Noteworthy Decision Summary

Decision: WCAT 2003-03729-RB **Panel**: Randy Lane **Decision Date**: November 25, 2003

Causation – Causative significance - Whether employment was of causative significance with regard to the worker's foot disability – A 20 percent contribution was found to be causative significant

A Medical Review Panel certificate indicated the worker had bilateral metatarsalgia, and 80% of the disability was due to congenital short first metatarsal bilaterally. The certificate further stated that the worker's work activities were of relatively minor causative significance, being about 20% causative regarding disability. The worker appealed the implementation of the certificate to the Appeal Division.

The panel held that 20 percent contribution of the worker's work activities to his bilateral foot disability meant that the work activities were of causative significance with respect to his disabling occupational disease. The two causes acted together. While the worker apparently had pre-existing short first metatarsals he had no symptoms until they were activated by the work activities. The worker did not have a pre-existing disability and there was no indication that the worker's pre-existing condition would have become a disability in the absence of his work activities.

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Panel: Randy Lane, Vice Chair

Introduction

In a June 11, 1999 finding the Workers' Compensation Review Board (the Review Board) confirmed earlier decisions by the Workers' Compensation Board (the Board) that the worker's plantar fasciitis was not due to his 1992 injury or his work activities in general. He appealed that finding to a Medical Review Panel which produced an October 20, 2000 certificate indicating that the worker had bilateral metatarsalgia due, in part, to his work activities over the years. The panel indicated that the plantar fasciitis was not causally related to work activities in general or the 1992 compensable injury. The Board implemented the Medical Review Panel certificate by paying temporary disability wage loss benefits for the period from March 8, 1996 to July 17, 2001.

By decision of August 3, 2001 the case manager advised the worker that Dr. A, the Board's consultant physiatrist, recommended that the worker be given orthotics; custom-made footwear, an orthotics shoe or footwear modification were not recommended. She indicated that wage loss benefits would conclude July 17, 2001, the date the worker was assessed by Dr. A. She commented that as the worker had taken early retirement and was in receipt of union and Canada Pension Plan disability benefits, no further assistance would be offered other than the treatment recommended by Dr. A.

By decision of August 8, 2001 the case manager reiterated Dr. A's opinion that the worker did not require a special boot, an orthopaedic shoe or modification of his footwear. She advised that the worker would not be referred for consideration of a pension because the Medical Review Panel indicated the worker's work was of minor causative significance regarding the disability of his feet. She commented that the worker did not meet the criteria for vocational rehabilitation assistance as he did not have a permanent disability and was not at risk of a permanent disability. She noted that the worker was in receipt of a retirement pension and no longer interested in returning to work. She also commented that as the Medical Review Panel did not report that the worker suffered from depression or chronic pain syndrome as a result of the mechanism of injury under the claim there was no reason for her to consider those diagnoses.

By decision of August 23, 2001 the case manager indicated that the diagnosis of a major depressive disorder accompanied by significant anxiety and chronic pain syndrome was not related to the mechanism of injury under the claim.

The worker appealed the decisions of August 3, 2001, August 8, 2001, and August 23, 2001. With the assistance of his union he provided three notices of appeal - part 1 and one notice of appeal - part 2. The worker's employer was provided with notice of the appeals but it did not indicate that it wished to participate.

An oral hearing was held on November 20, 2003 at the Richmond offices of the Workers' Compensation Appeal Tribunal (WCAT). The worker attended, as did his union representative, Mr. S.

Issue(s)

The issues on this appeal are whether the worker's depression and chronic pain disorder are in turn due to the occupational disease accepted under this claim, whether health care for his foot disability should be limited to orthotics, and whether the worker should be referred for a pension assessment.

Jurisdiction

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

Background and Evidence

As the decisions in question flow from implementation of the Medical Review Panel certificate, I consider that the following clauses from the certificate are of note:

> 2. The worker does now have a disability with respect to his right foot and left foot.
>
> 4.A) The disability which the worker now has is bilateral metatarsalgia of the second, third and fourth metatarsal heads largely due to a congenitally short first metatarsal on each side;
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> B[)] The work activities in general over the years were of causative significance in producing a disability.
>
> 5.A) The congenital short first metatarsal bilaterally is of major causative significance being about 80% responsible for the disability. The worker's work activities in general over the years were of relatively minor causative significance, being about 20% causative regarding disability.

B) The work activities in general over the years were of relatively minor causative significance regarding disability in the worker's feet. …

6.B) The two causes acted together to result in a disability regarding the worker's feet. ...

7. The Panel feels that the worker has been disabled since March 8, 1996 to the present time partly as result of the work activities in general over the years. The nature and extent of the disability is and was pain of moderate extent in both forefeet.

8.A) The worker suffered from a pre-existing congenital asymptomatic short first metatarsal bilaterally symptoms from which were activated by the work activities in general over the years. ...

B) The worker did not suffer from any pre-existing disability.

9. The worker now has a disability related to work activities in general over the years, which has gradually worsened since its commencement. The nature of the change is gradually increasing pain and resultant gradually increasing limitation of any activity carried out while the worker is standing or walking. No significant change in the disability is reasonably to be expected in the next 12 months except if the worker is treated with appropriate orthotics for the gradually worsening metatarsalgia. With appropriate treatment is possible that the worker's metatarsalgia could be significantly reduced.

10. The worker's bilateral foot condition now diagnosed as metatarsalgia is causally related to the work activities in general over the years...

A June 29, 2001 claim log entry indicated that temporary disability wage loss benefits would be maintained until the action plan had been confirmed by the Lower Limb Orthotic & Footwear Clinic. In his July 17, 2001 report Dr. A of that clinic noted that the worker was referred for an examination of his foot inserts. He confirmed that on examination the worker was quite tender in the heel region bilaterally and also in the metatarsal heads. There was slight tenderness in the mid-portion of the medial longitudinal arch on both sides. He noted that previous inserts and a support were not of assistance. He recommended replacement of the foot inserts via custom-made, heel cup and cushion, a better medial longitudinal arch support, and a metatarsal dome to release pressure on the metatarsal heads. He did not find any indication for prescribing custom-made footwear or an orthotic shoe; he did not consider that the worker would need modification of his footwear.

Dr. A saw the worker again on February 18, 2003. Examination revealed the same findings noted previously. He recommended modification of the worker's existing orthotics.

The only other information of note from health care professionals on the claim file consists of a May 20, 1998 report from Dr. B, a psychiatrist, an August 27, 2001 claim log from Dr. B2, a Board medical advisor, and a July 9, 2002 report from Mr. M, a clinical psychologist. (Mr. M does not have a Ph.D. but is a registered psychologist.)

Dr. B noted that loss of income had been a considerable stressor for the worker. At that point he was in receipt of a union pension of $420 per month. His application for Canada Pension Plan benefits had been denied and the Board had rejected his claim on appeal "which decision affected him some more." Dr. B administered the Minnesota Multiphasic Personality Inventory (MMPI-2), the results of which indicated somaticized depression and anxiety. He offered diagnoses of major depressive disorder accompanied by significant anxiety and chronic pain syndrome. He commented that the worker's current mental status did not enable him to perform any kind of gainful employment.

Dr. B2 participated in a team meeting in August 2001. An August 23, 2001 claim log entry by the case manager indicated that the medical advisor confirmed that the chronic pain and depression would not be related to the bilateral metatarsalgia. She commented the medical advisor would confirm that. In her August 27, 2001 claim log entry Dr. B2 offered the following comments regarding the issue of the worker's chronic pain and depression:

> Further to the Case Manager memo regarding our team meeting discussion about this worker's chronic pain and depression, I have reviewed the report from the Medical Review Panel. In summary, they concluded there was currently no evidence of plantar fasciitis in this worker's feet but there was evidence of metatarsalgia. The Panel concluded the cause of this metatarsalgia was related for the most part, to the worker's congenitally short first metatarsals (deemed to be approximately 80% causative) and that the worker's job activities had "minor causative significance" in producing the disabling condition of bilateral metatarsalgia. Therefore, this opinion should also apply to the worker's diagnosed chronic pain and depression. That is, the worker's job activities have had a minor causative significance in the metatarsalgia and chronic pain and depression.
>
> [reproduced as written]

The result of the team meeting provided the basis for the case manager's August 23, 2001 decision.

Mr. M administered the MMPI-2. He indicated the worker's symptoms pointed to moderate chronic major depressive disorder and chronic pain disorder associated with metatarsalgia. He outlined his opinion concerning the worker's personality and considered that the worker would never have really been a happy man all his life but would not have developed a clinically depressive mood disorder without the occurrence of a significantly ego-damaging situation. He noted that since ceasing to work the worker had developed a major depression. He indicated that without his job the worker's "premorbid depressogenic factors" in his personality had become more predominant and had exacerbated the felt loss of his identity. Mr. M indicated that the path was circular: the worker's passivity predisposed his depression and his depression reinforced his passivity.

The following paragraph of note linking the worker's job loss and pain to his symptoms occurs in the report:

> The pain disorder, the depressive disorder and the job loss are all connected. These disorders have been present since his job loss and are likely to continue. It has been determined that his work activities have contributed to some extent to his pain disorder which brought about the termination of his work. In turn, the pain and the job loss are the main precipitators of the man's depression. While there were pre-existing risk factors for both disorders, both required the occurrence of work-related conditions to become manifest.

Reasons and Findings

The notices of appeal - part 1 contend the worker has a permanent impairment and cannot return to work. The notice of appeal - part 2 indicates the worker's major depressive disorder should be accepted as part of the claim. Those are only two of the issues that arise from the appealed decisions.

At the oral hearing I reviewed with the worker's representative the issues they wished to pursue. Mr. S indicated that chronic pain syndrome and depression and a pension referral were at issue. He also referred to a vocational rehabilitation referral but later at the submission stage of the hearing he did not raise the issue of vocational rehabilitation. In response to my question regarding such a referral, he indicated that it would be pointless to refer the worker as he is unemployable.

I raised the issue of health care for the worker's feet and Mr. S indicated it was open to the panel to address the matter. He advised that he did not take issue with the termination of wage loss benefits as of July 17, 2001.

Causative significance generally

The question of causative significance and Medical Review Panel certificates was reviewed in depth in *Appeal Division Decisions #2002-0146/0147* (available on the Board's website and published at 18 *Workers' Compensation Reporter* 13). Those decisions reviewed whether benefits would be payable following a Medical Review Panel certificate which determined that ten percent of a worker's chronic obstructive pulmonary disease was due to his exposure to dust at work and 90 percent was due to his smoking.

That panel noted that the test is whether employment was of causative significance in producing a disease and observes that the test is applicable even when there are other non-compensable causes contributing to the disease. In paragraph #20 of the decision the panel made the following comments of note about the nature of the causative significance test:

> The "causative significance" test implies that a disability is compensable in its entirety, if the employment was a significant or material contributing factor. It does not allow compensation to be apportioned based on the relative contribution of work-related and other contributing factors. This approach was adopted by the Appeal Division in Decisions #98-1062 and #98-1122; both explicitly rejected the notion that compensation can be apportioned if an occupational disease is found to be due to the nature of the employment. We agree with the analysis in these decisions.

In *Appeal Division Decisions #2002-0146/0147* the panel determined that a certificate of the Medical Review Panel does not say anything about a worker's entitlement to compensation. A certificate is conclusive and binding on the Board with respect to medical matters only. Entitlement to compensation involves applying the rules of entitlement to the evidence and reaching a conclusion as to eligibility. The certificate is binding evidence to be considered given the effect of section 65 of the *Workers Compensation Act* (the Act), as reinforced by item #103.86 of the *Rehabilitation Services and Claims Manual, Volume 1* (the RSCM). As noted much later in the decision, item #103.84 of the RSCM, concerning cause of disability, provides that when the Medical Review Panel certifies as to cause, it is making a determination as to etiology as a matter of medical science and not a matter of law.

The panel then returned to the causative significance test:

> … it is important to understand when a cause is "significant", particularly when the degree of contribution of the target cause is small. The issue has been addressed in the law of causation in negligence cases, where the question is: What is a material contribution?

It considered that the principles of material contribution which included *de minimis non curat lex* (the law does not concern itself with trifles) were adopted by the Supreme Court of Canada in the leading case of *Athey* v. *Leonati* [1996] 3 S.C.R. 458 and the principles find their analogy in workers' compensation law in the doctrine of "causative significance", which implies the *de minimis* principle.

The panel offered comments of note about determining whether a particular cause is significant:

> Determining whether a particular cause is "significant" is not a pure question of fact. To say that a cause is "significant" is a conclusion based on the application of an implied test to the evidence. The test is a value judgment, and the value may not be the same depending on the role of the person making the judgment. For example there are different judgments for the assessment of causation made by a medical authority and for one made by a legal authority. From a medical perspective, whether a cause is significant is primarily a question of what science considers to be significant. This involves the consideration of scientific values. Legal assessment of significance (whether made by a court or the Appeal Division) must take into account the scientific evidence, but it must also consider other values. These values are essentially matters of law and policy. For example, a court must consider the purpose of tort liability and issues of justice. The Appeal Division must consider the purpose of the *Workers Compensation Act* and the "merits and justice of the case".

The panel then reviewed the Medical Review Panel certificate to determine whether the work contribution was covered by the *de minimis* exception. It found that the contribution was so minor that it could not be said to be more than negligible. The panel stressed that its "decision is not based on the notion that a set percentage of contribution is required in order for a particular cause to be considered more than *de minimis*" and determined that "in the circumstances of this case, after considering all of the evidence and the merits and justice of the case, the work-related cause is *de minimis*."

I consider that the 20 percent contribution of the worker's work activities to his bilateral foot disability means that the work activities were of causative significance with respect to his disabling occupational disease. The two causes acted together; they did not act separately. While the worker apparently had pre-existing short first metatarsals he had no symptoms until they were activated by the work activities. The worker did not have a pre-existing disability and there is no indication that the worker's pre-existing condition would have become a disability in the absence of his work activities. I make these observations because some claim log entries suggest that Board officers considered that a 20 percent contribution was insignificant.

That there were two causes of the disability raises concerns as to apportionment of benefits. I accept the analysis in *Appeal Division Decision #96-1721* (found at 13 *WCR* 353) concerning revisions in 1995 to Board policy concerning Medical Review Panel certificates. That panel determined that the revisions did not permit apportionment of benefits when there were work and non-work causes of disability in cases where there was no pre-existing disability. That panel further determined that apportionment would be permissible in cases where (1) a disability had been caused by the independent progression of a non-work related condition or disease regardless of whether there was any pre-existing disability, so long as it was established that this independent progression to a disability was not causally related to the work injury and (2) a disability resulted from a subsequent non-work cause.

As noted above, the worker did not have a pre-existing disability. Further there is no indication that the disability was caused by the independent progression of a non-work related condition or disease and there is no indication that the disability resulted from a subsequent non-work cause. That there were two causes of the worker's disability does not provide a basis to apportion benefits in this case.

Pension referral

The worker confirmed that his feet have stayed the same since the Medical Review Panel examination in 2000. He takes Tylenol #3 painkillers via prescription from Dr. G, his family doctor. Orthotics helped somewhat at the commencement of the problems with his feet but now they do not do very much. The Medical Review Panel considered that appropriate orthotics might reduce the worker's metatarsalgia; the Medical Review Panel did not indicate that the worker's metatarsalgia would be eliminated.

It is notable that the Board paid the worker wage loss benefits in response to the Medical Review Panel's certification as to a 20 percent contribution by the work activities. I accept Mr. S's point that if the 20 percent contribution was sufficient to pay wage loss benefits then it should be sufficient when the worker's eligibility for a pension is to be examined. As discussed above, 20 percent is sufficient to establish that his work activities were of causative significance with respect to the ongoing disability of his feet. He is to be referred to the Disability Awards Department.

Chronic pain disorder/depression

The worker indicated that he was not depressed when he was working but became depressed when he stopped working. He took anti-depressants but stopped in late 2002/early 2003 because they were not helping. He indicated that his depression had not changed since 2000 when he was examined by the Medical Review Panel.

That the Medical Review Panel did not address the issue of whether the worker had chronic pain syndrome and depression does not mean that the worker did not have

those conditions or that they were not related to his foot symptoms. The Medical Review Panel was asked to certify with respect to the worker's feet and it did so. I consider that the question of whether the worker has a chronic pain syndrome or disorder and depression due to his foot disability is to be determined by a review of the information from health care professionals and the certificate which establishes that his work is of causative significance with respect to his foot disability.

Dr. B did not offer an opinion linking the worker's psychiatric/psychological conditions to his physical disability. His comment that the worker had been depressed "probably since he went off sick from his construction job" is a temporal observation rather than a causal one. Further, his observation that the loss of income had been a considerable stressor did not indicate that the loss was of causative significance.

Dr. B2's opinion is not exactly as represented by the case manager in her claim log entry. He indicates that the worker's job activities have had "a minor causative significance in the metatarsalgia and chronic pain and depression." Thus he indicates that there is a causal link.

As noted above, Mr. M offers a much more detailed analysis of matters of causation.

I consider the health care evidence establishes that the worker's injury was of causative significance with respect to the worker's chronic pain disorder and depression. There is no health care opinion to the contrary. The comment of the Board medical advisor that there is minor causative significance does not mean that the causative significance dropped below the *de minimis* level. The worker's work activities are of 20 percent causative significance with respect to his foot disability and that disability which caused the worker to stop working, in turn, is of causative significance with respect to his chronic pain disorder and his depression. Whether these two conditions are permanent and should be included in a pension assessment is not before me for decision.

Custom footwear

No medical information has been submitted which challenges Dr. A's opinion that the worker only requires orthotics. Dr. A is a specialist who examined the worker and I do not consider that his opinion contains any flaws. I confirm the decision of the Board in that regard. If the worker considers that his orthotics are not assisting him he may wish to contact the Board to see if further assessment of his orthotics may be in order.

Expenses

The worker's representative has requested reimbursement of a bill for $1,147.50 in connection with Mr. M's report. I find full reimbursement by the Board would be appropriate.

Conclusion

I allow the worker's appeal in part. I vary the Board's decisions and find that worker's depression and chronic pain syndrome are due to his injury accepted under this injury and find that the worker should be referred for a pension assessment. I confirm the decision that health care for his foot symptoms should be limited to orthotics.

Randy Lane
Vice Chair

RL/jda

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