

Noteworthy Decision Summary

Decision: WCAT-2004-03709 **Panel:** Debbie Sigurdson **Decision Date:** July 12, 2004

Scope of WCAT's jurisdiction is broad – WCAT may take jurisdiction over issues the Workers' Compensation Board has identified and investigated but not formally communicated in its decision letter, even if on review the Review Division declined jurisdiction - Potential breach of natural justice at the Review Division may be remedied on appeal to WCAT

The Workers' Compensation Board (Board) accepted the worker's claim for a traumatic injury to his right elbow suffered in January 2002 for health care benefits only. When his elbow symptoms increased in November 2002 he sought further physiotherapy treatment, but the Board denied his request to reopen his claim. The Board also decided that his symptoms in November did not form the basis of a new claim, but failed to communicate this to the worker in writing. On review, the Review Division considered a medical opinion which it disclosed to the worker on October 10, 2003, but did not set a time frame for reply. On October 24, the Review Division confirmed the Board's decision to deny a reopening, relying on part on the medical opinion. The review officer refused to take jurisdiction over an earlier notation on the Board file that concluded the worker's symptoms in November did not arise from a new compensable injury. The worker appealed. The issues were: (a) whether the Review Division breached natural justice by failing to provide the worker with an adequate opportunity to respond to the new medical opinion; and (2) whether WCAT can take jurisdiction over issues the Board has identified and investigated but not formally communicated in a decision letter.

The worker should have been given an adequate opportunity to respond to the new medical evidence and ideally a clear time frame to respond to the new medical evidence before the issuance of the Review Division decision. However, this potential for breach of natural justice from the Review Division was remedied on appeal to WCAT, because at that point the worker had been given an adequate opportunity to make submissions on the new medical opinion. As the worker had not exhausted his appeal rights, the panel was not prepared to find a breach of natural justice occurred and void the Review Division decision.

WCAT's jurisdiction is not limited to the issues decided by the Review Division or the Board in the decision letter under appeal, and this finds support from the 2002 *Core Services Review of the Workers' Compensation Board* (Winter Report) and item #14.30 of WCAT's *Manual of Rules of Practice and Procedure*. The panel was concerned about WCAT taking jurisdiction over the new claim issue without the worker having the right of a review at the Review Division, but balanced this concern with the need to avoid delay in decision-making. This was not an issue that had not been previously identified. The Board was aware that the worker's symptoms in November 2002 may have arisen from the changes to his job duties at that time and took steps to investigate. The Review Division was also aware of the issue, but refused to make a decision on the issue of whether or not the worker's symptoms formed a new claim without a written decision letter under review. The WCAT panel disagreed with this approach and found it was appropriate to exercise its discretion to take jurisdiction over the issue of whether the worker sustained a new compensable injury in November 2002, notwithstanding the absence of a written decision letter from the Board on the matter.

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Introduction

The worker claimed compensation for injury to his right elbow following a work incident on January 8, 2002.

The Workers' Compensation Board (Board) accepted the worker's claim for traumatic right lateral epicondylitis for health care only. The worker received physiotherapy treatment in March and April 2002 in relation to ongoing right elbow symptoms.

In November 2002, the worker's right elbow symptoms increased and he sought further physiotherapy treatment. The worker requested the Board reopen his claim for health care benefits. On February 24, 2003 the Board denied the worker's request for a reopening and concluded that there was insufficient medical evidence to connect the worker's symptoms in November 2002 to his compensable injury.

The worker appealed that decision to the Review Division. The review officer sought a medical opinion on October 8, 2003 and disclosed that opinion to the worker and his representative on October 10, 2003. On October 24, 2003, the review officer confirmed the Board's decision to deny a reopening of the worker's claim, relying in part on the new medical opinion. The review officer refused to take jurisdiction over an earlier notation on the Board file that concluded the worker's symptoms in November 2002 did not arise from a new compensable injury.

The worker has appealed the Review Division decision. He claims that the Review Division breached a principle of natural justice by failing to provide him the opportunity to respond to the new medical opinion. He requests that the panel void the Review Division decision and return the matter to the Review Division for a fresh decision. In the alternative, the worker requests the panel allow his request for a reopening of his prior claim, or accept a new compensable injury occurred in November 2002.

Issue(s)

1. Was there a breach of natural justice such that the Review Division decision should be voided and the matter returned to the Review Division for a fresh decision?
2. What is the scope of an appeal before a Workers' Compensation Appeal Tribunal (WCAT) panel? Specifically, is WCAT's jurisdiction limited to the issues that have been defined and decided by the Review Division and/or the Board officer in the

written decisions under appeal, or may the WCAT panel take jurisdiction over issues the Board has identified and investigated but not formally communicated in the decision letter?

3. Did the worker experience a recurrence of his compensable injury in November 2002, such that he is entitled to a reopening of his claim for further health care benefits?
4. Did the worker sustain a new injury in November 2002 that is due to his occupational activities at that time?

Jurisdiction

Section 239(1) of the *Workers Compensation Act* (Act), as amended, provides that a decision made by a review officer under section 96.2 may be appealed to WCAT. Section 250(1) of the Act allows WCAT to consider all questions of law and fact arising in an appeal, subject to section 250(2), which requires that WCAT apply the relevant Board policy, and make its decision based on the merits and justice of the case.

The worker's disability in this case recurred after June 30, 2002, the transition date for relevant changes to the Act. Entitlement related to the recurrence is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. WCAT panels are bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

The worker has requested an oral hearing. I am satisfied that this appeal can be determined without the need for an oral hearing, based on a review of the file material and consideration of the submissions from the worker's representative to the Review Division and to WCAT. The employer has not participated in this appeal although provided the opportunity to do so.

Background and Evidence

The employer operates a general freight business. This 42 year-old male worker has been employed as a driver since December 9, 1993.

On January 8, 2002 the worker was closing the driver's door of the transport truck he was operating when his right hand slipped and his elbow hit the corner of the truck frame. The worker experienced immediate pain to his right elbow, with some temporary numbness to his right hand. The worker did not seek medical attention. He reported the incident to his supervisor and continued to work.

On January 21, 2002, the worker attended at emergency due to his ongoing right elbow pain. Dr. Dodd diagnosed the worker with traumatic tendonitis to his right elbow. X-rays of the worker's right elbow taken that day were normal. The emergency physician's clinical notes indicate that the worker had hit the lateral elbow a few days ago, with pain to the right elbow. There was no swelling but pain increased with dorsiflexion of the hand. The diagnosis noted was lateral epicondylitis.

On February 26, 2002, Dr. Mann provided the worker with a referral for physiotherapy. On March 18, 2002, the physiotherapist noted the worker had right lateral epicondylitis, and that he was experiencing gradual and consistent improvement to his right grip strength and function. The worker did not lose time from work due to his injury. The Board accepted the worker's claim for traumatic right lateral epicondylitis for health care only.

The worker sought further medical treatment on November 18, 2002 due to pain to his right elbow. Dr. Haugen examined the worker and noted the worker had experienced pain to the right medial elbow over the last three weeks, particularly when grabbing items. He was tender along the medial aspect of his right elbow. X-rays taken that day were normal, with no changes noted from the January 2002 x-rays. On November 25, 2002, Dr. Haugen reported that the worker had difficulty lifting greater than 25 pounds, with tenderness along his right medial epicondyle. The worker had reported a change in his job duties in that the vehicles he now drove were not equipped with power steering. By December 3, 2002 the worker's hours had reduced due to economic downturn. The worker continued to have pain to his right elbow.

A Board medical advisor provided an opinion on January 10, 2003 that the worker's injury on January 8, 2002 appeared to have caused a traumatic neuropraxia involving the ulnar nerve at the elbow. He speculated that the worker's symptoms in November 2002 may relate to medial epicondylitis, but indicated that there was insufficient evidence to confirm a diagnosis. The history suggested that the worker sustained trauma to the medial posterior elbow, the effects of which did not entirely subside. The Board medical advisor provided an opinion that it is plausible the worker experienced a flare-up of his symptoms due to repetitious and forceful wrist and elbow movements from driving a manually steered truck.

Notes to the Board file on January 21, 2003 indicate that the Board was investigating whether the worker's symptoms in November 2002 related to his previous injury or constituted a new injury. The Board officer confirmed with the employer that the worker had experienced problems with his elbow since January 2002, and the physiotherapist confirmed to the Board officer that the worker received treatment to the same area in November 2002 as in March and April 2002. The worker told the Board officer that he had experienced continued symptoms to his right elbow, and that after the changes at work, his symptoms worsened. The worker told the Board officer that he switched to a night shift position in October 2002, where he pulled the pallets himself, and drove a truck without power steering. The pain he experienced in November 2002 was to the

area of his elbow that he had struck in January 2002. He experienced pain symptoms during and after work, and in the morning.

Based on this information and the Board medical advisor's opinion, the Board officer concluded there was insufficient evidence of a new injury in November 2002, and denied the worker's claim pursuant to section 6(1) of the Act. The Board officer noted that the worker's job duties were not highly repetitive and his activities varied. The Board officer indicated that epidemiological studies did not note a higher incidence of epicondylitis in truck drivers. The Board officer did not issue a decision letter to the worker regarding the decision to disallow a new claim, but rather the Board officer closed the new claim file and transferred the information on the file to the worker's January 2002 claim file.

On January 31, 2003, Dr. Anders examined the worker and reported that he was experiencing right radio-humeral joint pain, and that he had a possible ulnar nerve injury. The worker experienced pain when driving trucks and cinching up loads. He had tingling to the ulnar aspect of his right hand, with radial dysfunction at times. His grip strength and power were normal.

A second Board medical advisor provided an opinion on February 10, 2003 that the worker's symptoms in November 2002 related to a different anatomical area than his area of injury in January 2002, and therefore his symptoms were not related to the original claim. The Board medical advisor noted the worker had hit the lateral aspect of his elbow on the truck, and he was diagnosed with lateral epicondylitis, whereas in November 2002 his diagnosis was medial epicondylitis. Further, the Board medical advisor pointed out that the worker did not receive treatment to his elbow from April 2002 to November 2002.

In the decision letter dated February 24, 2003, the Board officer noted the worker's job duties had changed such that he worked four hour shifts including night shifts, pulled pallets and drove a truck without power steering. The Board officer denied the worker's request for a reopening, relying on the second Board medical advisor's opinion, and concluded the worker's symptoms in November 2002 were not related to the January 2002 diagnosis of right lateral epicondylitis.

On May 9, 2003, Dr. Calder, specialist in physical medicine and rehabilitation, noted the worker presented with parasthesia and medial elbow pain when lifting, pulling, and wrenching at work. The worker described his elbow pain as severe and of a burning quality. He also experienced numbness to the ulnar nerve. Dr. Calder diagnosed the worker with a recovering right ulnar neuropathy. He indicated the worker may have only had a "neuropraxic chapter" rather than true axonotmesis.

The worker attributes his symptoms in November 2002 to the injury he sustained in January 2002. The worker requested a review of the Board's February 24, 2003 decision.

On October 8, 2003, the review officer sought a medical opinion from the Review Division medical advisor, who indicated that the ulnar nerve and medial epicondyle are on the inside of the elbow, whereas the lateral epicondyle is on the outside. The Review Division medical advisor noted that there was no continuity of symptoms. He provided an opinion that the worker's lateral epicondylitis accepted under this claim had no relation to his ulnar nerve problem. The Review Division medical advisor noted that the worker's neurological symptoms were short-lived after the incident, and were not consistent with a significant nerve injury. He would have expected the worker's symptoms to persist and/or reappear much sooner if it were related to the compensable injury. The Review Division medical advisor speculated that the worker engaged in physical work with deep elbow flexions that stressed the nerve and caused the ulnar nerve condition. He also indicated that spontaneous entrapment of the ulnar nerve at the elbow level in the cubital tunnel is not a rare condition, and can arise without a precipitating event.

On October 10, 2003, the review officer disclosed the Review Division medical advisor's opinion to the worker and his representative, and in her letter she requested whether the worker's representative would like to respond to this new medical evidence. No time frame for a reply was provided.

On October 24, 2003, the review officer confirmed the Board's decision to deny the worker's request for a reopening. The review officer accepted that the worker sought physiotherapy treatment in November 2002 for a different anatomical area, the medial epicondyle, than the area accepted under the claim. The review officer also concluded that the worker had a lack of continuity of symptoms and treatment such that she was unable to relate the ulnar nerve injury to the original incident. The review officer refused to consider whether the worker had experienced a new compensable injury as the adjudication of that issue was not communicated in the decision letter under review.

The panel requested the physiotherapist's clinical records from March 2002 to February 2003. Those records confirm that the worker was treated for lateral epicondylitis from March 8, 2002 to April 2, 2002, and for medial epicondylitis from November 18, 2002 to February 4, 2003. The physiotherapist noted the worker presented with ulnar nerve paraesthesia on February 4, 2003.

Submissions

A. Breach of Natural Justice:

The worker's representative submitted that the first notice the worker received of the review officer's intention to seek a new medical opinion was on receipt of a copy of that opinion on October 15, 2003. The review officer wrote, "Would you please contact me at the number above to advise if you will be providing submissions", but the letter did not provide a date by which the worker's representative must contact the review officer before a decision would be issued. The worker's representative submitted that late in the review process the review officer obtained new medical evidence but she did not ensure the worker had proper opportunity to respond to that new evidence before making a decision. The worker's representative submitted that six business days to respond to new medical evidence, which was relied on in reaching the decision adverse to the worker, was not sufficient. The worker's representative noted that as the review officer had relied on this evidence in reaching her outcome, the breach was not simply a procedural defect inconsequential in nature. The issues raised by the Review Division medical advisor warranted a response.

The worker's representative submitted that the worker's right of further appeal to WCAT does not remedy his denial of the opportunity to be heard at the Review Division. Procedural fairness is a fundamental safeguard of the administrative system, and the Review Division cannot operate outside the parameters of that because the statute provides for a reconsideration or right of appeal. The worker's representative submitted that the requirement for procedural fairness exists separate and apart from the worker's right of further appeal. The worker's representative requested the panel find that the worker was denied the opportunity to respond to a relevant statement prejudicial to his interests, which is equal to a denial of natural justice.

B. Jurisdiction of WCAT over new claim:

The worker's representative requested that the panel take jurisdiction over the issue of whether the worker sustained a new injury in November 2002 as arising from the changes in his job duties. She specifically requested that the panel not refer this issue back to the Board for an original decision.

C. Merits of the appeal:

The worker's representative in her submissions to the Review Division requested the review officer rely on the first Board medical advisor's opinion from January 2003 to find that the worker experienced a recurrence of his compensable condition. She noted that the worker and the employer have confirmed that the worker experienced continuity of symptoms from March 2002 through to November 2002 when he sought further medical treatment and physiotherapy. The worker's representative submitted that the worker's original traumatic injury was aggravated by the changes to his job duties and

responsibilities in October 2002, resulting in the need for the worker to seek further treatment in November 2002.

The worker's representative in her submissions to WCAT noted that the Review Division medical advisor did not express an opinion as to the nature of the injury, except to state that it caused symptoms for a short time. The worker's representative disputes the Review Division medical advisor's statement that the worker did not experience continuity of symptoms, as she noted that both the worker and the employer have provided evidence to the contrary. Further, she noted that the Review Division medical advisor acknowledged that he was speculating to a degree as to the non-occupational causes for the worker's nerve entrapment. The worker's representative submitted that the three medical opinions from the Board and the Review Division are inconsistent with respect to the worker's diagnosis. She submitted that the review officer adopted the Review Division medical advisor's opinion without addressing the discrepancies in the medical evidence on file.

She requested the panel adopt the first Board medical advisor's opinion and that the correct diagnosis is traumatic neuropraxia, which is supported by the mechanism of injury and Dr. Calder's report. The worker's representative acknowledged that the initial trauma was to the worker's lateral elbow, and not the medial elbow, but she asked the panel to accept the worker's statement that the same area was treated and that his symptoms were continuous and then increased following the changes at work.

The worker's representative requested the panel refer the worker to an independent health professional (IHP) in order to clarify the diagnosis and the relevant periods, particularly with respect to the worker's traumatic neuropraxia. She submitted that the panel is confronted with conflicting medical opinions and that an IHP opinion will assist the panel to determine issues of causation.

Reasons and Findings

A. Breach of Natural Justice:

The worker's representative has raised concerns about the worker's lack of opportunity to respond to a new medical opinion the Review Division obtained, without the knowledge of the worker, late in the review process. This opinion was then relied on to reach a decision adverse to the worker. I do not dispute that the worker ought to have been given the opportunity to respond to this new medical evidence prior to the issuance of the Review Division decision that adopted the new medical opinion. The fact however remains that the worker does have the opportunity to remedy the lack of opportunity to respond by appealing the Review Division decision to WCAT. The worker's representative has now had the opportunity to make submissions on the new medical opinion to WCAT, thus providing an opportunity to respond to the medical opinion. An appeal to WCAT allows a party to provide new evidence, including new medical evidence, and operates on an inquiry model. As a result, the potential for a

breach of natural justice from the Review Division decision has been remedied by the right of further appeal.

My reasons for refusing to void the Review Division decision and remit this matter back for a fresh decision are not meant to condone the actions taken by the Review Division. The worker's representative has raised a valid concern. The worker or his representative should have been given adequate opportunity to respond to new medical evidence, and ideally the review officer would have given the worker and his representative a clear time frame in which to respond to the new evidence before issuing the decision.

I note that there has not been a WCAT decision that has addressed the issue of a potential breach of natural justice at the Review Division. Previous Appeal Division panels have found on appeal that a decision contains a breach of natural justice; however, I note that those decisions arose in limited circumstances on reconsideration when the appellant had exhausted his appeal rights. The remedy in those circumstances was to remit the matter back to a fresh Appeal Division panel for a new decision. In this appeal, the worker has not exhausted his appeal rights, and therefore I am not prepared to find a breach of natural justice has occurred and void the Review Division decision.

B. Jurisdiction of WCAT:

The worker's representative has requested that the panel take jurisdiction over the issue of whether the worker sustained a new compensable injury in November 2002 as a result of the changes to his job duties. The Review Division specifically refused to exercise jurisdiction over this issue because the Board decision letter under appeal did not adjudicate whether the worker sustained a new injury in November 2002.

I find that WCAT's jurisdiction on an appeal is not limited to the issues decided by the Review Division or the Board in the decision letter under appeal. In appropriate circumstances, WCAT's jurisdiction on an appeal extends to those issues that ought to have been decided based on the evidence and information on the Board file. I rely on the *Core Services Review of the Workers' Compensation Board* dated March 11, 2002 (Winter Report) to support my finding of WCAT's scope of jurisdiction on an appeal, and I refer specifically to page 49, which states:

Once again, the subject matter of the appeal should not be limited to what the Review Manager actually dealt with in the four corners of his/her decision letter. Rather, the appeal would encompass any issue which the Appeal Tribunal believes should have reasonably been dealt with by the initial decision maker in his/her decision letter, or by the Review Manager during the subsequent internal review process.

Additionally I rely on the *WCAT Manual of Rules, Practices and Procedures (MRPP)* item #14.30, on the scope of an appeal. That item provides:

The WCAT panel has a discretion to go beyond the issues expressly raised by the parties to the appeal which were contained in the lower decisions giving rise to the appeal. A WCAT panel will normally not proceed to address such other issues, but has a discretion to do so.

From my review of the Board file, I note that the Board did in fact make an initial decision to disallow a new claim in relation to the worker's symptoms in November 2002. The Board however failed to communicate that decision in writing to the worker, and therefore did not provide the worker with a right of appeal. I note that the Board officer's memorandum to file dated January 21, 2003 provides evidence that the Board officer investigated a new claim by speaking to both the worker and the employer, sought a Board medical advisor's opinion in relation to the new claim, and then decided to join this information to the worker's earlier claim from January 2002.

I find the circumstances of this appeal fall squarely within that contemplated by the Winter Report. The Board ought to have communicated a decision to the worker on the issue of whether his symptoms in November 2002 formed the basis of a new claim, and have provided the worker with rights of review and appeal, however that did not occur. I have concern about WCAT taking jurisdiction over the new claim issue without the worker having the right of a review at the Review Division, but I also balance that concern with the need to avoid delay in decision making. I note that this is not a new issue that has not been previously identified. The Board was aware that the worker's symptoms in November 2002 may have arisen from the changes to his job duties at that time, and took steps to investigate. The Review Division was also aware of the issue, however refused to make a decision on the issue of whether or not the worker's symptoms formed a new claim, without a written decision letter under review. I disagree with that approach and I find that this is an appropriate case to exercise my discretion to take jurisdiction over the issue of whether the worker sustained a new compensable injury in November 2002.

I also note that the worker's representative has expressly raised the issue of the new claim on appeal to WCAT, and that she has specifically requested that WCAT exercise its jurisdiction over the issue and not refer the matter back to the Board for an initial decision. The MRPP at item #14.30 further states:

WCAT will generally restrict its decision to the issues raised by the appellant in the appellant's notice of appeal and submissions to WCAT. The appellant is entitled by right to a decision on the issues expressly raised in the appeal.

This provides further support for WCAT's jurisdiction over the issue of whether the worker sustained a new compensable injury in November 2002. In summary, in light of

the Winter Report, the MRPP, and the specific facts of this case, I find it reasonable for WCAT to take jurisdiction over not only the issues that arise from the decision as communicated by the Board officer in the letter of February 2003 and the Review Division decision of October 24, 2003, but also decisions that reasonably ought to have been communicated to the worker but were not.

C. Merits of the appeal:

There are two issues before the panel concerning the worker's right elbow symptoms in November 2002: whether the worker's right elbow symptoms were a recurrence of his January 2002 compensable right lateral epicondylitis, or whether his right elbow symptoms in November 2002 were due to his occupational activities at that time.

I note that there are conflicting medical diagnoses and opinions provided with respect to the worker's right elbow symptoms. The worker was initially diagnosed with traumatic elbow tendonitis in January 2002, and later that month with right lateral epicondylitis. In November 2002, the worker was diagnosed with right medial epicondylitis, and in 2003 he was diagnosed with an ulnar nerve injury. The worker's representative has requested the panel refer the worker for an IHP due to the various Board medical advisors' opinions and diagnoses provided. In my opinion, referring the worker for another medical opinion will not resolve the conflicting medical opinions already provided. The role of a decision maker is to consider and weigh often conflicting medical evidence and opinions in order to reach a decision. I find that there is sufficient medical evidence and opinion on the file from the Board medical advisors, the worker's attending physician, and the treating specialists to adjudicate this appeal without the need for a further medical opinion or medical evidence.

Section 96(2) of the Act provides that the Board may reopen a matter when there has been a significant change in the worker's medical condition that the Board had previously decided was compensable, or there has been a recurrence of the worker's injury. RSCM item C14-102.01 provides that a significant change to a worker's medical condition is a change to the worker's physical or psychological condition and would warrant consideration of a change in compensation or rehabilitation benefits or services. A recurrence of an original injury is distinguished from a new injury. A recurrence refers to the recurrence of the original injury without a second compensable event.

I accept the medical opinion provided by the first Board medical advisor on January 10, 2003 as to the diagnosis of a right ulnar nerve neuropraxia. This diagnosis is supported by the medical evidence from both Dr. Calder and Dr. Anders. Additionally I note the physiotherapist also reported ulnar nerve paraesthesia. I also adopt the reasoning of the first Board medical advisor that there is insufficient evidence to confirm a diagnosis of right medial epicondylitis. I note that the medical evidence in November 2002 and in 2003 does not indicate the worker was experiencing symptoms related to right lateral epicondylitis, which is the condition accepted under the January 2002 claim. As the balance of medical evidence supports a diagnosis of an ulnar nerve injury as the likely

cause of the worker's symptoms from November 2002 and into 2003, I find that the worker did not sustain a recurrence of his compensable right lateral epicondylitis. I do however find that the worker's traumatic injury to the elbow in January 2002 was capable of causing a traumatic nerve injury, which was aggravated by the changes to his job duties in the fall of 2002.

Section 6(1) of the Act provides that when a worker suffers from an occupational disease which disables the worker from earning full wages and the disease is due to the nature of the employment, compensation is payable. RSCM II at item #25.10 notes three basic requirements for compensation for an occupational disease, as follows:

1. The worker must be suffering from a disease designated or recognized by the Board as an occupational disease;
2. The disease suffered by the worker must be due to the nature of the worker's employment; and
3. The worker must be disabled from work as a result of the disease.

RSCM II item #26.55 recognizes that a worker's pre-existing disease may be aggravated by work activities to the point that a worker is disabled by the disease, and that in absence of the work activity, the worker would not have been disabled. A compensable aggravation occurs when the evidence shows that a disease has been significantly accelerated, activated or advanced more quickly than would have occurred in the absence of the work activity.

I accept the Board medical advisor's opinion in January 2003 that the worker's repetitious and forceful wrist and elbow movements from driving a manually steered truck were capable of causing an aggravation of his symptoms. I note Dr. Anders reported that the worker experienced pain when he was driving and when cinching up the loads. Dr. Calder also reported the worker had experienced symptoms to his right elbow in relation to performance of his job duties, including lifting, pulling and wrenching at work. Further, I note the Review Division medical advisor's comment that the worker's physical work with deep elbow flexions that stressed the nerve could have caused the ulnar nerve condition. Although the Review Division medical advisor also indicated that such injuries can occur spontaneously, I find the medical evidence together with the changes to the worker's job duties supports an occupational cause for the worker's symptoms in November 2002.

I accept that the worker's job duties changed in October 2002 such that he was required to perform more physical work, both when loading and unloading the truck and when driving the manual steered vehicle. I note that this change with an increase in physical labour coincided with the increase to the worker's right elbow symptoms.

I note that the second Board medical advisor's opinion was restricted to a consideration of whether the worker's medial epicondylitis was a recurrence of his previously accepted traumatic lateral epicondylitis claim. This opinion did not consider a diagnosis of ulnar nerve neuropraxia or the possibility of a work cause or aggravation to that condition.

I accept the worker's evidence, which is corroborated by the employer's evidence, that there was continuity of symptoms from April 2002 through to November 2002, despite the fact the worker did not seek medical treatment during that time. I also accept that the worker's symptoms worsened in November 2002, which prompted his need for further medical treatment. I find the worker sustained a compensable aggravation to an underlying right elbow injury in November 2002 that is due to the changes in his job duties.

Conclusion

In accordance with the above reasons and findings, I vary the Board's decision and the Review Division decision and allow the worker's appeal. I refer the matter back to the Board to determine the worker's entitlement to benefits. No expenses have been requested and none are ordered.

Debbie Sigurdson
Vice Chair

DS/jd