

NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2004-05173-RB **Panel:** Janice Leroy **Decision Date:** September 30, 2004

Injury In the Course of Employment – Section 5 of Workers Compensation Act - Functional Capacity Evaluation – Policy Items #14.00, #19.40, #19.41, and #20.30 of the Rehabilitation Services and Claims Manual, Volume I (RSCM I)

Where a worker is injured during a functional capacity evaluation (FCE) undertaken as a condition of receiving a job promotion with his or her employer, the injury occurred in the course of the worker's employment, and is therefore compensable under section 5 of the *Workers Compensation Act*.

In this case, a worker with a prior non-compensable lower back injury was offered a promotion with his employer on the condition that he undertakes an FCE to see whether he was functionally capable of doing the job. The worker further injured his back while undertaking the FCE. The Workers' Compensation Board (Board) decided that the injury was not compensable because the FCE was analogous to treatment for the lower back problem, and injuries that occur in the course of treatment for non-compensable conditions are not compensable. The worker appealed to the Workers' Compensation Review Board but it was not considered by a Review Board panel before the Review Board and the Appeal Division of the Board were replaced by WCAT and so it was decided as a WCAT appeal.

The worker argued that the FCE took place in the course of his employment as the employer paid for the FCE, the worker received wages and compensation for meal expenses incurred during the FCE, and he would not have been promoted had he not participated in the FCE. The employer argued that the FCE was not required for the job the worker was currently performing with the employer. Rather, the worker voluntarily undertook it in order to receive a promotion and therefore under policy item #20.30 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) (which relates to injuries that occur in the course of training), the injury is non-compensable. The employer also argued that the worker was on his own time during the FCE as he paid his own travel expenses. The fact that the worker was on paid leave was a gesture of goodwill by the employer and not a legal obligation.

The WCAT panel reviewed policy item #19.40 of the RSCM I which provides that if the employer provides medical or first aid facilities and an injury results from their use, this may be a factor indicating that the injury arose in the course of employment. The panel found that if the fact of providing first aid or medical facilities that workers may use is a factor, compelling a worker's attendance at a facility is an even more significant factor. Furthermore, policy item #19.41 of the RSCM I states that where an employer requires an inoculation and the worker suffers an adverse reaction, the claim should be allowed.

The WCAT panel found that the worker's situation was analogous to an adverse reaction to an inoculation because although the employer did not compel the worker's attendance at the FCE, it did make it a condition of job advancement with the employer. In addition, the fact that the employer provided paid leave for the worker to attend the FCE is an indication that the injury took place in the course of employment. That the employer might not have arranged for the



FCE had the worker not had the non-compensable low back condition is irrelevant. The WCAT panel allowed the worker's appeal.

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Introduction

The worker is now 49 years old. He drove haul trucks for the mining company employer for 12 years. In January of 1999 he applied for compensation for low back problems diagnosed as facet joint irritation, which he attributed to jarring from months of driving haul trucks with poor suspensions over rough roads. In a decision letter dated June 17, 1999 a case manager with the Workers' Compensation Board (Board) denied the claim, saying she was unable to conclude that the work activities caused the low back condition.

The worker returned to work in a janitorial position. In 2002 he applied for a processing plant labourer position. His employer arranged for a functional capacity evaluation (FCE) to determine whether he was functionally capable of performing labourer duties. Following the FCE the worker applied for compensation for an aggravation of his low back condition that he alleged had occurred in the course of the FCE.

In a decision letter dated November 8, 2002 a Board case manager denied the claim, saying that since he had been referred for a FCE specifically because of the low back problems, the FCE was analogous to treatment for the low back problem, and injuries or aggravations that occur in the course of treatment for non-compensable conditions are not compensable.

The worker appealed the Board's decision. With his notice of appeal he filed two medical reports:

exhibit #5 July 23, 2003 report from the worker's family physician, Dr. I, to the worker's long term insurer

exhibit #6 March 12, 2003 consult report from Dr. M, orthopaedic specialist

The matter was initially scheduled for an oral hearing. However, noting that the issue is strictly whether the worker was in the course of his employment while he was undergoing the FCE, I gave the parties the option of proceeding by way of written submissions. Both indicated their preference for a hearing by written submissions.

On August 5, 2004 the employer filed evidence consisting of a letter dated August 4, 2004 from the Clinic Manager of the clinic at which the FCE took place, and

correspondence from 2002 confirming arrangements for the FCE and reporting the findings. These are marked exhibit #1 and #2 respectively.

The worker filed a submission dated August 20, 2002. Attached to it was a memo dated August 6, 2002, a copy of the worker's pay stub for the period ending August 25, 2002, excerpts from the collective agreement, and a letter from the employer to the worker dated February 8, 2002. These are collectively marked exhibits #4.

The employer filed a submission, with attachments, including a copy of the worker's shift schedule for October 28 to November 21, 2002, his shift schedule for August 12 to 25, 2002, and an excerpt from the *Health, Safety and Reclamation Code for Mines in British Columbia*. The submission, with attachments, is marked exhibit #3.

The worker filed a rebuttal submission dated September 24, 2004.

Issue(s)

The issue is whether the worker was in the course of his employment while he was undergoing the FCE.

Jurisdiction

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

WCAT panels must apply applicable policies of the board of directors of the Board. The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

Relevant Information

In a fax to the Board dated October 1, 2002 the employer's safety coordinator explained that the worker had applied for a labourer position. Knowing that the worker had ongoing low back complaints the employer sent him for a job specific FCE, to see whether he was functionally capable of doing the job. The FCE was done on August 15 and 16, 2002. The safety coordinator said that on September 27, 2002 the worker reported having aggravated his back August 15, 2002 in the course of the FCE.

The FCE report is dated September 5, 2002. The program physiotherapist and kinesiologist stated that in their opinion there was no evidence of any physical impairment that would prevent the worker from immediately working as a coal plant

labourer. They said his demonstrated physical abilities met and exceeded the job demands as provided by the employer.

The worker had explained that he was currently working as a dry attendant/janitor, and wanted to apply for a different position that would require heavier job demands.

The evaluators wrote that there was no evidence of a current acute lumbar condition, but from the history and reports of the CT scans, it appeared the worker had episodic mechanical back pain from a discogenic source.

Over the course of the two days of testing the worker's ability to sit, stand, walk, climb stairs and ladders, lift, carry, bend and twist, and shovel were tested. He met the job demands on all counts.

There is no mention in the report of the worker having complained of an injury in the course of the evaluation.

Following the FCE the worker returned to his dry attendant/janitor job, until he filed the report of injury and went off work on September 27, 2002.

He returned to work on alternate light duties on October 28, 2002.

In his application for compensation dated October 28, 2002 the worker said that he had been injured at 1:15 p.m. on August 15, 2002 in the course of the FCE, when he had been asked to lie on his back and raise his legs in the air for an entire minute.

In a first report dated October 2, 2002, Dr. I reported the worker's advice that he had had severe lumbar pains with radiation down his legs, especially the left, since doing activities in the course of a FCE on August 15 and 16, 1999.

In his report to the worker's insurer of July 23, 2003, exhibit #5, Dr. I said he had first seen the worker on October 3, 2002 after his previous doctor, Dr. D, had left the community. The worker and his records gave a history of driving big coal mining trucks, in the course of which he developed significant lumbar problems and sciatica. He said that two CT scans had reported some lower lumbar degenerative changes. He had returned to work in a janitorial capacity, and on August 15 and 16, 2002, at an FCE, had developed more severe pain with numbness and paraesthesias along the left sciatic distribution to the left foot, and also some right leg pain. Dr. I felt the worker had developed a recurrent disc protrusion.

The worker's symptoms had then worsened and he had gone off work on November 26, 2002, at which point his left foot "felt like a block of ice." The worker's symptoms had since improved with physiotherapy and swimming, but he still had lumbar pain, mainly on the left and radiating to the left leg.

In his consult report of March 12, 2003 Dr. M said he had examined the worker on March 12, 2003. He said the mechanism of injury at the FCE was that the worker had been lying on his stomach, and been required to lift his legs and chest off the mat to hyperextend his lumbar spine, which had strained his low back. He said that whereas before the worker had had mechanical back pain with some left sciatica, after the FCE he had pain into both legs, newly focused on the right side. He had had six pre-planned days off after the evaluation and had returned to work and managed to work about six weeks before he had had to go off work due to worsening symptoms.

The submissions, and the documents submitted with them, indicate that when the worker applied for the labourer job the employer was concerned about his ability to handle it, in light of his back problems. Exhibit #4 contains a letter from the employer to the worker dated February 8, 2002, indicating that he was the successful applicant provided his physician gave a medical clearance that he was fit to perform the duties associated with the position. A two-page medical form was attached.

Exhibit #4 also contains a memo dated August 6, 2002 from one employer officer to another, enclosing an itinerary for the FCE to be given to the worker, and saying, "Please code [the worker] as medical leave for both of the days in question and I will talk to [another employee] in payroll and explain what is happening."

The pay stub for the period ending August 25, 2002 shows 24 hours of "Company leave."

Exhibit #2 indicates that the employer contracted directly with the clinic to conduct the FCE and report the results.

The shift schedules in exhibit #3 indicate that the worker was on scheduled days off on August 15 and 16, 2002 but that he was given paid shifts off on August 19 and 20, 2002.

The employer pointed out that the FCE was not required for the janitorial job worker was performing. They said they had tried to discourage the worker from applying for the labourer position and agreed to a FCE once the worker insisted he wanted the position. They said the worker was on his own time during the FCE, and that the employer did not pay travel expenses for the worker for attending the FCE. The employer characterized the additional paid days off that the worker was given on August 19 and 20, 2002 as a goodwill gesture, saying they were under no legal obligation to provide the time off.

The worker pointed out that he would not have been permitted to take the labourer job, for which he had been the successful bidder, had he not participated in the FCE. It was a condition of being awarded the position. He said the employer paid his hotel and

meals while he was at the FCE, but that he paid his own travel expenses, as he had personal business to attend to in addition to the FCE.

Reasons and Findings

Section 5 of the Act provides that compensation is payable when a worker suffers a personal injury that arises out of and in the course of employment.

The first step in adjudicating compensability is usually to determine whether the claimant has suffered a personal injury. In this case, however, since the case manager believed that the worker had not been in the course of employment while undergoing the FCE, she did not specifically direct her mind to whether the worker had in fact suffered an injury arising out of the FCE. My jurisdiction is limited to the matters specifically decided in the decision under appeal. Since the question of whether a personal injury occurred was not addressed in the decision letter under appeal, I have no jurisdiction to consider it.

The only issue before me is whether the worker was in the course of employment while undergoing the FCE.

Item #14.00 of the RSCM I explains that an injury is not necessarily non-compensable just because it did not occur in the course of productive activity. The test is whether it occurred in the course of employment, not whether it occurred while the claimant was actually doing work.

No single criterion can be regarded as conclusive for deciding whether an injury should be classified as arising out of and in the course of employment. Some of the indicators that are commonly used for guidance include:

- Whether the injury occurred on the employer's premises
- Whether the worker was doing something for the benefit of the employer
- Whether the worker was in the course of carrying out the employer's instructions
- Whether the injury occurred during a time period for which the claimant was being paid

The case manager said that since the whole point of the FCE was to determine whether the worker's low back complaints would permit him to do the labouring job, the FCE was to investigate the non-compensable low back complaints, and was therefore in the nature of treatment for those complaints. She reasoned that since one is not in the course of employment when one is undergoing investigation or treatment for a

non-compensable condition, an injury at the FCE could not have occurred in the course of employment.

I accept that had the worker left his employment to have an investigation, such as an x-ray or CT scan, or to have treatment, such as physiotherapy or chiropractic manipulation, any injury suffered in the course of the investigation or treatment would not be compensable. But the worker did not leave his employment. The worker attended a testing facility, there to have his fitness to perform specific job functions tested. He attended on the employer's specific instructions, and though the FCE stood to benefit him, it was also being done for the benefit of the employer.

Although it was uncertainty about the worker's non-compensable low back problems that prompted the employer to arrange for the test, the test was not an investigation of the worker's low back problem or treatment for it. The FCE was a test of the worker's ability to perform each of the core job functions in the position for which he had been the successful candidate.

Item #19.40 of the RSCM I provides that the provision of medical or first aid facilities by an employer may be a factor indicating that an injury resulting from their use arose out of and in the course of employment.

If the fact of providing first aid or medical facilities that workers may use is a factor, compelling a worker's attendance at a facility is an even more significant factor.

Item #19.41 of the RSCM I discusses the situation where a claimant has an adverse reaction to an injection or inoculation. If the employer requires it, either as a condition of employment or as a condition of continued employment (such as where the claimant has suffered an injury or contracted a disease outside the work environment, but the employer insists on precautionary measures being taken before the claimant returns to employment), the claim should be allowed.

This is a parallel situation. Although the employer did not, in this case, compel attendance as a condition of employment – the worker could have continued to work as a janitor – attendance was compulsory if the worker wished to move on to a higher paid position. Moreover the testing was done during work hours. The worker was paid for the two days. The employer paid for the testing.

That the employer might not have arranged for the FCE had the worker not had the non-compensable low back condition is irrelevant. The fact is, the employer instructed the worker to attend and undergo functional testing concerning his capacity to perform a specific job. The testing took place during hours for which the worker was paid through additional paid time off.

The employer cited item #20.30 of the RSCM I, which deals with injuries in the course of educational or training courses. It provides that there is a distinction between things workers must do to become and continue to be qualified to perform a job, and the things they must do as part of the job. Generally, only the latter activities are covered. For instance, compensation does not extend to injuries occurring in the course of first aid courses being taken off the employer's premises and outside work hours, even though the worker receives additional pay for a first aid ticket and is reimbursed the course fees.

This situation is not analogous to the situation described in item #20.30. First, the worker participated in the FCE not to become qualified to perform the labourer job, but to satisfy the employer that he had the necessary physical ability. Second, the FCE took place during work hours, in that the worker was, at the end of the day, paid for his time at the FCE.

On all of the evidence I am satisfied that the worker was in the course of his employment while he was undergoing functional testing on August 15 and 16, 2002.

Much of the evidence that the parties filed and the submissions they made were directed at whether the worker suffered a personal injury in the course of the FCE. I make no finding in that regard.

Conclusion

The appeal is allowed. I find that the worker was in the course of his employment while he was undergoing functional testing on August 15 and 16, 2002.

The Board officer's decision is varied. The claim is referred back to the Board to adjudicate whether the worker suffered a personal injury arising out of the FCE.

Expenses

No hearing expenses were requested or otherwise evident. None are ordered.

Janice A. Leroy
Vice Chair

JAL/lc