutting them out was a safety hazard. The employer advised him that he would write-up the incident when he was finished working on his computer.

The worker said his back was recovering after his vacation, and when he returned to work on August 7, 2001 he “reaggravated” it. He left work early that day due to back pain, and the following day went to see his doctor. The worker said that possibly he saw a locum for his regular doctor, who advised him to work at modified or light duties. The worker said that the principal reason for this visit to the doctor was for his back pain, and he also asked about a rash on his face. The doctor diagnosed shingles and gave him medication. The worker said that the rash was confined to his face, and the primary reason for his visit was his back pain.

He continued to work at modified duties, and missed some total or partial shifts due to back pain. The worker could not recall exact dates or hours missed. He said that he missed a week of work because of the pain from the shingles, however he would have missed this week regardless because of the concurrent back pain. The worker could not recall when this week of time loss was, or if it was during his vacation. He said he saw the doctor again on September 11, 2001 when he was booked as fit for modified duties only by Dr. Paisley. He denied seeing his doctor for reasons other than his back pain during this time.

The worker said that he did not mention the incident on July 13, 2001 in his first application for compensation or conversations with the entitlement officer because he assumed the Board had this information through the first aid report that he believed the employer had filed.

The worker then said that when he spoke to the entitlement officer and advised her he had hurt himself packing drywall, she noted that many people pack drywall without an injury, there had to be a specific incident, and he believed he described the July 13, 2001 incident to her.

The worker said that he did not have back pain prior to July 13, 2001 and he did not believe his bulging disc, which was detected on x-ray, was present prior to that incident.

When asked why he waited from October 2001 to March 2002 to file a claim for compensation in relation to the July 13, 2001 incident, the worker advised that he did file a claim as soon as he was told by the Board officer that he needed a specific incident to attribute his injury to his work. He could not provide an explanation for the six-month interval during which he was not working or receiving benefits, and not in contact with the Board.

The worker said that during his holidays at the end of July, beginning of August, he took it easy. He did go hiking and fishing, however nothing too strenuous as his back was painful. He had lifted weights competitively in the past, but stopped this activity in 1986. The worker identified his lower back as the most painful region. He reported constant tenderness in his abdominal region, particularly when having therapeutic massage. The

worker said that he did also have shoulder pain, and had physiotherapy and injections for this. He acknowledged a prior history of shoulder pain.

Submissions

The employer submitted that there was no evidence the worker's symptoms were related to an incident at work. She noted there was no continuity of medical evidence and no evidence the worker was advised to be on modified duties in August. She noted the worker had prior compensation claims and was familiar with the process.

The worker's representative submitted that the worker was discouraged from reporting the July 13, 2001 incident to first aid. The company was aware of the worker's time loss as a result of this accident. The worker's representative argued there was sufficient medical evidence to satisfy section 5 of the *Workers Compensation Act* and that the worker had sustained an injury as a result of his employment.

The worker's representative also submitted two letters dated February 26, 2003 and July 25, 2003 from the worker's registered massage therapist. The letter of February 26, 2003 advised the worker presented for treatment of a workplace injury. He had chronic low back pain with radiation to the right buttock and crepitus in the lumbar spine with coughing or sneezing. The therapist noted findings of tilted pelvis and right shoulder girdle, elevated left clavicle, rotation and tilt at C1, a shortened left psoas, lumbar spasm, and an inability to maintain basic righting reflexes. Treatment to regain structural balance and reduce hypertonus was ongoing.

The letter of July 25, 2003 advised the worker had reported injuring himself after falling through a wall and striking his abdomen. He reported chronic low back pain with an L3-4 disc bulge, frontal headaches and a stiff neck. In addition to the findings above, the therapist believed the worker had a probable tear and separation of the abdominal muscles. The worker's condition had improved with treatment.

Post Hearing Submissions

The employer's representative was provided seven days to respond to the letters from the massage therapist, and did so by letter dated August 27, 2003. She noted the massage therapist did not correlate the worker's symptoms with his functional capacity. The location of the worker's symptoms reported to the massage therapist were not consistent with the initial medical reports. The representative noted that the letter of February 26, 2003 did not make any conclusion regarding the causative significance of the events of July 13, 2001. There was no diagnostic test on file to confirm an L3-4 disc bulge. Finally, the employer's representative noted that registered massage therapists are prohibited by their scope of practice from making a diagnosis or attributing symptoms to a particular condition.

The worker's representative responded by letter dated September 5, 2003, which largely repeated his previous submission regarding the appeals, and relied on policy #97.00 of the *Rehabilitation Services and Claims Manual, Volume 1* regarding weighing of evidence.

Reasons and Findings

At the outset of the oral hearing the worker's representative requested that the appeal of the October 16, 2001 decision letter be withdrawn. The worker's position was there was only one incident, that of July 13, 2001 and the application for compensation in August 2001 was in fact related to that incident, not a separate incident in August. The worker's representative indicated the oral evidence would make this clear. I reserved a decision on this issue at that time.

Item #5.60 of the *WCAT Manual of Rules, Practices and Procedures* establishes that the WCAT panel has the discretion to decline to grant a withdrawal once it has begun its consideration of the evidence. This may occur in situations where there is evidence of fraud or misrepresentation by the appellant, or where an error in law or policy will result in a favourable decision for the appellant.

After hearing the worker's evidence, I find that the appeal will not be withdrawn, as the totality of the evidence must be considered. The evidence contained in the August 2001 claim file has substantive differences from that in the second, or July 2001 claim file and at the oral hearing, and is therefore relevant. In addition, to allow only the second appeal to proceed would in essence create a situation where a worker has filed two applications for compensation for the same injury.

Regarding the appeal of the October 16, 2001 decision letter, to summarise the worker's position at the oral hearing, he injured himself on July 13, 2001 when he fell through the tarpapered opening into the prefabricated home. He thought his back would improve while he was on holidays so he did not seek medical attention or file a claim for compensation. His back did improve, and during his holidays he participated in outdoor activities. However, when he returned to work in August he "reaggravated" his injury by engaging in his regular work duties.

Although the worker advised that he scraped and banged his abdomen and arms when he fell through the doorway in July 2001, he did not advise the entitlement officer of this incident when they discussed the cause of his injury in August and September 2001. At that time the worker clearly attributed his symptoms in his shoulders and back to his regular work activities of hanging drywall and indicated they were gradual in onset, that there was no specific incident. The worker was inconsistent in his evidence regarding whether he advised the Board of a specific incident. He stated that he did not mention the July 13, 2001 incident at this time because he assumed the Board knew about it as he had reported it to his supervisor and requested an entry in the first aid book. Later in

his evidence the worker indicated he “thought” he advised the entitlement officer in September 2001 of a specific incident, and also that he reported there was an incident as soon as the Board officer told him he needed to have one in order to consider his claim. I do not accept the worker’s evidence in this regard.

The worker’s physician did not describe a work incident in July 2001 on his reports to the Board in August and September. I again do not accept the explanation that the doctor neglected to mention the incident. The first documentation regarding an incident at work from a physician was by the orthopedic surgeon in January 2002 noting an injury “sometime in July.”

I find insufficient evidence to conclude the worker sustained an injury arising out of and in the course of his employment on August 7, 2001. I deny the worker’s appeal.

Regarding the appeal of the April 2, 2002 decision letter, at the oral hearing the worker could not provide an answer when asked why he waited until March 2002 to apply for compensation for the incident on July 13, 2001. He could only state that as soon as he was told by a case manager that the Board required a specific incident in order to consider whether an injury arose out of and in the course of employment, he reported it. However, the evidence on the 2001 claim file is that the worker’s representative contacted the Board in November/December regarding the July incident and reconsideration of the October 13, 2001 decision letter. The worker’s representative was advised to file a new claim as the new evidence he was submitting pre-dated the application for compensation. The worker did not file an application for a further three months.

The written statements of his co-workers prepared in December 2001 do not provide a specific date for this event, and one indicated it was possibly in June 2001. There is no evidence to support the worker’s contention he was placed on light or modified duties in July, August or September 2001 before he booked off work.

The July 13, 2001 incident might well have occurred, however there is insufficient evidence to conclude it lead to the worker’s disabling symptoms some two months later. As discussed above, the worker did not immediately seek medical treatment for his back pain, nor is there documentation that he reported this incident to his physicians until January 2002 when he advised that he fell through a doorway “sometime in July.”

I do not consider the reports of the massage therapist relevant to the appeal, as these cannot be considered a medical diagnosis. In addition, there is no opinion provided regarding causation of the symptoms and the workplace accident. Some of the symptoms reported in July 2003, such as headaches and a stiff neck, were not reported to the worker’s physician at the outset. There is a significant time lag between the incident in July 2001 and massage therapist’s initial treatment. Finally, I agree with the

employer's representative that there is no indication in the letters regarding the worker's capacity to return to work.

I find that there is insufficient evidence to conclude the worker sustained an injury on July 13, 2001 that lead to his disabling symptoms in September of that year. I deny the worker's appeal.

Conclusion

The decision of the Board set out in the letter dated October 16, 2001 is confirmed.

The decision of the Board set out in the letter dated April 2, 2002 is confirmed.

The worker requested reimbursement of expenses for travel from Penticton. These are not awarded as the appeal was unsuccessful.

Sherryl Yeager
Vice Chair

SY/ch