Noteworthy Decision Summary

Decision: WCAT-2004-06682 **Panel**: Heather McDonald **Decision Date:** December 17, 2004

Reopening of claim – New diagnosis on reopening – Back strain – Disc herniation – Radiculopathy – CT scan – Section 96(2) of the Workers Compensation Act

It is not necessary that the diagnosis on reopening be the same as the initial diagnosis upon which the Workers' Compensation Board (Board) accepts a claim. In this case, a CT scan clarified the original diagnosis. Despite a new diagnosis, the worker's medical condition was the same and the worker was entitled to reopening of his claim.

The worker fell off a ladder and felt immediate pain in his back with radiating pain down his left leg. Four days later the worker saw his attending physician. He did not miss work despite ongoing pain. The Board accepted the worker's claim on the basis of a lumbar strain, and paid health care benefits only. Six weeks later the worker reported pain in his left leg and knee, which his attending physician described as L5-S1 radiculopathy. He referred the worker for an x-ray, querying a disc problem. The x-ray did not reveal any abnormalities. A second x-ray taken a month later also did not reveal any abnormalities. Ten months later a neurosurgeon ordered a CT scan, which revealed a large left disc herniation at L5-S1.

The Board denied a reopening of the claim because:

- there had been a period of six months during which no medical treatment was required;
- the Board could not conclude there had been a significant change in the worker's lumbar strain, as that condition was expected to resolve within 12 weeks;
- there was no time loss; and
- there were no neurological findings at the first medical examination.

The worker requested a review by the Review Division of the Board, which confirmed the Board decision. The worker appealed to the Workers' Compensation Appeal Tribunal.

The panel concluded the original diagnosis was incorrect. The worker's symptoms at the time of injury were not easy to explain as a lumbar strain. No CT scan was ordered at the time of injury. If there had been a normal CT scan, it would have been unlikely that the original injury was a disc herniation. The large disc herniation revealed on CT scan ten months later at the precise location where the worker had been experiencing symptoms since his injury. Despite the change in diagnosis, the worker's symptoms had remained essentially the same.

The panel concluded the worker had sustained a disc herniation in the original work incident. This was followed by an improvement in his symptoms; however, due to the irritation of various incidents at work his symptoms recurred. It was not necessary that the diagnosis on reopening be the same as the initial diagnosis upon which the Board accepted the claim. The problem was still a lower back problem, and in that sense the medical condition accepted by the Board as compensable was still the same.

The worker's appeal was allowed.

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WCAT Decision Date: December 17, 2004
Panel: Heather McDonald, Vice Chair

Introduction

The worker is a 37-year-old log home builder. The worker is appealing a Review Division decision dated May 7, 2004. That decision confirmed a November 7, 2003 decision by a Workers' Compensation Board (Board) case manager. The case manager denied a reopening of the worker's December 12, 2002 claim, thus denying responsibility for symptoms of a disc herniation diagnosed in October 2003. In that decision, the case manager also decided not to establish a new claim for the worker to accept responsibility for the disc herniation.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the worker submits that his disc herniation injury arose out of and in the course of his employment with the employer. He argues that his symptoms in July 2003 and in the autumn of 2003 are linked to the compensable medical condition accepted under his 2003 back claim, or represent symptoms of a new work injury in July 2003 that aggravated his vulnerable back condition.

Issue(s)

Is the worker's disc herniation related to his December 2002 compensable work injury? Should the Board reopen the worker's December 2002 claim to provide him compensation benefits relating to his disc herniation? Should the Board establish a new claim as of July 2003 to accept responsibility for the worker's disc herniation?

Jurisdiction and Procedural Matters

WCAT's jurisdiction in this appeal arises under section 239(1) of the *Workers Compensation Act* (Act). A workers' adviser represented the worker in these appeal proceedings. An employers' adviser represented the employer. The worker requested an oral hearing. I have decided that it is unnecessary to convene an oral hearing, as the file documentation and the parties' written submissions provide sufficient information to deal with the issues in this case.

The employers' adviser sent in his submission to WCAT 13 days beyond the deadline specified by the WCAT registry. He explained, in a letter dated September 30, 2004, that the missed deadline was an oversight. After considering the matter, I decided to exercise my discretion under section 10.20 of WCAT's *Manual of Rules of Practice and Procedure* to consider the late submission. After reading the employer's submission, I

decided that it was unnecessary to disclose the submission to the worker's representative, as the arguments were essentially the same as the employer had made before the Review Division, to which the workers' adviser had already responded. Further, given the ultimate result of my findings in this case, there was no prejudice to the worker in not disclosing the submission to his representative.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its final decision on the merits and justice of the case, but in so doing, must apply a Board policy that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it. This is an appeal by way of rehearing. WCAT has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal.

On the reopening issue, the applicable policy in this case is policy item C14-102.01 in Volume II of the *Rehabilitation Services and Claims Manual* (RSCM II). See *Resolutions 2002/06/17-02* and *18/02*. That policy echoes the provisions of section 96(2) of the Act by providing that the Board may reopen a matter that has been previously decided if (a) there has been a significant change in a worker's medical condition that the Board previously decided was compensable, or (b) there has been a recurrence of a worker's injury. The policy states that a "significant change in a worker's medical condition that the Board had previously decided was compensable" means a change in the worker's physical or psychological condition. It does not mean a change in the Board's knowledge about the worker's medical condition. A "significant change" would be a physical or psychological change that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits or services. Section 96(3) of the Act goes on to state that if the Board determines that the reopening circumstances in section 96(2) justify a change in a previous decision respecting compensation or rehabilitation, the Board may make a new decision that varies the previous order.

With respect to the issue of whether the Board should establish a new claim, the applicable policies are also in RSCM II, including item #14.00 (Arising Out of and in the Course of Employment) and item #15.20 (Injuries Following Motions at Work).

Background and Evidence

The worker made a claim for compensation for an injury sustained at work on December 12, 2002. He was descending a ladder when his foot broke through a rung, landing hard on the rung one foot below. Then the worker's other foot landed on the ground approximately two feet lower. This incident jarred his lower back. The worker consulted his attending physician on December 16, 2002. The physician recorded that the worker had experienced immediate pain in his back at the time of the incident, with progressive pain symptoms in the lower back, and radiating pain down the left leg. He was unable to flex, and there was limited extension of the trunk. The physician

indicated that the worker was not medically capable of working full duties, full time, but that he would be able to return to the workplace in approximately one week. The physician diagnosed a lumbar strain.

The worker also consulted a chiropractor on December 16, 2002, who noted that the worker had pain on flexion at the waist and pain on lumbar extension. The chiropractor also provided the opinion that the worker was unable to work, but that he would be able to return to work within two to three weeks.

Despite the opinions of the worker's physician and chiropractor that he would be unable to work for some time, the worker did not miss any time from work, although the evidence is that he was continuing to experience back pain, with pain radiating to his left posterior thigh and leg. The Board accepted the worker's claim for compensation on the basis of a lumbar strain, and paid health care benefits only on the claim.

The physician's chart notes of January 28, 2003 note that the worker was experiencing pain in his left leg and knee, which the physician described as L5-S1 "radiculopathy." He referred the worker for an x-ray, querying whether there might be a "disc" problem. The x-ray report dated January 31, 2003 did not reveal any abnormalities.

The next chart note is dated February 11, 2003. The physician observed that the worker's back was "better." The chart note of February 26, 2003, however, noted that there was an increase in pain in the lower back and left leg, with L5 radiculopathy and leg spasm. The physician prescribed muscle relaxant and pain medication. A second x-ray was taken on February 28, 2003, but again it did not reveal any abnormalities. The report said there was no change from the January 2003 x-ray.

There were no further chart notes until July 29, 2003. The chart notes state that "above is back" (referring to the back and left leg pain). The physician stated that the worker had "reinjured" himself approximately one week earlier, and prescribed physiotherapy and pain medication.

The physician referred the worker to a neurosurgeon, Dr. Singh. Dr. Singh's report, dated September 26, 2003, noted the worker's report that he had back problems stemming from the December 2002 work incident. Dr. Singh recorded the worker's report that he had increasing pain off and on since the incident, and that the pain medication prescribed by the attending physician had helped a bit. Dr. Singh noted that the worker's back pain and radiating pain down the left leg was "quite bad to start with" but had improved with physiotherapy. Dr. Singh's impression was that the worker had L5 root compression which was improving, but due to the chronic nature of the problem, Dr. Singh referred the worker for a CT scan.

An employer representative telephoned a Board client services representative on October 9, 2003, advising that the worker was limping around and had told the employer that he had to take it easy. The employer representative reported that the

employer did not have "light duties to speak of," but that the worker mostly had trouble climbing ladders and he should be finished with that shortly. The worker wanted to take time off work to attend physiotherapy appointments and the employer was wondering if the Board would pay for the time off work.

On October 14, 2003, the worker contacted the Board case manager dealing with his claim and advised that his back had been a problem since December 2002, that he was attending physiotherapy and had modified his hours to remain at work. The case manager advised the worker that a reopening of the December 2002 claim was unlikely as the Board had accepted his claim for a strain injury only that was anticipated to resolve within 12 weeks at the most.

The CT scan report is dated October 20, 2003. It stated in part as follows:

> At L5-S1, there is a large left posterolateral disc herniation which posteriorly displaces the left S1 nerve root and also extends into the left intervertebral foramen. The L5 vertebral body is posteriorly displaced on S1 by about 6 mm. The L5-S1 facet joints are slightly widened as a result.

The worker's wife telephoned the Board's case manager on October 24, 2003 with a message from the worker to advise that he did not have a new injury in July 2003, but rather a significant flare-up of his December 2002 injury. The worker was not sure why the attending physician had referred to a reinjury on the July 29, 2003 chart notes.

A progress report dated October 27, 2003 by the worker's attending physician notes that the worker's pain had improved with decreased use of his back. There was occasional radiation to the left posterior knee. The diagnosis was an L5-S1 disc herniation.

The worker's wife again contacted the Board's case manager on October 29, 2003. She advised that the worker recalled two different work activities in late July 2003 that caused him to note an increase in his low back symptoms. The first was when he stepped into a depression in the ground causing him to stumble and twist his back. The second involved him turning as he carried something, and he twisted his back.

Dr. Singh saw the worker again on November 5, 2003, and noted that the worker was working and "not doing too badly" despite the disc herniation. Dr. Singh recommended a second neurosurgical opinion, however, in light of the large herniation and vertebrae slip. He asked Dr. Faridi to see the worker.

The last physician's progress report on file is dated November 2, 2004. It refers to an injury date of December 12, 2002. The diagnosis is simply "back pain." The report states that the worker "tripped over block of wood on ground. Fell to the ground, and hurt back in lower back similar [*sic*] to previous. Took Vioxx immediately with mild relief." The worker was not disabled from work.

On November 7, 2003, the Board case manager contacted the employer to inquire about first aid book entries regarding the worker's back complaints. The foreman confirmed that it was possible that the worker could have reported symptoms, but nothing would be noted if the worker was just providing comments. The foreman could not recall any specific reports from the worker about increased back symptoms. Unless a worker wanted a formal record, nothing would be noted in the first aid log.

Dr. Faridi's report was dated December 1, 2003. It stated in part as follows:

> …[The worker] had an injury on the job and had back pain and left leg pain. Then he improved and was injured again. This time the pain did not go away although at the present time the pain has improved and the patient has been back to work. He is a construction worker. He feels like climbing a ladder brings the pain on and so he has not climbed a ladder for about 2 months now….
>
> …straight-leg raising on the left side causes pain at about 85 degrees. The right side is completely normal and there is no motor deficit. His flexion is about 90% normal and he is able to flex about 1 foot from the floor and back extension is limited….
>
> …
>
> He clinically has improved and has no deficit, so I don't believe he needs surgery at this time. I advised him if he develops weakness or numbness, I will be glad to reassess him and if he wants surgery for the pain the indication will be recurrence and persistent pain.
>
> If the pain returns, he should be treated with pain medication and anti-inflammatories and if the pain does not go away, in that case, he can be reassessed considering surgery and intermittent claudication type pain. This means the patient does not have pain at rest but as soon as he starts to become active, he develops leg pain. In that case also surgery will be indicated….

The Board case manager issued her decision on November 7, 2003. On the reopening issue, she referred to section 96(2) of the Act and applicable Board policy in RSCM II, which allows the Board to reopen a matter if there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or when there has been a recurrence of a worker's compensable injury. The case manager stated that the Board had accepted the worker's claim for a back strain only. She noted that there was no time loss and that there were no neurological findings at the first medical examination. The case manager observed that there was a significant gap in medical treatment between February 3, 2003 and July 29, 2003, and that the

attending physician had indicated a reinjury had occurred one week earlier. The case manager stated that she could not conclude that the worker had a significant change in his low back strain condition, as that type of injury was expected to resolve within 12 weeks. The 12-week time frame was in keeping with the attending physician's report of February 3, 2003 which had indicated that the worker's back was improving. Thus the case manager denied a reopening of the worker's December 12, 2002 claim.

With respect to the issue of whether to establish a new claim, the case manager referred to policy item #14.20 in RSCM II, which states in part as follows:

> Where there is no "accident", there is no presumption under Section 5(4) and the evidence must support a conclusion that the injury arose out of the employment as well as a conclusion that it arose in the course of the employment.
>
> …To be compensable, however, the evidence must warrant a conclusion that there was something in the employment that had causative significance in producing the injury. A speculative possibility that this might be so is not enough….

The case manager stated that there was no documentation or confirmed report that the worker had suffered a new injury. She noted that the worker mentioned two separate incidents in July 2003, but also stated on a different occasion that a new injury did not occur. The case manager concluded that the worker had not sustained a new injury arising out of and in the course of his employment in July 2003, and therefore did not establish a new claim.

The worker requested a review by the Review Division of the case manager's November 7, 2003 decision. In the Review Division proceedings, the worker provided written statements from two co-workers and his wife. One co-worker stated that he remembered seeing the worker limping across the yard at work in July of 2003. When he asked the worker what was wrong, the worker had told him that he had stepped into a hole and injured his back. The co-worker stated that the worker looked like he was in pain.

Another co-worker wrote that he remembered the worker had injured his back in the summer of 2003 when he stepped into a dip in the ground while they were working. That co-worker estimated the date as approximately the week before the August long weekend. The co-worker also stated that: "It's obvious when he has irritated his back and leg, by the way he moves around."

The worker's wife also provided a written statement in which she recalled the worker arriving home from work one afternoon in the last week of July 2003. She stated that it was immediately obvious from his posture and the way he was walking that he was in a lot of discomfort. When she asked him what was wrong, the worker told her that he had

irritated his back that day at work, and the pain had increased significantly, mostly down the back of his left leg. The worker's wife encouraged him to consult his physician, as she did not want it to take as long for his pain to improve as it did after the work injury of December 2002.

Before the Review Division, the worker requested that a new claim be established based on an aggravation of a pre-existing condition. In the alternative, he requested that the disc herniation should be considered as a recurrence of his original compensable condition. The worker submitted that the evidence of the worker's wife and co-workers supported the position that the worker had aggravated his back condition when he stepped into the depression and again jarred his back. There was nothing outside the workplace that would have had causative significance in causing the worker's disc herniation. The evidence is that the worker continued to work after the December 2002 work incident, albeit that he was in pain. It is clear that the worker is a stoic individual who did not report ongoing problems after February 2003 to his physician, as his pain was manageable. The case manager did not seek a medical opinion regarding causation of the disc herniation, and as there is no medical opinion contrary to finding a causal link between the disc herniation and the worker's activities at work, the Board should accept responsibility for the worker's disc herniation.

The employers' adviser submitted that the Board's November 7, 2003 decision should be confirmed. He argued that the compensable condition was a muscle strain, and the evidence did not support that the muscle strain had changed significantly or that the strain had reoccurred. He noted that the workers' adviser also did not support a reopening of the worker's claim.

The employers' adviser also supported the Board's decision not to establish a new claim for the worker. He argued that the worker's references to both a twisting incident and stepping into a depression in the ground indicate that he did not have a new injury, but was speculating about the cause of his symptoms. The employers' adviser referred to policy #97.00 in RSCM II which indicates that speculation should not be used in place of evidence to establish causative significance of a work event in relation to a worker's medical condition. He referred to the following portion of policy #97.00:

> It is therefore not uncommon to see that a claim will be denied when a claimant, away from employment, begins to feel some pain and discomfort in the lower back, and seeking to find a reason for this condition, thinks back to the work being done over a period of time and concludes that the problem must have resulted from something which occurred on a certain day when certain heavy work was being performed. The question then arises whether there was anything other than the claimant's hindsight which would allow the Adjudicator to conclude that the work done some weeks or months previously had causative significance. It is at this point that investigation takes place and the evidence is weighed. If there is nothing objective to indicate any activity at work was potentially causative

> of the condition complained of, at or near the time alleged by the claimant, it can fairly be said that the claim has not been established….

The employers' adviser also submitted that the Review Division should give no weight to the written statements provided by the worker's wife and co-workers as they were written long after the alleged incident, and none of them indicated that they actually observed the worker stepping into the ground depression.

In confirming the Board's November 7, 2003 decision, the review officer decided that there had not been a significant change in or a recurrence of the worker's low back sprain/strain. The review officer interpreted the attending physician's February 11, 2003 report that the worker's back was "better," and the x-ray was normal, as evidence that the worker had fully recovered from the compensable back strain of December 12, 2002. The review officer interpreted the July 29, 2003 attending physician's report as a new diagnosis related to a re-injury. However, the review officer stated that the physician did not relate the worker's L5 back condition to the worker's employment.

With respect to establishing a new claim, the review officer reviewed the evidence as a whole and concluded that it did not warrant a conclusion that there was something in the worker's employment that had causative significance in producing the worker's disc herniation. Therefore, on the evidence, the review officer decided that the worker had not sustained a personal injury arising out of and in the course of his employment in July 2003.

On appeal to WCAT, the workers' adviser disagreed with the Review Division's finding that the evidence did not support a significant change in the worker's compensable medical condition. The CT scan findings of a large left L5-S1 disc herniation represented a significant change from the earlier x-ray results. The workers' adviser submitted that the worker is a stoic individual, and did have residual symptoms continuing from the December 2002 workplace injury. However, it was not until the later July 2003 workplace incidents that the symptoms significantly flared, leading to the new diagnosis.

On the new claim issue, the workers' adviser submitted that the evidence does support that the worker had the two workplace incidents of twisting and stepping into the depression. The co-workers and the worker's wife support his evidence in that regard, and in fact the attending physician's report in late July 2003 recorded that the worker had indicated a "re-injury" approximately one week earlier. The workers' adviser argued that if the July 2003 workplace incidents had no effect, the worker would not have sought medical attention, nor would he have mentioned a re-injury to the attending physician. While the worker's wife initially reinforced the worker's belief that his new problem was related to the old injury in December 2002, the workers' adviser submitted that she was simply relaying their belief that the worker had suffered a recurrence of the old workplace injury.

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On the reopening issue, the employers' adviser submitted that the Act specifically states that a significant change justifying a reopening must be associated with the compensable medical condition. As the Board had not accepted the worker's claim for a disc herniation, an injury to that area of the back can not be said to be a significant change to the worker's previous strain injury. Further, the employers' adviser submitted that there is no medical evidence to suggest that the worker's strain injury had reoccurred.

With respect to the new claim issue, the employers' adviser argued that the best counter evidence to establishing a new claim is the worker's continued position that he continues to suffer from the effects of his previous compensable injury, while his wife maintains that a new incident took place three months after the fact. The employers' adviser submitted that the workers' adviser has tried to intertwine the facts by arguing that an incident at work resulted in the compensable injury reoccurring, but the evidence does not support that the worker was involved in any subsequent incident that injured his back.

Reasons and Findings

After reviewing the evidence and the parties' submissions, I have decided to vary the Review Division decision dated May 7, 2004, finding that the Board should reopen the worker's claim as of July 29, 2003 to accept responsibility for costs associated with his disc herniation.

I disagree with the Board officer's statement in the November 7, 2003 decision that there were no neurological findings at the first medical examination. In fact, the physician recorded at the December 16, 2002 examination that the worker was experiencing not only pain in his lower back, but also pain radiating down his left leg. These symptoms continued and progressed, although the worker did not miss time from work. His back pain continued and pain radiated to his left posterior thigh, leg and down to the knee. The attending physician initially diagnosed a back strain. This was the only diagnosis at the time, and only one day of health care expenses was involved on the claim. Therefore, when it accepted the worker's claim for compensation and paid those expenses, the Board accepted the claim on the basis of that initial diagnosis.
Within six weeks of the worker's injury, his attending physician was querying whether the problem might instead be a disc problem at the L5-S1 level, noting the symptoms of radiculopathy that the worker was experiencing. He sent the worker for an x-ray, which did not reveal any abnormalities. By February 11, 2003, the physician observed that the worker's back was "better." The review officer concluded from that evidence that the worker had fully recovered from "his compensable back strain of December 12, 2002." I do not agree with that conclusion, because in my view the evidence does not support that conclusion.

First, the more appropriate interpretation is that the worker's back had improved as of February 11, 2003, not that he had fully recovered. Clearly he had not fully recovered

as the next chart note of February 26, 2003 recorded that he was experiencing an increase in pain in his lower back and left leg, with continued L5 radiculopathy and leg spasm. The physician prescribed a muscle relaxant and pain medication, which would not have been necessary if the worker's back was fully recovered or even just well on the mend.

Second, the evidence does not persuade me that the physician's initial diagnosis of the worker's symptoms at the L5-S1 level, including the radiculopathy, was the correct one. The x-rays in February 2003 did not reveal any abnormalities, but the radiating pain symptoms in the worker's left posterior thigh and leg were not easy for the physician to explain as a lumbar strain. That is why the physician initiated a further investigation by way of x-rays, to determine whether there might be another diagnosis to explain the worker's continuing L5-S1 symptoms, including the radiculopathy.

If the physician had arranged for a CT scan in January or February 2003, and the CT scan did not reveal any abnormalities at that time, it would have been difficult to associate the worker's disc herniation, subsequently revealed in the October 2003 CT scan, with his December 12, 2002 work injury. But the physician arranged only for x-rays, which reports Dr. Singh did not rely on. Like the attending physician, Dr. Singh suspected that there was something more than a lumbar strain accounting for the worker's "chronic" problem at the L5-S1 level. Accordingly, he ordered the CT scan, which revealed a large disc herniation at the L5-S1 level, precisely the location where the worker had been experiencing symptoms, including the radiculopathy, as of the date of the work injury on December 12, 2002.

The worker did not seek medical treatment between the end of February 2003 and the end of July 2003, a period of five months. This suggests that the worker's back pain and radiating leg symptoms were not a significant problem for him during that period.

The next evidence begins with the physician's chart note of July 29, 2003, indicating that the worker's symptoms at the L5-S1 level had returned, and that the worker had "reinjured" himself. I have considered that evidence, together with the evidence of the co-workers, the worker's wife, the worker's own statements, Dr. Singh's report of September 26, 2003, and Dr. Faridi's report of December 1, 2003. I disagree with the submission of the employers' adviser that no weight should be given to the statements of the worker's wife and coworkers. On their face, they are straightforward statements by persons remembering the worker's complaints in late July 2003, and I have found them to be largely consistent with each other and the rest of the evidence. While I have found credible the references in those statements to the events that occurred, I have not given much weight to any one of those witnesses' characterizations of the worker's renewed symptoms in July 2003 as a "new injury" or a "reinjury" or an "irritation." The appropriate characterization is an issue for me to decide. I do appreciate that the worker, his wife, and others were simply trying their best to rationalize the reason for the significant symptoms he experienced in July 2003.

The picture that is revealed by the evidence as a whole is that by the summer of 2003, the worker had a back condition that had not fully recovered since the December 12, 2002 work incident, although it had improved and was not a significant problem to him for a five month period between March 2003 and the end of July 2003. But by the end of July 2003, the worker's back problem at the L5-S1 level had begun to deteriorate, with renewed back pain and radiating pain down the left posterior thigh and leg. As well, he was limping.

I accept that during July 2003, the worker had also experienced several work incidents that were likely not atypical of incidents during a work day on a construction site: stumbling due to a depression in the ground, twisting when carrying something, and tripping over a block of wood on the ground. I am unable to find that those incidents caused a new injury to the worker's back, as the evidence is insufficient for me to conclude, pursuant to RSCM II policies in items #14.00 and #15.20, that any one of them caused a new injury arising out of and in the course of the worker's employment.

The evidence does compel me to conclude, however, that within the meaning of section 96(2)(b) of the Act, there had been a recurrence of the worker's compensable injury sustained in the December 2002 work incident, and that the Board should reopen his claim to provide him with an additional period of temporary compensation benefits relating to that injury. The evidence leads me to conclude, due to the similarity of symptoms at the same L5-S1 location, that the worker had likely sustained his disc herniation as a result of the December 12, 2002 work incident, although the x-rays did not reveal it in January or February 2003. At that time, the worker's attending physician did suspect a disc problem at the L5 S1 level, but his suspicion was not confirmed until the CT scan in October 2003. The worker had not fully recovered from his compensable back injury of December 12, 2002, and the symptoms reoccurred in July 2003, being irritated or aggravated by various work incidents.

Although there has been a change in diagnosis since the Board initially accepted the worker's claim, the symptoms have been essentially the same. After the December 12, 2002 work incident, the worker was able to continue working despite his symptoms of back pain and radiculopathy. And in October 2003, even after Dr. Singh ultimately diagnosed the disc herniation earlier suspected by the attending physician, the worker was still able to work, and Dr. Singh observed that he was not doing "too badly" despite the herniation. Dr. Singh reported that the worker had pain "off and on" since the December 12, 2002 work incident, with Dr. Faridi indicating that the worker had been reinjured in the same body area and "this time the pain did not go away." The worker's attending physician attributed the worker's back problem in the autumn of 2003 as having its genesis in the original work injury of December 2002. From all this evidence, I conclude that the worker sustained a disc herniation in the December 12, 2002 work incident, his symptoms improved to a great extent, but due to the irritation of various incidents during the summer of 2003 at work, his symptoms reoccurred again. This is consistent with one co-worker's observation that it was "obvious" by the way the worker moved when the worker had irritated his back and leg at work, and by his wife's

observation that one day in the last week of July 2003, the worker was obviously in a lot of discomfort, and that he had explained it due to increased pain in his back and leg. The worker's back problem, accepted by the Board as a compensable injury in December 12, 2002, had reoccurred.

I disagree with the approach of the Board's case manager in her November 7, 2003 decision, supported by the employers' adviser in his written submissions, that there can never be a reopening of a claim if the diagnosis at the time of reopening is in any way different than an initial diagnosis upon which the Board accepted the claim in the first place. This may be true in some situations, but in my view in other situations, such as in the case at hand, that would be an unfairly restrictive interpretation of section 96(2) of the Act.

Often diagnosis can be an inexact and imprecise task. In this case, the Board accepted the worker's claim in December 2002 for a back injury. At that time, the worker's symptoms at the L5-S1 level initially suggested a diagnosis of a lumbar strain, therefore that was the attending physician's first diagnosis, and when accepting responsibility for the worker's symptoms, the Board accepted the claim based on the only diagnosis available at that time. Soon after the work incident, in the early months of 2003, the attending physician realized that his initial diagnosis did not explain all of the worker's symptoms, particularly the radiating pain symptoms. The problem was still a lower back problem, and in that sense the medical condition accepted by the Board as compensable was still the same. But the physician began to query an alternative diagnosis of a disc problem.

That diagnosis was confirmed with different screening methodology, later in October 2003, after the worker began to experience a recurrence of the same symptoms he had experienced after the work incident in December 2002. The diagnosis had been clarified with respect to the same L5-S1 symptoms for which the Board had earlier accepted responsibility under the claim. The Board had decided that the worker's low back condition in December 2002 was a compensable injury, and the recurrence of those symptoms (without any intervening injury) in July 2003 justifies the Board reopening his claim under section 96(2) of the Act to accept responsibility for the recurrence of the worker's injury. This approach is consistent with directions given to Compensation Services Division staff in a March 3, 2003 "significant practice clarification," and in a memo dated April 30, 2003 from the Division's manager of Policy and Practice. The March 3, 2003 practice clarification observes that when the Board accepts a claim on the basis of a broad injury description (e.g. "right knee injury") and subsequently there is greater clarity of diagnosis for that injury, there is no new matter for the Board officer to adjudicate, but the officer can act accordingly in directing or approving treatment. The April 30, 2003 memo indicates that a recurrence under section 96(2)(b) of the Act applies to situations where a worker experiences a flare-up of back symptoms (for example) earlier accepted by the Board as compensable under the claim.

Conclusion

For the foregoing reasons, I allow the worker's appeal. I vary the Review Division's May 7, 2004 decision by finding that under section 96(2) of the Act, the Board should reopen the worker's December 12, 2002 claim to accept responsibility for costs associated with the recurrence of symptoms (his back injury symptoms) which he began to experience again in July 2003, now diagnosed as caused by a disc herniation.

Expenses were not an issue in this case and none are awarded.

Heather McDonald
Vice Chair

HM/hb