Noteworthy Decision Summary

Decision: WCAT-2004-03496 **Panel**: Ning Alcuitas-Imperial **Decision Date:** June 30, 2004

Interpreting section 96(2) of the Workers Compensation Act (Act) – Injury in section 96(2)(b) means compensable injury – Hence, if an injury has not yet been determined to be compensable, it cannot recur for the purpose of section 96(2)(b) of the Act

A worker injured his low back in 1998 and his claim was accepted for lumbar strain. In 2003 he requested a reopening of his claim due to worsening back pain, which was attributed to MRI findings of annular tear and disc herniation. The Workers' Compensation Board (Board) denied his request and the worker appealed. The worker argued that he was entitled for further benefits because his compensable injury, which he defined as including the MRI findings of an annular tear and disc herniation, recurred. The issue was whether it was correct to characterize the worker's request for benefits as a request for reopening under section 96(2) of the *workers Compensation Act* (Act). Section 96(2) states that the Board may reopen "a matter that has been previously decided by the Board".

The panel found that section 96(2) of the Act restricts the Board's consideration of a reopening request to those medical conditions, injuries or disabilities that the Board has previously decided were compensable. It also noted that section 96(2)(a) explicitly restricts the Board to considering changes in a worker's medical condition "that the Board has previously decided was compensable". There is no similar language in section 96(2)(b). However, section 96(2)(b) refers to a recurrence of an "injury". The only reasonable interpretation was that the "injury" in section 96(2)(b) means a compensable injury. If an injury has not yet been determined to be compensable, it cannot recur for purposes of determining entitlement to compensation. In reaching its conclusion, the panel considered the reasoning of other WCAT panels in WCAT Decisions #2003-04254, #2003-04257, and #2004-02240. As the accepted condition in this case was the lumbar strain, and the Board had not yet adjudicated the question of the compensability of the worker's annular tear and disc herniation, the claim should not be reopened.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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Introduction

In October 1998, the worker, a crusherman, injured his low back at work. The Workers' Compensation Board (Board) accepted his claim for compensation. The worker received wage loss and health care benefits for a period of temporary disability from October 1998 to April 1999.

In March 2003, the worker submitted medical information about worsening back pain. The Board opened a new claim for the worker, but this was disallowed in May 2003 on the basis that the worker had not suffered a new compensable injury. The Board officer noted that the worker attributed his March 2003 symptoms to his 1998 claim, so referred this information to another Board officer to deal with.

On June 23, 2003, a Board case manager denied the worker's request to reopen his 1998 claim. He determined that the worker had not suffered in March 2003 a recurrence of his compensable injury.

The worker appeals this decision of the Board. His representative argues that the worker's ongoing back symptoms are related to his 1998 compensable injury.

Issue(s)

Should the worker's 1998 back claim be reopened for his March 2003 symptoms?

Jurisdiction

Section 96(2) of the amended *Workers Compensation Act* (Act), in effect at the time of the decision under appeal, states that the Board may reopen a matter that has been previously decided by the Board, if one of two conditions exists. The reopening may be on application or on the Board's own initiative.

Sections 240(2) and 241(5) of the Act provide that a decision to reopen or not to reopen a matter, on application under section 96(2), may be appealed to the Workers' Compensation Appeal Tribunal (WCAT) by a worker or employer who is directly affected by that decision.

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The June 23, 2003 decision stated that it was in response to the worker's request to have his 1998 claim reopened. The Board advised the worker that he could appeal the June 23, 2003 decision directly to WCAT.

On January 14, 2004, a WCAT Deputy Registry advised the worker of a recent change in WCAT's interpretation of the term "on application" used in section 96(2) of the Act that affected his appeal. Based on this interpretation (contained in *WCAT Decision #2003-04322*), the worker was given the option of continuing his appeal to WCAT or transferring his appeal to the Board's Review Division. The worker did not respond to this letter, so the Deputy Registrar deemed on February 4, 2004 that the worker wished to continue his appeal to WCAT.

Under section 250(1) of the 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's board of directors that is applicable in the case. 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 under section 254 of the Act.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

Although the worker requested an oral hearing, I am satisfied that the worker's appeal can be properly determined without such a hearing. Therefore, I have reviewed the worker's 1998 and 2003 claim files, as well as written submissions and evidence provided by the worker. The employer is participating in this appeal. The employer was invited to provide written submissions, but none were received. I note that I reviewed the worker's 2003 claim file, as it contains relevant medical evidence about the worker's March 2003 symptoms.

As noted above, the worker injured his low back on October 17, 1998 after lifting heavy items. At the time of his injury, he was working as a crusherman.

The worker applied for compensation from the Board. Dr. Loewen diagnosed him with a lumbar strain and occasional sharp pains down his left leg. The Board accepted his claim. He received wage loss and health care benefits for a period of temporary disability from October 1998 to April 1999.

During this period of temporary disability, the Board sponsored the worker to participate in two rehabilitation programs: a work conditioning program from January to February 1999 and an occupational rehabilitation program from March to April 1999.

Dr. Young examined the worker on March 4, 1999 at the occupational rehabilitation program. The worker reported to Dr. Young that he attributed his back problem to several years of repetitive, heavy lifting at work. The worker described the mechanism of his injury as having to bend over and turn sideways to lift and pull a railing up to his level. The worker said he felt a sudden pop and immediate pain.

Dr. England, orthopaedic surgeon, examined the worker on March 12, 1999. The worker reported having bilateral leg symptoms in the thigh and calf for the last six years. This was investigated but no definitive test results were noted. Dr. England thought that the worker had a well-defined injury to his back without signs of radiculopathy or neural impingement. However, he ordered an MRI examination to rule out an annular tear or a disc injury as a cause for the worker's ongoing back, buttock and thigh pain.

The March 17, 1999 MRI of the worker's lumbar spine showed the worker with degenerative disc disease at L5-S1. The test also found a diffuse posterior annular tear with a borderline, central left paraforaminal disc herniation. However, Dr. Vellet found the disc herniation did not impinge upon the S1 nerve root.

After reviewing the results of the MRI, Dr. England stated that there was no evidence of neural impingement. In terms of the annular tear, he noted that such tears cause back, buttock and leg pain in some instances. He thought the worker's compensable injury caused the annular tear.

The worker was discharged from the occupational rehabilitation program on April 23, 1999 as fit to return to modified, full-time work with limitations. Although the worker had a full range of lumbar motion, he had pain on the end of rotation bilaterally. His neurological signs were normal. Program staff recommended that he use certain techniques, including stretch breaks, prone lumbar extension and a lumbar seat pad, at work and at home. They also recommended that the worker avoid prolonged sitting at work.

There is then a gap in the medical information on file until Dr. Loewen filed a February 6, 2001 report with the Board. The worker reported having severe back pain on January 31, 2001. Although this pain improved, the worker sought medical attention as the pain was now radiating down his left leg. Dr. Loewen diagnosed the worker with a lumbar strain and recurrent low back pain.

Dr. Loewen then filed a physician's first report with the Board on March 31, 2003. Noting the results of a March 26, 2003 examination of the worker, Dr. Loewen diagnosed the worker with L5-S1 degenerative disc disease and a lumbar strain. The worker reported having worsening back pain over the previous few weeks. The pain was radiating to his

left calf and right buttock. Dr. Loewen recommended the worker undertake alternate duties, with no activity that would jar his back.

The worker then applied for compensation in April 2003. He stated that he developed lower back pain on March 14, 2003 after operating a truck on rough roads. He attributed his symptoms to a re-aggravation of his 1998 injury, indicating that he had ongoing back pain since returning to work in 1999.

Dr. Loewen then filed further progress reports in the worker's claim files until May 2003, certifying that the worker could only perform light duties.

The Board adjudicated the worker's new claim in May 2003. The claim was disallowed on the basis that there was no evidence of a new injury. As a result of this decision, the worker's request for compensation was forwarded to the case manager assigned to the 1998 claim.

On June 23, 2003, a Board case manager issued the decision letter under appeal. In reaching his conclusion to deny the worker's request to reopen his 1998 claim, the case manager determined that the worker had not suffered in March 2003 a recurrence of his compensable injury. He noted the two-year gap in medical information. He concluded that the worker's 1998 compensable strain injury had resolved with no evidence of a continuity of symptoms until March 2003, when new symptoms developed.

The worker then called the Board on June 30, 2003 in response to the decision under appeal. In a claim log entry, the case manager noted that the worker drew his attention to a 1999 MRI examination showing a disc herniation. The case manager asked the worker to forward him a copy of the MRI for review.

The case manager reviewed the MRI examination. However, he declined to change his previous decision. In a July 21, 2003 claim log entry, the case manager concluded that the worker's 1998 claim was accepted for a lumbar strain, but that the MRI provided no new information. He advised the worker of his decision by telephone. I note that information on the claim file shows that the worker stopped working in June or July 2003.

On August 1, 2003, the case manager wrote a detailed memo to a Board medical advisor requesting his opinion on the causative significance of the 1998 compensable injury in relation to the MRI findings. The case manager noted that this was a new matter for adjudication that had not been previously dealt with.

I note that the case manager accepted the description of the mechanism of the 1998 injury as described in Dr. Young's intake report for the occupational rehabilitation program.
The case manager expressed the opinion that the MRI findings were not reasonably due to the 1998 injury. He thought that the worker's ongoing symptoms likely due to the

natural consequences of a pre-existing condition. He based his opinion on the following several factors:

- The fact that Dr. England noted prior bilateral leg symptoms similar to the symptoms of March 2003. He also noted the worker's report of prior ongoing problems during the occupational rehabilitation program. This implied that the 1998 injury was possibly a temporary flare-up of a pre-existing condition.

- Dr. England's opinion on the causative significance of the 1998 injury in relation to the annular tear was not definitive.

Dr. Biro, Board medical advisor, wrote a brief claim log entry on August 13, 2003. Dr. Biro expressed agreement with the case manager's opinion following a team meeting review.

Following receipt of Dr. Biro's opinion, the case manager issued an August 14, 2003 decision declining to reconsider his previous decision. He noted the information about the disc herniation and the worker's disagreement with the decision under appeal.

Further progress reports from Dr. Loewen noted some improvement in the worker's condition, but with flare-ups in September 2003 and January 2004.

In his appeal documents to WCAT, the worker stated that his original 1998 claim had not been diagnosed properly and that a more serious injury (i.e. a herniated disc) had been sustained at that time. He asked for a remedy of compensation, including long-term and health-care benefits.

In support of this appeal, the worker filed a September 8, 2003 letter from Dr. Loewen. He stated that the worker's 1998 compensable injury was very likely "the causative factor" in the ongoing low back symptoms. He based his opinion on a review of the symptomatology, which was consistently reported as low back pain with radiating left leg pain. He also thought Dr. Young's reference to prior bilateral leg symptoms "completely unrelated" since this was in relation to the worker's thigh pain. He also characterized Dr. England's opinion on causation as stronger. Dr. Loewen also thought the worker's case became confusing because there was a change in the diagnosis from lumbar strain to annular tear. He noted that "Chronic ongoing fluctuation of back pain is common, once a tear has occurred and there is disc damage."

The worker also submitted an August 2003 CT scan of his lumbosacral spine. Dr. Maisonneuve noted mild annular disc bulging at L5-S1, with no focal herniation. He noted that the disc margin abutted the S1 nerve root on the right, but the worker's symptoms were left-sided. No stenosis or left nerve root compression was noted.
The worker's representative also filed a November 5, 2003 written submission and further documents. He argued that the worker continued to experience back problems,

but was able to work until March 2003. He noted that the worker's original application for compensation under the 1998 claim noted left leg pain. He argued that the Board relied upon portions of Dr. England's opinion, but did not adequately consider his opinion on the causation of the worker's annular tear. He submitted that the worker's ongoing back and left leg symptoms were related to his 1998 compensable injury. He asked the panel to allow the appeal and direct the Board to provide compensation for a period of temporary total disability from June 30, 2003 to July 16, 2003, followed by a period of temporary partial disability.

The worker's representative also filed an undated, handwritten letter from a co-worker. He recalled the date and mechanism of the worker's 1998 compensable injury.

Following receipt of these submissions, the parties were also provided disclosure of the 2003 claim file. They were also invited to comment on a preliminary issue about the panel's jurisdiction over the issue of whether the MRI findings (herniated disc and annular tear) are a compensable consequence of the 1998 injury or whether this is a new matter for adjudication that must be dealt with by the Board.

The worker's representative responded to the jurisdictional issue on May 17, 2004. He argued that the panel had jurisdiction over the compensability of the MRI findings, as the Board had denied that the MRI findings were related to the 1998 injury. He submitted that the August 14, 2003 decision was an addendum to the decision under appeal, rather than a new decision.

Reasons and Findings

Section 96(2) of the Act states that a matter that has been previously decided by the Board may be reopened if one of two conditions exists. There must be a significant change in the worker's medical condition that the Board had previously decided was compensable, or there must be a recurrence of the worker's injury.

Policy #C-14-102.01 of RSCM II states that a "significant change" refers to a change in the worker's physical or psychological condition, not a change in the Board's knowledge about the worker's medical condition. The policy also states that a "recurrence" of the original compensable injury occurs without an intervening second compensable injury. A recurrence of an original injury is distinguished from a new injury. The decision whether to reopen the existing claim or initiate a new claim depends on the evidence in each case.

In considering whether one of the two grounds for reopening have been met in this case, I must deal with the preliminary question of the scope of section 96(2). This examination is necessary because the worker's representative raises an argument that the worker is entitled to further benefits because his compensable injury has recurred. The worker's representative has defined that injury to include the MRI findings of an annular tear and disc herniation.

The question that arises is whether the compensability of the MRI findings of an annular tear and a disc herniation is properly adjudicated under a section 96(2) reopening? In other words, is it correct to characterize the worker's request for benefits as a request for reopening under section 96(2)?

In my view, there is an aspect of the worker's request for further benefits that cannot be properly characterized as a request for reopening under section 96(2). The worker's request is founded upon his argument that his compensable injury includes the MRI findings of an annular tear and disc herniation. Yet, interpreting the statutory language in section 96(2), I find that this question falls outside the scope of a section 96(2) consideration. I find that section 96(2) of the Act restricts the Board's consideration of a reopening request to those medical conditions, injuries or disabilities that the Board has previously decided were compensable.

In interpreting the statutory language, I refer to the plain wording of section 96(2) which states that the Board may reopen "a matter that has been previously decided by the Board."

I also note that the first ground outlined in section 96(2)(a) of the Act explicitly restricts the Board to considering changes in a medical condition that the Board has previously decided was compensable. There is no similar language in section 96(2)(b). However, section 96(2)(b) refers to a recurrence of an "injury." The only reasonable interpretation to adopt is that "injury" in section 96(2)(b) means a compensable injury. If an injury has not yet been determined to be compensable, it cannot recur for purposes of determining entitlement to compensation.

I have also considered the provisions of Board policy at item #C-14-102.01 of RSCM II. I did not find the policy instructive on this particular question, but it does emphasize the need to properly characterize a worker's request for further benefits in the context of distinguishing between a reconsideration request and a reopening request. I interpret the Board's practice directive (Practice Directive #58 on "Reopenings" as amended on July 1, 2003 and publicly available on the Board website at www.worksafebc.com), which provides examples for the benefit of guiding the Board's adjudicators, as lending support for the need to carefully examine and properly characterize a request for further benefits.

In reaching my conclusion on the interpretation of section 96(2), I have considered the reasoning of other WCAT panels in *WCAT Decisions #2003-04254, #2003-04527 and #2004-02240*.

The proper characterization of a worker's request for further benefits is necessary, given the more restrictive grounds outlined in the amended version of section 96(2). As well, I view this interpretation as respecting the Board's broad jurisdiction to consider what medical conditions, injuries or disabilities are accepted under a claim, while also

balancing the intent of the statute to restrict reopenings of matters to the two grounds outlined in section 96(2).

In this case, I find that the Board has not yet adjudicated the question of the compensability of the worker's annular tear and disc herniation. Although the worker's representative has argued otherwise, I agree with the Board case manager that the accepted condition in this case is the lumbar strain.

Thus, in considering whether to reopen this worker's claim, I have examined the evidence to determine whether there has been a significant change in his lumbar strain condition or a recurrence of that condition only.

Having reviewed the evidence, I find that the worker's claim may not be reopened.

Firstly, I find that the evidence does not demonstrate a significant change in the worker's lumbar strain condition. Apart from the MRI evidence, the worker has not provided any additional medical evidence to show that his lumbar strain condition has significantly changed since his period of temporary disability ended in 1999.

Secondly, I find that the evidence does not show that the worker's lumbar strain has recurred. The Act and Board policy does not define the word "recurrence." The *Concise Oxford Dictionary*, Eighth edition, defines the word "recur" as "occur again; be repeated." In a medical context, *Dorland's Illustrated Medical Dictionary*, 27th edition, defines "recurrence" as "the return of symptoms after a remission." Although the worker argues that his low back and left leg symptoms have recurred in 2001 and 2003, he attributes these symptoms to his annular tear and disc herniation. Similarly, Dr. Loewen's opinion that the worker's 1998 compensable injury is responsible for his ongoing symptoms is based on his understanding that the annular tear and disc herniation were accepted conditions under the 1998 claim. As these are not compensable conditions, the weight of the worker's evidence and Dr. Loewen's evidence is reduced.

Although I must deny the worker's appeal on the threshold question of whether the grounds for reopening in section 96(2) have been met, I recommend that the Board adjudicate the question of the causative significance of the 1998 compensable injury in producing the MRI findings of an annular tear and a disc herniation. With respect, I do not agree with the worker's representative that this question has been fully adjudicated or considered by the Board. It is touched upon peripherally in the decision under appeal and the supporting documentation for the August 14, 2003 decision, but this is done in the context of section 96(2). I consider that it is a new matter for adjudication. I note that the Board case manager recorded his observation that this was a new matter for adjudication in the referral memo to the Board medical advisor, but failed to address it in the August 14, 2003 decision.

I acknowledge the unfortunate impact of my decision in creating a further delay on the consideration of the worker's request for further benefits. However, I am aware that the worker may appeal any decision issued by the Board on the compensability of the MRI findings to the two-level process of review and appeal normally applicable under the Act.

Conclusion

I deny the worker's appeal. I find that the worker's 1998 claim may not be reopened. However, I strongly recommend that the Board adjudicate the question of the causative significance of the 1998 compensable injury in producing the MRI findings of an annular tear and a disc herniation.

The worker incurred expenses to obtain Dr. Loewen's report for this appeal. As per item #13.23 of WCAT's *Manual of Rules, Practices and Procedures*, it was reasonable for the party to have sought such evidence in connection with the appeal. Thus, I order the Board to reimburse the worker for this expense to the extent allowed under Board policy. I make this order under Section 7 of the *Workers Compensation Act Appeal Regulation*.

Luningning Alcuitas-Imperial
Vice Chair

LA/cmm