Noteworthy Decision Summary

Decision: WCAT-2005-01106 **Panel**: Elaine Murray **Decision Date:** March 2, 2005

Reopening of Claim – Recurrence of Injury – Lower Back Strain – Disc Herniation – Insignificant MRI Finding – Section 96(2) of the Workers Compensation Act – Policy Item #C14-102.01 of Rehabilitation Services and Claims Manual, Volume II – Resolution 2004/11/16-04

For the Workers' Compensation Board (Board) to have jurisdiction to reopen a claim under section 96(2) of the *Workers Compensation Act* (Act), the symptoms that the worker reports on reopening must have been caused by the same condition for which the worker's claim was originally accepted.

The worker was employed as a housekeeper at a motel. She experienced a sharp pain in her back when twisting while preparing a bed. The Board accepted her claim for lower back strain and she received temporary disability benefits for four months before returning to work. An MRI taken a month before the worker returned to work revealed a "tiny" right paramedian disc protrusion at L5-S1. In the opinion of a Board medical advisor, the protrusion had no clinical significance. Five months after returning to work the worker complained of lower back and left leg pain. She claimed that the injury had occurred as a result of twisting her back while carrying equipment at work. The Board denied her claim for a new injury. The worker did not request a review of that decision.

Two days after her claim was denied, a CT scan revealed that the worker had a large left posterolateral herniated disc, also at L5-S1. The worker wrote to the Board stating that her original back strain had never resolved and requested a reopening.

The medical advisor reviewed the CT scan and advised that the large left herniated disc was a markedly different finding from that shown on the MRI seven months earlier. The worker had returned to work after the MRI and then experienced an abrupt deterioration five months later. The medical advisor concluded this was likely either a spontaneous new disc herniation or another back strain. The worker's request for a reopening was denied. The worker appealed this decision to the Workers' Compensation Appeal Tribunal.

The panel noted the opinions of medical specialists that the worker's current symptoms were caused by her left disc herniation but did not offer an opinion with respect to the cause of that herniation. The panel also noted that *Resolution 2004/11/16-04* had amended policy item #C14-102.01 of the *Rehabilitation Services and Claims Manual, Volume II* with respect to reopenings after the worker had made her request. Although *Resolution 2004/11/16-04* was not directly applicable to the appeal because it was not in effect at the time of the Board decision, it offered useful guidance in considering the meaning of a "recurrence of a worker's injury" in the context of section 96(2) of the Act. For there to be either a significant change in the worker's previously compensable condition or a recurrence of that injury, there must first be a causal link between the symptoms that the worker reports on reopening and those for which her claim was accepted.

The panel referred to the medical advisor's opinion that the right disc herniation was of no clinical significance and that the worker's claim was only accepted for a low back strain. Thus,

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the panel concluded that even if the right-sided herniation "became" the left-sided herniation, as the worker contended, this would not amount to a significant change in the worker's previously accepted compensable condition or a recurrence of her injury. The left-disc herniation was not caused by the compensable lower back strain but arose from a new cause.

The worker's request to have her claim reopened was denied.

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WCAT Decision Number: WCAT-2005-01106
WCAT Decision Date: March 02, 2005
Panel: Elaine Murray, Vice Chair

Introduction

The Workers' Compensation Board (Board) accepted the worker's June 25, 2003 claim for a low back strain and paid her temporary disability benefits until October 22, 2003, at which time she was considered fit to return to work without limitations. In an undated letter to the Board, received on May 7, 2004, the worker requested a reopening of her June 25, 2003 claim. She informed the Board that she stopped working on March 17, 2004, and attributed her disability to a significant deterioration in her low back condition. By decision dated May 31, 2004, a Board officer informed the worker that her June 25, 2003 claim would not be reopened. The worker now appeals the May 31, 2004 decision to the Workers' Compensation Appeal Tribunal (WCAT).

The employer is not participating in this appeal. The worker's representative, Mr. Doug McCall, provided a December 13, 2004 submission, along with a November 9, 2004 medical report from Dr. Gittens, a neurosurgeon. The worker did not request an oral hearing. I am satisfied that I can properly decide the issue on appeal without holding a hearing, since there are no factual disputes or issues of credibility.

Issue(s)

Does the evidence satisfy the requirements for a reopening of the worker's June 25, 2003 claim on account of her symptoms during March 2004 and beyond?

Jurisdiction

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

Section 96.2(2)(g) of the Act states that the Board's Review Division may not review a decision to reopen or not to reopen a matter "on an application" under section 96(2) of the Act. *WCAT Decision #2003-04322* (available on WCAT's website) addressed what is meant by "on an application". It was incorporated in the recent amendments to the *Rehabilitation Services and Claims Manual, Volumes I and II* policy item #C14-102.01 (which came into effect on January 1, 2005 as a result of *Resolution 2004/1/16-04*). I am satisfied that the worker's letter to the Board, received on May 7, 2004, amounts to a request "on an application".

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Section 253(2) of the Act states that WCAT's jurisdiction is limited to determining whether the matter that is the subject of the application under section 96(2) must be reopened or may not be reopened.

Section 250 of the Act provides that WCAT must make its decision based on the merits and justice of the case but, in so doing, must apply relevant policies of the board of directors of the Board. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into and determine all matters of fact, law, and discretion arising in an appeal before it.

Background and Evidence

On June 25, 2003, the worker, a motel housekeeper, who is presently 64 years old, was tucking a sheet in between a box spring and mattress when she twisted and experienced a sharp pain in her back. The worker continued working, but later that day experienced sharp low back pain when pushing a 60-pound housekeeping cart. She worked the next day, and then called in sick.

On July 3, 2003, Dr. Arnott, the worker's family physician, reported that the worker had a lumbosacral strain, with no central nervous system sequelae. He considered her to be disabled from working given her pain and limited ability to bend and lift.

The Board accepted the worker's claim for a low back strain, and began to pay her temporary disability benefits as of June 29, 2003.

With Dr. Arnott's approval, the worker began a graduated return-to-work (GRTW) on August 9, 2003 performing modified duties for four hours a day. After working for a few days, the worker told Dr. Arnott that she was having increased pain and stiffness. He recommended physiotherapy.

On August 22, 2003, the worker told a Board nurse advisor that after a treadmill workout in physiotherapy her lower back pain began to radiate to her left leg and foot.

On August 22, 2003, Dr. Arnott told the Board nurse advisor that the worker had developed intermittent left-sided sciatica symptoms. He requested x-rays and an MRI, and recommended that the worker continue with modified duties for four hours per day.

On August 27, 2003, the worker's physiotherapist told the Board nurse advisor that she continued to treat the worker's low back pain. She also said that the worker had never complained to her about radicular pain.

A September 11, 2003 MRI revealed a "tiny right" paramedian disc protrusion at L5/S1, but no evidence of central spinal stenosis, neural foraminal compromise or nerve root compression at any level.

On September 15, 2003, the employer advised the Board nurse advisor that the worker was doing well on modified hours and duties.

On September 18, 2003, Dr. Arnott recommended that the worker commence a work-conditioning program (WCP), along with four hours of modified duties per day. He thought that she would be able to return to work and perform her full duties, while working full hours following the WCP. In his September 19, 2003 report, he noted that the MRI showed only degenerative changes, with no disc prolapse.

The worker participated in a combined WCP and Occupational Rehabilitation Program from September 22 to October 22, 2003. On October 21, 2003, Dr. Arnott reported that she was medically capable of working full duties, full time; however, he wrote that she was not very happy or confident. She still found some bending and lifting duties painful. Dr. Arnott told her to continue with home exercises and swimming, and to ask for lifting assistance when necessary.

The WCP staff noted in the discharge report that the worker's active lumbar spine range of motion was limited to half of normal in all directions owing to her reports of pain. The WCP staff commented that she had dramatic improvement in lower extremity and back muscle strength. She was able to complete her GRTW as well as a modified rehabilitation program, which equalled a full work day of eight hours. As well, the WCP staff found that the worker was meeting critical job demands and was ready to resume full duties and full hours, although she did not feel ready to do so.

In an October 22, 2003 decision, a Board officer informed the worker that her claim was "only" accepted for a low back strain, and temporary disability benefits and health care benefits would end on October 22, 2003. The worker did not appeal that decision.

On October 27, 2003, Dr. Arnott reported that the worker complained of lumbosacral pain while making beds at work on October 25. He noted her reluctance to return to work because of her lumbar back pain "despite assurances from me, therapist and normal imaging".

In a November 12, 2003 claim log entry, Dr. D, a Board medical advisor, confirmed that the worker's diagnosis was a back strain and offered the following opinion concerning the right-sided disc herniation shown on the September 2003 MRI:

> With respect to the tiny right paramedian disc protrusion noted on the MRI, I spoke to the reading radiologist, Dr. Lee. At the time of speaking to me, he did not have the actual film in front of him, but he felt that if he said tiny, that meant insignificant. He said he would look at the films again and get back to if it was more than something that was tiny and would be unlikely to cause any clinical symptoms. I note that with a large paramedian disc protrusion, one could certainly get symptoms on the opposite side. Please

> note this is a right tiny disc herniation which could theoretically cause left sciatica if it were a very large herniation. Normally, a right-sided herniation would cause right sciatica. In order for it to swing over and affect the left side, it would have to be quite large. This does not fit that case. Nor is there any good documentation to support left sciatica in terms of sensory reflex abnormalities, radiation pain down to the foot and ankle, etc., as one would expect in an L5-S1 herniation affecting either the L5 or S1 nerve roots. Therefore, it is highly unlikely based on the information I have so far that this tiny right paramedian disc protrusion is clinically significant at all.
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> [Reproduced as written]

The Board heard nothing further from the worker or Dr. Arnott following October 27, 2003 until after the worker attended an emergency ward on March 17, 2004. While in the emergency ward, she complained of lower back and left leg pain, which had been increasing for three days. The worker then applied to the Board for compensation. She wrote on her application that she twisted while carrying her caddy in one hand and a vacuum cleaner in the other on March 16, 2004 and felt immediate pain in her low back.

In an April 19, 2004 decision, a Board officer denied the worker's claim for a new low back injury arising out of and in the course of her employment on March 16, 2004. The worker did not submit a request for review of that decision to the Review Division.

An April 21, 2004 MRI revealed that the worker had a large left posterolateral disc herniation at L5-S1.

In her undated letter to the Board, received on May 7, 2004, the worker wrote that her back strain never completely resolved. She explained that she returned to work in the "slow part" of the season and never worked enough to seriously aggravate her back. However, after working five consecutive days in March 2004 and "twisting" her lower back, she was unable to continue working beyond March 17, 2004.

During a May 27, 2004 team meeting, Dr. D advised that the large left-sided posterolateral disc herniation at L5-S1 was a markedly different finding from that shown on the September 11, 2003 MRI. Dr. D thought that this large posterolateral disc herniation was a different/new herniation. She noted that the worker had returned to work by the end of October 2003, and then had an abrupt deterioration in her condition in mid-March, 2004. In Dr. D's opinion, it was likely that in mid-March 2004 there was either a spontaneous new left posterolateral disc herniation at L5/S1 or another back strain.

Dr. D asked the radiologist in the Board's Visiting Specialists Clinic, Dr. Hodges, to compare the September 2003 MRI to the April 2004 CT scan. He did so on June 16, 2004, and reported that the CT scan demonstrated a "new" large inferior extruded disc

herniation on the left at L5/S1. He also confirmed that the MRI demonstrated a very small right paracentral disc herniation at L5/S1.

In the May 31, 2004 decision under appeal, a Board officer decided that there had been no significant change in the worker's low back strain or a recurrence of that injury. She concluded that there was a change in the worker's condition; however, she found that it did not relate to the worker's June 25, 2003 work injury, given that the CT scan findings were markedly different than the previous MRI.

Dr. Costantino, a neurologist, reported on July 21 and August 13, 2004 that the worker continued to complain of chronic low back discomfort, along with left leg symptoms. He referred her to Dr. Gittens.

On November 9, 2004, Dr. Gittens reported that the worker presented with pain extending from her back and sacroiliac area to her left lower extremity as far as the toes, with numbness in the sole of her left foot. He was of the opinion that the worker's symptoms at that time were caused by the L5-S1 disc herniation on the left side.

Reasons and Findings

Mr. McCall submits that the tiny right-sided disc herniation at L5-S1, as shown in the September 2003 MRI, became the moderate to large left-sided disc herniation at L5-S1 as a result of the worker's injury in March 2004. He submits that this represents a significant change in her medical condition, which satisfies the reopening criteria.

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

Rehabilitation Services and Claims Manual, Volume II (RSCM II) policy item #C14-102.01 (in effect at the time of the decision under appeal) provides that a "significant change" means a change in the worker's physical condition (not a change in the Board's knowledge about the worker's medical condition) that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits.

The policy also states that a recurrence of the original compensable injury occurs without an intervening second compensable injury.
I note that *Resolution 2004/11/16-04* has amended RSCM II policy item #C14-102.01 to clarify ambiguities in the Board's policies with respect to reopenings. The resolution is effective January 1, 2005, and applies to all decisions (not appellate decisions) made on or after that date. The amended language states that a recurrence of an injury for the purposes of section 96(2) may result where the original injury, which had either resolved or stabilized, occurs again without any intervening new injury.

The amended policy states that the following questions may assist in determining whether there is a recurrence or a new injury:

- Have there been any intervening incidents, work-related or otherwise?
- Has there been a continuity of symptoms and/or continuity of medical treatment?
- Can the current symptoms be related to the original injury?

Although the amended policy is not directly applicable to this appeal, I find that it offers useful interpretive guidance in considering the meaning of a "recurrence of a worker's injury" in the context of section 96(2) of the Act.

In this case, the matter that was previously decided by the Board was to accept the worker's June 25, 2003 claim for a low back strain only, and to pay wage loss and health care benefits until October 22, 2003. Although the September 2003 MRI showed a tiny right-sided disc herniation, Dr. Arnott did not provide an opinion relating that herniation to the June 25, 2003 injury or any treatment for that injury. He encouraged the worker to return to work, given the "normal imaging". This is consistent with Dr. D's November 12, 2003 opinion that the right-sided disc herniation was of no clinical significance. The October 22, 2003 decision confirmed that the worker's June 2003 claim was only accepted for a low back strain. Accordingly, even if the right-sided herniation "became" the left-sided herniation, as Mr. McCall contends, this would not amount to a significant change in the worker's previously "compensable" condition or a recurrence of her injury.

For there to be either a significant change in the worker's previously compensable condition or a recurrence of that previous injury, there must first be a causal link between the symptoms that the worker reports on reopening and those for which her claim was accepted. In other words, the question is not whether the right-sided herniation is causally related to the left-sided herniation. The initial matter for determination is whether the worker's complaints during March 2004 and beyond are causally related to her June 25, 2003 compensable injuries.

The evidence shows that the worker had low back pain and some intermittent left leg symptoms following her June 25, 2003 injury. Her symptoms improved over time and she was able to return to work in October 2003. She reports that she had increased pain with working in mid-March 2004, which disabled her by March 17, 2004 after twisting at work. Based on Dr. Gittens' report, I accept that the worker's symptoms in mid-March 2004 and beyond arise from the left-sided posterolateral disc herniation at L5-S1. Neither Dr. Gittens nor Dr. Constantino offered opinions with respect to the cause of that herniation.

On June 16, 2004, Dr. Hodges compared the worker's September 2003 MRI to the April 2004 CT scan and was of the impression that the CT scan demonstrated a "new"

herniation on the left side, whereas the MRI demonstrated a very small right disc herniation. Dr. Hodges' opinion confirmed Dr. D's May 27, 2004 impression that the worker's symptoms in mid-March 2004 and beyond arose from a different/new herniation. She attributed that herniation either to a spontaneous herniation or another back strain, not to the June 25, 2003 injury. In short, the evidence does not suggest that the worker's symptoms in mid-March 2004 and beyond represented either a significant change in her "compensable" condition or a recurrence of her injury; rather, the evidence suggests that her symptoms arose from a new cause.

I find that the worker's symptoms in mid-March 2004 and beyond do not amount to a significant change in her compensable low back strain or a recurrence of that back strain. Accordingly, the worker's June 25, 2003 claim may not be reopened under section 96(2) of the Act, and I deny the worker's appeal.

Conclusion

Applying the language of section 253(2) of the Act, I find that the matter that is the subject of the reopening application may not be reopened.

No expenses were requested and none are awarded.

Elaine Murray
Vice Chair

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