

### Noteworthy Decision Summary

**Decision:** WCAT-2006-01738**Panel:** Deirdre Rice**Decision Date:** April 20, 2006***Whether an Oral Hearing is required – Credibility – Item #8.90 of the Manual of Rules of Practice and Procedure***

This decision is noteworthy for its analysis of the factors to be considered when determining whether a worker's credibility is in issue when determining whether to hold an oral hearing.

The employer appealed the acceptance of the worker's knee claim. WCAT granted the employer's initial request for an oral hearing. Subsequently, both the employer and worker agreed to the appeal proceeding on the basis of written submissions. The employer later argued that the appeal raised an issue of credibility and that without an oral hearing the panel would not be privy to personal observations of the worker's presentation.

The panel found that an oral hearing was not required and also denied the employer's appeal. Item #8.90 of the *Manual of Rules of Practice and Procedure* states that WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility. The panel found the appeal did not raise any material issue of credibility. The employer's initial request for an oral hearing did not provide any reasons as to why such a hearing was required.

There are a number of indicators to consider in determining whether credibility is in issue including: inconsistencies in the worker's description of the mechanism of injury; evidence that directly contradicted the worker's version of relevant events or otherwise confirmed that version was likely not true; medical evidence that called into question the likelihood of there being a causal relationship between the work incident described and the diagnosed injury; substantive delays in symptom onset or reporting of those symptoms; and, medical evidence confirming that the worker may have had a relevant pre-existing condition. None of these indicators were present in this appeal and thus there was no sound basis for questioning the worker's credibility.

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## Introduction

On November 11, 2004, the worker completed an application for compensation for a twisting injury to his left knee that he attributed to having slipped on some slippery plates while at work during an October 12 to 13, 2004 shift. In a November 18, 2004 decision, a Workers' Compensation Board (Board) entitlement officer denied the claim.

The worker asked the Board's Review Division to review this decision. In a July 6, 2005 decision (*Review Decision #27928*), a review officer determined that the worker had sustained a personal injury arising out of and in the course of his employment on October 13, 2004. Accordingly, the review officer varied the November 18, 2004 decision.

The employer has appealed the review officer's decision to the Workers' Compensation Appeal Tribunal (WCAT).

## Issue(s)

The issue is whether the worker sustained a personal injury to his left knee that arose out of and in the course of his employment during the shift he worked on October 12 to 13, 2004.

## Jurisdiction

This appeal was filed with the WCAT under section 239(1) of the *Workers Compensation Act* (Act). The worker's condition arose after June 30, 2002, the transition date for relevant changes to the Act. His entitlement to benefits is to be determined under the provisions of the Act as amended by 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*. Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

## Background and Evidence

The worker is currently 43 years old and began working for the employer, a marine transportation service, in May 1996.

In the November 18, 2004 decision, the entitlement officer noted that the best evidence that an injury resulted from a work activity is usually the evidence closest to the time of the incident, such as immediate pain, timely reporting to first aid or the employer, and seeking medical attention as soon as possible. The entitlement officer concluded that she was unable to accept the worker's claim because of the delay in reporting, the lack of evidence of symptom continuity, the worker's ability to continue performing heavy job demands for more than one week following the incident without complaint or activity modification, and his delay in seeking medical attention.

The worker filed two new documents in support of his request for review: a copy of an entry in the employer's watch log report, dated October 15, 2004, which states, "[the worker] left knee twisted on Oct. 12 now beginning to trouble him"; and a copy of a first aid report dated October 14, 2004. The review officer took both this new evidence and the evidence in the claim file into account in *Review Decision #27928*.

The employer took the position that, although the worker had reported that he had injured his knee on October 14, 2004, he did not advise that his knee complaints were due to his employment as no incident was reported. The review officer noted that the worker had stated that he thought his injury was minor, and so had not reported it before leaving work on October 13, 2004. However, he said that he did report his injury to his supervisor on October 14, 2004. Information in the claim file confirms that B, who identified himself to the Board as the worker's direct supervisor, said that the worker had advised him of his left knee complaints on October 15, 2004 and that he made a note of it in the first aid book. Since B's statement was consistent with the log entry dated October 15, 2004, and that log entry noted the worker's knee injury, the review officer was satisfied that the worker reported the incident on October 15, 2004.

The employer argued that the worker's ability to continue to perform his regular duties as an engine room assistant until October 21, 2004 was inconsistent with him having injured his left knee as stated, and also denied any reports of the worker's ongoing symptoms. The review officer noted that the worker said he had worked as a third engineer following the incident and had continued to work by self-treating with Advil and a tensor bandage. Further, B told the Board that he had noticed the worker limping and using ice and a tensor bandage on October 15 and 16, 2004. B also noted that the worker continued to perform his regular duties, but that parts of the job were not too heavy and did not require a lot of movement. Another co-worker confirmed that the worker complained of knee pain following the incident. The review officer acknowledged that the co-worker could not confirm any work-related injury and did not observe any obvious knee problems. However, the co-worker was aware of the worker's knee pain as the worker complained about it.

The review officer concluded that the combination of the statements by the co-worker and B provided corroborating evidence that the worker had ongoing symptoms following the work incident. The review officer said that she had also placed considerable weight on B's statement about the nature of the worker's regular job duties, as B worked with

the worker and was also the worker's supervisor on occasion. Further, the review officer was satisfied that with, self-treatment, it was reasonable that the worker continued to work following the reported incident.

The employer also argued that the worker did not seek first aid from the occupational first aid attendant. However, the worker said that he was a first aid attendant. He stated that he did not seek first aid treatment immediately as he felt he had a strain that would resolve on its own. In addition, the worker said that he completed a first aid treatment report on October 14, 2004 when his left knee symptoms worsened. This was the report which he filed in support of his request for review. Although the employer noted that the first aid treatment report was self-written by the worker and argued that it was never submitted to the appropriate department, the review officer noted that the report had been signed by B. The review officer concluded that, in any event, since she had already found that the worker reported the incident to B on October 15, 2004, she did not place much weight on the first aid treatment report with respect to the issue of reporting.

The review officer acknowledged that the worker did not consult a physician for his symptoms until October 26, 2004, thirteen days following the incident. However, the officer concluded that there was objective evidence that the worker had left knee complaints following the work incident on October 13, 2004. Further, the officer accepted that the delay in seeking medical attention could be explained on the basis that the worker believed that his symptoms would resolve over time.

When the worker did see a physician on October 26, 2004, the physician suspected that he had sustained a meniscal tear and recommended that the worker take time off work. The physician recorded that the worker said he had twisted his knee while cleaning wet deck plates on October 12, 2004. On examination, the worker had some crepitus and minor effusion, but no instability. Given that there were meniscal signs on the right side of the knee, the physician recommended an orthopedic referral. On April 20, 2005, orthopedic surgeon Dr. D. Lake performed arthroscopic left knee surgery. During the operation, Dr. Lake found a significant medial meniscal tear, which Dr. Lake presumed was causing the majority of the worker's symptoms. There was also some early medial and patellofemoral compartment chondral damage, which Dr. Lake said might give the worker some trouble in future years.

The review officer was satisfied that the worker's left knee symptoms and subsequently diagnosed injury were in keeping with the work incident described, and therefore determined that the worker had sustained a personal injury that arose out of and in the course of his employment on October 13, 2004.

## Submissions

The employer takes the position that the worker did not incur an injury which arose out of and in the course of employment. The employer asks that the Board's November 18, 2004 decision to deny the worker's claim be confirmed and that the review officer's decision be varied accordingly.

In the submission she filed in support of the appeal, the employer's representative said that the employer has had difficulty with the worker's claim from the outset, largely due to the lack of prompt reporting of the event of injury to the employer. The representative submitted that, since he had worked for the employer since 1986, the worker was fully familiar with the work practices and routine of the employer. The representative noted that, although the worker reported on October 14, 2004 that he had injured his left knee while on shift two days earlier and was seen limping and using a tensor bandage, he did not seek an independent medical examination until October 26, 2004. Further, while the worker had named witnesses, they could not verify that the incident occurred and, instead, had only heard his complaints two shifts later. After that, they worked with the worker throughout the remainder of his shifts, during which time he did not have any work limitations. In addition, the representative noted that the worker has subsequently claimed that he suffered a right knee injury related to the same event, although there had been no mention of a right knee injury to the employer or to his treating physician.

The employer's representative said that, in large part, the appeal raises an issue of credibility but that, without an oral hearing, the panel cannot be privy to personal observation of the worker's presentation. The employer does not dispute and accepts the medical findings in the file, but feels that there is only speculation as to the cause of the injury to the worker's left knee, and now his reported right knee problem. The representative submitted that there is a distinct lack of evidence to support that the worker was injured in the course of his employment as it pertains to his bilateral knee problems and that the worker's "late attribution that the right knee injury is related to the same event supports this view." The representative asked the panel to review the matter from the view of determining whether the injury incident actually occurred and whether there was "independent evidence to support this fact."

The worker's representative submitted that the Review Division decision should be upheld. He said that: the worker was fit for duty prior to October 13, 2004; the physical conditions in which he was working (on wet decks) were consistent with him having injured himself; the injury occurred at the end of his shift and he reported it to his supervisor at the beginning of the next shift; and, the worker completed a first aid report. The representative also noted that the worker's claim for benefits for his right knee meniscus tear is not at issue in this appeal and, instead, only the left knee injury is relevant. The representative disputed that the worker's credibility must be called into question because he has filed a separate claim for his right knee condition. He said that, on a balance of probability, the objective evidence shows that there is a greater

than 50% likelihood that the worker's left knee injury arose out of and in the course of his employment.

### **Reasons and Findings**

The employer's representative requested an oral hearing of the appeal and WCAT set an initial hearing date in January 2006. At the request of the employer's representative, the hearing was postponed to a date in February 2006. However, the hearing did not proceed at that time because of difficulties related to the worker's attendance at the hearing and because he had recently retained a representative who was not available to attend on the scheduled date. The worker's representative advised WCAT in a letter dated January 18, 2006 that the employer's representative had no objections to the appeal proceeding on the basis of written submissions. An appeal liaison with WCAT subsequently confirmed with the employer's representative that she wished the appeal to proceed on the basis of written submissions. In light of the agreement of both parties to proceeding in this manner, I granted the parties' request and both representatives have filed written submissions. The employer's representative was provided with the opportunity to file a final rebuttal to the submissions the worker's representative made, but chose not to do so.

Item #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) confirms that, while an initial decision regarding the manner in which an appeal will proceed is generally made by the WCAT registrar's office, the ultimate decision as to the manner in which an appeal should proceed rests with the panel responsible for deciding the appeal. Item #8.90 of the MRPP also sets out relevant considerations that a panel should take into account when making that decision, and notes that WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility. An oral hearing may also be granted where there are:

- (a) significant factual issues to be determined;
- (b) multiple appeals of a complex nature;
- (c) complex issues with important implications for the compensation system;
- (d) other compelling reasons for convening an oral hearing (e.g. where an unrepresented appellant has difficulty communicating in writing).

Conversely, WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based and credibility is not at issue.

In this case, the registrar's office granted the employer's request for an oral hearing even though the representative did not indicate the reason why such a hearing was

required. I granted the parties' request that the hearing proceed on the basis of written submissions because both of the experienced representatives on the file agreed that the appeal could appropriately proceed in that manner. Since she has taken the position that the issue in this appeal is in large part one of credibility and that, without an oral hearing, the panel cannot be privy to personal observation of the worker's presentation, it appears that the employer's representative is now having second thoughts about having made that choice. Were I in agreement that an oral hearing was required for the purpose of assessing the worker's credibility, I could schedule one.

However, I do not agree that the appeal raises any material issue of credibility. There are a number of indicators that WCAT panels look to in determining whether credibility is in issue. These can include: inconsistencies in a worker's description of the mechanism of injury (date, time, location, manner in which the injury was sustained, and so on); evidence that directly contradicts the worker's version of relevant events or otherwise confirms that that version is likely not true; medical evidence that calls into question the likelihood of there being a causal relationship between the work incident described and the diagnosed injury; substantive delays in symptom onset or reporting of those symptoms; and, medical evidence confirming that the worker may have had a relevant pre-existing condition.

None of these indicators are present in this appeal. The worker reported his injury to his employer the day after it occurred. There is independent evidence supporting the presence of an ongoing left knee condition subsequent to the date of the incident to which the worker's injury is attributed. The findings on initial medical examination, which confirmed that there was no instability in the left knee, do not suggest that the worker would have been incapable of continuing to work because of his injury. There is no evidence that contradicts the worker's evidence regarding the nature of his duties in the days following October 13, 2004. There is no medical evidence suggesting that the course of symptoms which the worker has consistently described does not accord with him having sustained the left knee meniscal tear on his October 12 to 13, 2004 shift. Dr. Lake provided the expert opinion that the majority of the worker's knee pain was likely due to the meniscal tear, rather than the degenerative changes he found in the arthroscopic procedure. There is no evidence that the degenerative changes were symptomatic prior to the reported incident or that the worker had other symptoms that were indicative of a relevant pre-existing condition and, in his application for compensation, the worker denied having had any previous pain or disability in the area relevant to his injury.

The worker's signature on the application for compensation confirms his declaration that the information he gave in the report was true and correct, and that he understood that it is a serious offence to knowingly make a false claim.

I do not consider that there is a sound basis for questioning the credibility of the worker. In this regard, in my view, the mere fact that the worker has now filed a separate claim for a right knee condition which he also attributes to the same work incident does not

call his credibility into issue. The employer's representative has not pointed to any evidence that suggests that this claim was made on the basis of untrue information or is otherwise false. Nor has the representative identified how the fact that the claim was filed might be interpreted as an indication that the left knee injury was not sustained in the manner the worker described in his application for compensation, in his report to the employer, and in his reports to his treating physicians. The merit of that subsequent claim is not at issue in this appeal.

I am satisfied that an oral hearing is not required to ensure a full and fair consideration of the issues in the appeal, either for reasons related to the worker's credibility or for any other reason.

I have reviewed and considered all of the information in the claim and appeal files. I find that the review officer's conclusion that the worker sustained a personal injury to his left knee that arose out of and in the course of his employment is consistent with the evidence, as are the findings of fact upon which that conclusion was based. Moreover, the review officer applied the correct law and policy in reaching that conclusion. I can find no basis for interfering with the review officer's decision and I confirm it.

### **Conclusion**

The employer's appeal is denied. The evidence supports a conclusion that the worker suffered a personal injury to his left knee that arose out of and in the course of his employment during his October 12 to 13, 2004 shift. The Review Division's July 6, 2005 decision is confirmed.

No expenses were requested, and it does not appear from a review of the file that any reimbursable expenses were incurred in relation to this appeal. I therefore make no order regarding expenses of this appeal.

Deirdre Rice  
Vice Chair

DR/dw