

Noteworthy Decision Summary

Decision: WCAT 2004-00182 **Panel:** Susan Marten **Decision Date:** January 15, 2004

Causation – Causative significance – Two and a half year delay before the onset of tinnitus – Worker’s compensable injury was not of causative significance with regard to his tinnitus

The worker was injured in a motor vehicle accident in January 2000, and the Workers' Compensation Board accepted his claim for dizziness and soft tissue injury to his neck. He was then in a second accident in March 2001, and in July 2002 began experiencing tinnitus. He claimed that his tinnitus arose from his January 2000 injury. The issue was whether the compensable injury was of causative significance with regard to the worker's tinnitus.

The worker's tinnitus occurred approximately 2.5 years after the January 2000 accident and approximately 1.3 years after the second March 2001 accident. The panel found the delay in the onset of tinnitus to be relevant. The occurrence of the intervening accident was also relevant, but not necessarily fatal to the worker's appeal, in that sole causation is not a requirement under the Act. It is sufficient if the employment or injury was a significant contributing factor, or contributed to a material degree to the disablement. The weight of the evidence did not support the worker's compensable injury was of causative significance with regard to the tinnitus. The panel preferred the opinion of the attending physician that it was unlikely a causative relationship existed. The weight of the evidence supported the physician's assessment that an approximately 2.5 year delay was significant. An ear specialist said a 6 month delay was usual or expected, but that tinnitus could occur later, particularly if there was another accident. Without considering whether the March 2001 injury was of causative significance in respect to the condition, as this issue was not before it, the panel considered the specialist's comments also indicated the worker's tinnitus occurred much beyond what would have been expected in this case. There was insufficient evidence to the contrary. The other factors of the 2001 accident, age, and noise exposure could also be viewed as contributory. Even if the panel accepted the specialist's view that the January 2000 accident likely played a partial role in the onset of the tinnitus, the weight of the evidence was that the January 2000 injury was de minimus and did not make a material contribution.

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Introduction

The worker was in a motor vehicle accident on January 14, 2000, while in the course of his employment as an electrician. The Workers' Compensation Board (Board) accepted his claim for dizziness and a soft tissue injury to the neck.

By decision dated January 22, 2003, a disability awards officer (DAO) awarded the worker a permanent partial disability (PPD) award of two percent of total disability for the permanent functional impairment (PFI) associated with his dizziness. The pension was effective May 7, 2001, and based upon purchased optional protection coverage of \$1,500.00 per month. No loss of earnings pension was awarded.

By decision dated June 12, 2003, *Review Division Decision #378* partially allowed the worker's appeal. The review officer found the worker's tinnitus was not related to the compensable injury. The review officer upheld the percentage of disability awarded. The review officer found the worker should have been assessed for a loss of earnings award, and referred the claim file back to the Board for that purpose.

The worker appeals the review officer's decision. He requests the acceptance of his tinnitus and an increase in the percentage of disability awarded.

Legal counsel represents the worker. He did not request an oral hearing. I am satisfied that the worker's appeal can be properly determined without holding an oral hearing.

Issue(s)

Whether the compensable injury was of causative significance with regard to the worker's tinnitus.

Whether the Board appropriately determined the worker's pension entitlement.

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act (Act)*.

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 of directors that is applicable

in the case (section 250). 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 254).

The worker's entitlement in this case is adjudicated under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). Policy relevant to this appeal is primarily set out in the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM), relating to the former provisions of the Act.

Background and Evidence

I have read and considered all the information on the claim file, and that presented on appeal. I find that *Review Division Decision #378* contains an accurate summation of the facts and evidence. To that summary, the following brief review of additional information is relevant to the issues identified above.

A February 2000 X-ray of the worker's cervical spine reported, in part, that there were findings of moderate mid-cervical spondylosis. There was no abnormal mobility between flexion and extension. An August 2000 CT scan of the cervical spine reported, in part, the presence of a developmental fusion of the occiput in C1. No convincing fractures were noted.

The worker denied any problems with his vision or hearing, or problems with tinnitus, when Dr. R, medical advisor, examined him in July 2000.

The worker similarly denied any problems with tinnitus, when Dr. L, specialist in otolaryngology, examined him in October 2000. Dr. L's report also described that caloric testing simulated the feeling of dizziness and spinning the worker experienced when he looked up. The worker had a disturbance involving his balance system. Posturography testing indicated the presence of an organic disorder related to the compensable injury.

The attending physician's (Dr. M) April 18, 2001 report described that the worker's symptoms, following the March 2001 non-compensable motor vehicle accident, included neck pain, reduced range of neck motion, and increased muscle spasm and tenderness.

The September 2002 report of Dr. B, attending specialist in general otolaryngology, otolaryngic allergy, and nasal, sinus and laser snoring surgery, stated, in part, that the worker experienced two whiplash injuries. He was treated appropriately for the first injury, then had another injury, and now had tinnitus in both ears, slightly worse on the right.

In October 2002, the worker submitted a second application for compensation, which indicated he was injured on July 22, 2002. He was working and felt dizzy. He therefore descended the ladder he was on, felt dizzy again, and heard a sound in his right ear.

Dr. L reassessed the worker in October 2002, at the request of Dr. RL, disability awards medical advisor (DAMA). Dr. L advised, in part, that the tinnitus began about two months earlier, occurred in the right ear, and was hissing-like in character. Repeat posturographic testing results were considered reliable and consistent, and again indicative of a definite disturbance of the balance system. The worker's performance was slightly better on this occasion. His dizziness could be associated with cervical vertigo, which was a very poorly understood condition. He did not have classic benign positional vertigo, in light of the absence of dizziness on turning over in bed, getting into and out of bed, and on stooping.

The worker's notice of appeal to the Review Division indicated, in part, that his disability was equivalent to 70 percent. He told the review officer the dizziness affected his sleeping when he turned over in bed, but other home activities were not affected. The worker's representative's March 6, 2003 submission stated, in part, that raising his neck was a common movement in the worker's job. He suffered from dizziness without warning, and was severely and regularly disabled.

The review officer sought a medical opinion on whether the mechanism of the worker's January 2000 and/or March 2001 injuries would produce the symptoms of tinnitus. Dr. M, medical advisor, replied, in part, that the worker had longstanding hearing loss that would not be associated with the tinnitus. It was unlikely the tinnitus was related to the worker's accidents, in that it did not seem to be an issue until well over two years from the first accident, and well over one year from the second accident.

Dr. B provided reports, dated November 7, 2002 and April 8, 2003, in support of the worker's appeal. In the November report, Dr. B provided a medical-legal report that primarily referred to the March 2001 accident. Dr. B stated, in part, that the worker's main symptom now was tinnitus, which worsened after the March 2001 accident. The second motor vehicle accident contributed to the worsening of the tinnitus and dizziness. In his April report, Dr. B referred to both motor vehicle accidents in the reference line of his report, and stated the motor vehicle accident probably contributed to about 60 percent of the worker's tinnitus. Age and noise exposure also played a part. In the future, the motor vehicle accident may contribute to about 75 percent of the tinnitus.

In her decision, the review officer stated, in part, that Dr. B's reports did not refute Dr. M's opinion about the delay in the onset of the tinnitus. Dr. B's November 2002 opinion that the March 2001 accident worsened the tinnitus was considered inconsistent with comments in his September 2002 that the worker did not experience tinnitus until after the second accident. Dr. L's reports and the worker's own evidence indicated he

did not experience tinnitus until after the second accident. The review officer accepted the DAMA's opinion about the nature and extent of the PFI associated with the worker's dizziness, as reasonable and consistent with the guidelines found in the fifth edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA Guides).

Dr. B provided additional reports dated June 25 and August 12, 2003, in support of the worker's appeal of the Review Division decision. In brief, Dr. B indicated that he agreed the January 2000 accident probably contributed, in part, to the onset of the worker's tinnitus. In the August 2003 report, he provided a medical-legal report on the January 2000 accident. He stated it was not unusual for tinnitus to start some time after an accident. It usually started about six months later, but could occur later, particularly if there was another accident. The worker had another accident, so the tinnitus was probably related to both. The reason it started later was likely due to minimal damage to the hearing apparatus at the time of the accident, as well as aging and noise exposure. All these factors had a compounding effect, and the tinnitus came on sooner than it would have if it were only due to age and noise exposure.

In submissions provided in June, July, and August 2003, the worker's representative submitted, in brief and in part, that the decision not to accept the tinnitus was contrary to the medical evidence from Dr. B that the March 2001 injury probably contributed to the tinnitus by about 60 percent. By inference, the January 2000 injury contributed to the tinnitus by about 40 percent. The worker suffered a loss of function in excess of 2 percent. He had difficulty climbing ladders, lifting ceiling tiles, and moving his head from side to side.

Reasons and Findings

Tinnitus

The worker is claiming his tinnitus arose from his compensable injury. The review officer referred to RSCM items # 31.00 and #97.30. I have also had regard to policy item #22.00, which provides that the minimum requirement, before one event can be considered the consequence of another, is that it would not have happened but for the other. The matter should be looked at broadly and from a "common sense" point of view, to consider whether the previous injury was a significant cause of the later injury. I have had regard to section 250(4) of the Act and to policy items #97.00 and #97.10, concerning the weighing of evidence and the requirement to resolve an issue in a manner that favours a worker, where the evidence supporting different findings is evenly weighted.

The October 2002 report of Dr. L and August 2003 report of Dr. B both describe that the worker first noticed his tinnitus in approximately August 2002. As noted above, the reports of Dr. R, in July 2000, and Dr. L, in October 2000, expressly state the worker did

not complain of tinnitus during those examination procedures. The worker's October 2002 application reported that it first occurred in July 2002. The worker's evidence, as stated on that application, is very specific. He describes how the tinnitus occurred on July 22, 2002 when he was on a ladder at a specific work location. On balance, I accept the worker's direct evidence on this point. There is insufficient evidence to the contrary.

I therefore accept that the worker's tinnitus occurred approximately two-and-a-half years after the first January 2000 accident and approximately one year and four months after the second March 2001 accident.

There are competing medical opinions on the relationship of the tinnitus to the compensable injury.

Dr. M's opinion is clear. He considers a relationship unlikely, because of the delay in the onset of the tinnitus.

Dr. B's opinion is less clear. He indicates the tinnitus was worsened by the March 2001 accident (November 2002 report), the motor vehicle accident probably contributed to about 60 percent of the worker's tinnitus, may contribute to about 75 percent in the future, and age and noise exposure also played a part (April 2003 report). Although the worker's representative interprets Dr. B's April 2003 report as indicating the March 2001 motor vehicle accident contributed about 60 percent, Dr. B refers to both motor vehicle accidents in the reference line of that April 2003 report. He then states the January 2000 injury probably contributed, in part, to the onset of the tinnitus (June 2003 report) and the tinnitus was probably related to both accidents (August 2003 report).

In summary, the reports from Dr. B provide opinions that relate the tinnitus to both accidents, to age and noise exposure, and also state its onset was partly due to the January 2000 accident and worsened by the March 2001 accident.

Both Dr. M and Dr. B address the delay in the onset of the tinnitus. I agree that the delay in onset is relevant in this case. The occurrence of an intervening accident is also relevant, but not necessarily fatal to the worker's appeal, in that sole causation is not a requirement under the Act. It is not necessary that an injury be the sole cause or even the most significant factor. It is sufficient if the employment or injury was a significant contributing factor, or contributed to a material degree to the disablement [See Professor Ison's *Worker's Compensation in Canada* (2nd Edition), at page 58. See also *Athey v. Leonati*, (1996) 3 S.C.R. 458].

Appeal Division Decision #2002-0146/0147 (18 W.C.R. 113) discussed considerations to be made in determining whether the employment was of causative significance with regard to an occupational disease. The appeal commissioners considered the case of a worker with a respiratory disease, where a Medical Review Panel had stated 90 percent

of the disease was caused by smoking and 10 percent by the workplace exposure. Published decisions are not binding, and do not constitute policy, but I consider they can provide useful guidance in the interpretation and application of the Act and published policy in particular cases.

The panel discussed the determination of causative significance, in terms of what is a material contribution. The panel discussed that the Supreme Court of Canada in *Athey v. Leonati* adopted an approach that is referred to as the *de minimus* principle. The test in the context of workers' compensation is whether the work activity or injury falls outside the *de minimus* range and whether it was a material or significant contribution.

On balance, I find that the weight of the evidence does not support the worker's compensable injury was of causative significance with regard to the tinnitus. My reasons include that I prefer Dr. M's opinion that it is unlikely a causative relationship exists. I consider the weight of the evidence supports Dr. M's assessment that an approximate two-and-a-half-year delay is significant. I note that Dr. B indicated a six-month time frame is the usual or expected time. He then stated it could occur later, particularly if there was another accident. In passing and without determining whether the March 2001 injury was of causative significance with regard to the tinnitus, as that matter is not before me, I consider Dr. B's comments also indicate the worker's tinnitus occurred much beyond what would have been expected in this case. I consider there is insufficient evidence to the contrary. As also noted by Dr. B, the other factors of the 2001 accident, age, and, noise exposure can also be viewed as contributory. Even if I were to accept Dr. B's views about the partial role of the January 2000 injury, in my view, the weight of the evidence is that the role of the January 2000 injury is *de minimus* and did not make a material contribution.

For similar reasons, I do not consider the evidence evenly weighted. As set out in RSCM item #97.10, there is a possibility that the worker's injury was of causative significance. While an absence of positive data does not necessarily mean that a condition is not related to a person's employment, it may mean there is a lack of evidence that such a relationship exists. The Board must make its decisions according to the evidence, or lack of evidence, received, and not in accordance with speculations unsupported by the evidence. There is some evidential support, in that the worker did sustain an injury that resulted in a permanent disability of dizziness, and an attending specialist supports the injury was a partial cause. However, I have accepted the opinion of Dr. M, and consider the approximate two-and-a-half year delay significant. I conclude the evidence is not evenly weighted.

Permanent Partial Disability

Section 23 of the Act provides for the assessment of permanent partial disability. The Board's published policy, concerning the assessment of permanent partial disability awards, is primarily contained in Chapter 6 of the RSCM.

The review officer referred to section 23 of the Act, as it read immediately prior to June 30, 2002, as well as RSCM items #38.00, #39.50, #40.11, #66.20, #96.30, and #97.30. I agree with the review officer's statement of the applicable law and policy in the particular circumstances of the worker's case. I have also had regard to policy items #38.10 and #97.40.

The worker did not make a submission on the pension's effective date, the wage rate, or the conclusion there was no loss of earnings. However, as noted in item #14.30 of the *Manual of Rules, Policies and Procedures* (MRPP), a WCAT panel may address any aspect of an appealed pension decision.

I have reviewed all elements of the worker's pension award. I find the Board correctly determined the effective date of the award and the pension wage rate. The pension is effective the day following the conclusion of his wage loss benefits. The worker purchased personal optional protection. RSCM item #66.20 provides that the average earnings of a person entitled to personal optional protection are the earnings for which coverage has been purchased. I agree with the review officer's direction that the fact the worker is self-employed and returned to work did not address the issue of any lost income. I agree that the Board should undertake an investigation under section 23(3) of the Act.

With regard to the percentage of disability, the worker's representative has not disputed the review officer's conclusion that the worker's dizziness is appropriately assessed in Class 2 of the AMA Guides. He indicates the percentage should be higher.

Dr. B's reports discuss the worker's dizziness, but do not challenge or disagree with the percentage of disability.

RSCM policy item #97.40 provides that the reports of an external provider or a DAMA are to be considered "expert evidence" in the assessment of the worker's PFI, and this evidence should not be disregarded without other evidence to the contrary.

The DAMA asked Dr. L to assess whether the worker had any permanent vestibular impairment resulting from his injury. I have carefully examined the whole of the medical evidence, with particular attention to Dr. L's October 2002 findings and the findings described in Dr. B's reports.

The review officer stated the DAMA's assessment of a 2 percent impairment meant he had categorized the worker in Class 2. I agree that the AMA Guides are a useful tool that can be used to determine the nature and extent of the worker's disability. RSCM item #39.50 provides that reference can be made to schedules of disability used in other jurisdictions.

The DAO's January 15, 2003 memo indicates he understood the worker did not experience dizziness in any situation except putting his head back. Dr. L's October 2002 report provides a similar assessment. However, Dr. B's November 2002 report described dizziness when turning the head to one side. His August 2003 report described the dizziness occurred daily after the accident and was, at times, associated with nausea. The review officer's March 2003 memo states the worker described the dizziness affected his sleep when turning in bed, but all other activities at home were not affected.

The review officer concluded the worker's dizziness is appropriately categorized in Class 2 of the AMA Guides' system of rating impairment due to vestibular disorders. As noted by the review officer, Class 2 provides for a rating of 1 – 10 percent of total disability. An individual is rated in Class 2 when there are symptoms or signs of vestibular dysequilibrium present with supporting objective findings, and activities of daily living can be performed without assistance, except for complex activities (riding a bicycle) or certain types of demanding activities related to the individual's work (walking on girders or scaffolds). A Class 3 rating is provided for findings that include, in part, that an individual cannot perform activities of daily living without assistance.

On balance, I agree the worker's impairment is appropriately considered under Class 2. Dr. L's report indicated that repeat posturographic testing results were considered reliable and consistent, and indicative of a definite disturbance of the balance system. The worker is able to perform activities of daily living without assistance, except for certain complex activities. I would consider working on a ladder a complex activity and the worker has significant difficulty with that task.

I do not confirm the 2 percent award. My reasons include that evidence of additional impairment, as described above, has been presented on appeal that was not before the DAMA. I found that evidence compelling, in that it indicates there is some impact on the worker's activities of daily living (sleeping) as well as dizziness on motions other than looking up. The worker's representative describes that the sleep interference causes the worker to miss work, or severely reduce his work the next day. Dr. B described that the dizziness is, at times, associated with nausea. In addition, the dizziness on looking up is significant, in that the worker regularly finds himself unable to continue working on ladders. The June 2000 job site visit report describes that his work regularly involves overhead work.

In my view, some recognition is due for these findings. I conclude the worker is entitled to an additional award for those findings. Neither Dr. B nor the worker's representative has identified what would be an appropriate percentage. The worker states his impairment is approximately 70 percent; which would indicate a Class 5 level of impairment. I do not consider the weight of the evidence supports the workers findings warrant a Class 5 level of impairment. RSCM item #96.30 provides that the evaluation of a DAMA or authorized external provider is usually the primary input relied upon by a

DAO. On balance, I consider it appropriate to refer this matter back to the Board, with the recommendation that Dr. RL, or another DAMA (if Dr. RL is unavailable for that purpose), provide guidance on what is an appropriate additional percentage of disability.

Conclusion

I vary the Review Division decision. I vary the review officer's conclusion to confirm the percentage of disability awarded. I conclude the worker is entitled to an additional award. I refer this matter back to the Board, with the recommendation that Dr. RL, or another DAMA, provide guidance on what is an appropriate additional percentage of disability. I confirm the decision not to accept the worker's tinnitus.

It is not apparent whether there were expenses associated with Dr. B's reports, in that the worker's representative did not request reimbursement. If the worker incurred expenses to obtain Dr. B's June 25 or August 19, 2003 reports, those expenses should be paid, in accordance with the Board's fee schedule.

I do not order reimbursement of Dr. B's November 7, 2002 and April 8, 2003 reports. The November 2002 report concerned the March 2001 non-compensable injury. I did not find the April 2003 report useful or helpful, as it did not identify which injury was being discussed when it referred to one accident, and cited both injuries in the reference line of that report.

Susan Marten
Vice Chair

SM/jkw