Noteworthy Decision Summary

Decision: WCAT-2006-01889 **Panel**: Iain Macdonald **Decision Date:** April 28, 2006

Section 246(3) – Matter that was referred back to the Workers' Compensation Board returned to WCAT

This decision is noteworthy as an example of a matter referred back to the Workers' Compensation Board (Board) under section 246(3) of the *Workers Compensation Act* (Act) and then returned to the WCAT for completion.

The worker suffered a low back injury when, while travelling in a vehicle at work on May 16, 2001, he was bounced and landed on a hard surface. On July 10, 2003 he suffered another low back injury as a result of bending forward for approximately an hour at work to repair a forklift. The Board accepted both claims. The worker later requested physiotherapy.

In *WCAT Decision #2005-05238*, pursuant to section 246(3) of the Act, the panel had previously concluded that a request for physiotherapy should have been treated as a new matter rather than a reopening under section 96(2) of the Act. Therefore, the panel returned the matter to the Board for determination. The Board decided that the symptoms for which the worker required physiotherapy treatment in 2004 were not caused by either or both of the 2001 and 2003 compensable injuries, neither directly nor as a compensable consequence of them.

The panel noted that health care benefits are provided pursuant to section 21 of the Act to cure and relieve from the effects of a work injury or alleviate those effects. The panel found that the worker's back symptoms are not likely due to the effects of either the 2001 compensable injury or the 2003 compensable injury, neither directly nor as a compensable consequence of them. Therefore, the panel denied the appeal and concluded that the worker is not entitled to receive physiotherapy treatments under either of the claims in question.

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Panel: Iain M. Macdonald, Vice Chair

Introduction

This decision should be read in conjunction with the September 30, 2005 Workers Compensation Appeal Tribunal (WCAT) decision (*WCAT Decision #2005-05238*) in which I found that there was a matter that should have been determined but had not been determined by the Board.

The worker appealed a December 6, 2004 decision made by a review officer of the Workers' Compensation Board (Board). The review officer had considered the April 16, 2004 decision made by a case manager, who decided that the worker's medical condition previously accepted as compensable arising from work injuries in 2001 and again in 2003 had not changed significantly, or recurred. Consequently the case manager concluded that neither of the worker's earlier claims would be reopened for ongoing health care benefits as of February 2, 2004.

The review officer concurred with the case manager, and decided that the worker's need for health care benefits in February 2004 was not due to a significant change in the worker's medical condition that the Board had previously decided was compensable under the 2001, or under the 2003 claim. The review officer agreed that there should be no reopening on either of the claims.

The case manager and review officer treated the request for physiotherapy in February 2004 as a reopening of a matter that had previously been decided by the Board. I found in *WCAT Decision #2005-05238* that the Board officers were not correct, and that the request for physiotherapy should have been treated as a new matter.

The matter I returned to the Board for determination on September 30, 2005 was whether the symptoms for which the worker sought physiotherapy benefits in 2004 were caused by, either directly or as a compensable consequence of, either or both of the 2001 and 2003 compensable injuries.

On November 18, 2005 the case manager decided that the symptoms for which the worker required physiotherapy treatment in 2004 were not caused by either or both of the 2001 and 2003 compensable injuries; neither directly nor as a compensable consequence of them.

The worker disagreed with the case manager's November 18, 2005 decision.

The worker and the employer are both participating in this appeal. The worker is represented by legal counsel.

The worker requested an oral hearing. Item #8.90 of the WCAT *Manual of Rules of Practice and Procedure* states that this tribunal may conduct an appeal in the manner it considers necessary. The appeal will normally be conducted on a read and review basis where the issues are largely medical, legal or policy based and credibility is not an issue. I am satisfied that credibility is not an issue in this appeal and that the matter may be fairly and fully decided without an oral hearing.

The parties received disclosure of the claim file contents up to December 29, 2005. No new documents material to the appeal were placed on file after that date.

Written submissions dated April 18, 2005 and March 16, 2006, respectively, were received from the worker's counsel, and were disclosed to the employer. The employer made no submissions. I have decided this appeal after considering the information contained in the relevant claim files, and the evidence and argument presented in writing by the worker's counsel.

Issue(s)

Pursuant to section 246(3) of *Workers Compensation Act* (Act), I found that there was a matter in an appeal before WCAT that should have been determined but was not determined by the Board, and I returned the matter to the Board for determination on September 30, 2005. In *WCAT Decision #2005-05238* I disposed of a number of the issues raised in the review officer's December 6, 2004 decision. The sole remaining issues, including those arising from the determination of the matter returned to the Board on September 30, 2005, are:

- Whether the symptoms for which the worker sought physiotherapy benefits in 2004 were caused by, either directly or as a compensable consequence of, either or both of the 2001 and 2003 compensable injuries; and if so,

- Whether the worker is entitled to physiotherapy treatment as recommended by his physician.

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the Act.

WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but, in so doing, it must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has exclusive jurisdiction

to inquire into, hear and determine all those matters and questions of fact and law and discretion arising or required to be determined in an appeal before it.

Pursuant to section 246(4) of the Act, if WCAT refers a matter back to the Board for determination under section 246(3) of the Act, WCAT must consider the Board's determination in the context of the appeal and no review of that determination may be requested under section 96.2 of the Act.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision by the Board officer under appeal.

Relevant Information

The evidence as set out in the review officer's December 6, 2004 decision is not in dispute, in any material sense. The worker suffered a low back injury when, while travelling in a vehicle at work on May 16, 2001, he was bounced and landed on a hard surface. On July 10, 2003 he suffered another low back injury as a result of bending forward for approximately an hour at work to repair a forklift. The Board accepted both claims. In February 2004 the worker's physician, Dr. B, recommended that he receive physiotherapy for ongoing back pain. Records from the employer's first aid department showed that on February 5, 2004 the worker had reported pain in his lower back after having installed something under the dashboard of a vehicle at work. He had been bent backward to accomplish this task and had felt pain in his lower back. This had not been claimed as an injury arising out of and in the course of the worker's employment, and was not mentioned in any of the subsequent medical reports. Upon receiving the request for physiotherapy a case manager sought assistance from a Board medical advisor.

Dr. DN, Board medical advisor, reviewed the information on both the 2001 and 2003 claim files and observed that on May 16, 2001 the worker was sitting in a van which went over a bump in the road. He bounced up out of his seat hitting his head, and as he came down the van hit him in the buttocks. He was diagnosed as having a "bruised and strained back and neck". X-rays of the lumbar spine were normal and any time loss from work was minimal. The worker underwent physiotherapy and the last regular medical visit was on July 23, 2001. At that time the attending physician reported that the worker described only "occasional pain when he twists his trunk". The Board medical advisor said that the medical examination at that time was completely normal and noted that the attending physician cleared the worker for full duties. The worker had seen his attending physician again two months later when he advised he had "restrained his back 10 days ago" but he was not considered disabled from work. The appearance of increased back pain at that time was associated with recent work on a friend's cabin, where there had been some heavy lifting done. The last medical report submitted to the Board concerning the 2001 claim was in December 2001, when the

worker told his doctor that he had ongoing back pain "with lifting" and he was advised to restrict his lifting to less than 50 pounds.

The Board medical advisor then noted that on July 10, 2003 the worker had been bent over working on a forklift for about an hour and had reported low back pain when he stood up. There was no history of a traumatic injury at that time. The attending physician diagnosed a mechanical back strain and the Board accepted the claim for that. The record showed that the worker was off work for two weeks and returned to full duties on July 24, 2003. He had continued working after that.

On October 16, 2003 the attending physician recorded "some back pain" but no tenderness, full range of motion and "minimal discomfort". The worker saw his attending physician once more in October 2003, once in November 2003 and then not again until February 2004. The Board medical advisor observed that a CT scan of the lumbar spine done on January 24, 2004 was completely normal without any evidence of traumatic, degenerative or congenital pathology. The most recent medical reports indicated that the worker had "occasional aches" if in a prolonged position such as mowing his lawn. The worker's doctor said he had "ongoing" back pain and referred him to Dr. J, a physician with an interest in physical medicine and rehabilitation. He also referred the worker for physiotherapy.

The Board medical advisor wrote:

> In summary this man had a back strain at work in May 2001 with no apparent disability or evidence of significant injury or permanent functional impairment. He is somewhat vulnerable to recurrence of "backache" from time to time but this appears to result from non-work related activities as well as work activities. The "strain" accepted under this claim was because of bending over for an hour but there was no traumatic injury to the back and he was only disabled for 2 weeks. X-rays (twice) and recent CT scan fail to demonstrate any abnormalities which would explain his ongoing back symptoms. Although this man appears to be susceptible to recurrent "backache" with certain work and non-work related activities, in view of the absence of any significant trauma or physical findings I am unable to relate his current/ongoing back symptoms to either his 2001 or 2003 back injury claims as either a recurrence or significant deterioration.

The case manager decided that the worker's claim could not be reopened under section 96(2) of the Act, and on December 6, 2004 the review officer agreed.

The worker submitted additional records showing that he underwent further physiotherapy for his back problems in 2004, the need for which he attributed to injury at work. Given that the physiotherapy reports in question described the worker's actual problems only after February 14, 2004 the nature of which are not in dispute, the reports are not helpful as a contemporary record in corroborating whether there was a

continuity of symptoms after the injury in 2001 and/or the injury in 2003. Chart notes from the worker's doctor reflected a complaint of backache in January 29, 2003 in conjunction with some other problems. There was no further mention in the chart notes of back problems until the work incident on July 10, 2003.

The worker also provided documents showing that he had continued to report back problems to the first aid attendant at work. These reports described a number of the worker's complaints involving different body parts; however there were numerous gaps in the continuity of reports of back complaints.

In a September 23, 2004 letter, Dr. J confirmed that he had seen the worker for low back pain of long standing in the lumbosacral area centrally, with no radiation down the limbs. According to Dr. J, the pain, which had begun with the work injury in 2001, was readily aggravated by activity. Dr. J confirmed that imaging studies of the worker's lumbosacral spine were normal, and said that the worker suffered from "chronic mechanical back pain, excessive body weight." Dr. J advised the worker to engage in a program of physical exercises lasting at least 15 minutes per day, and told him that his weight might contribute to the problem.

The worker's counsel presented an April 18, 2005 written submission and a March 16, 2006 submission, which will be discussed insofar as it is relevant to the issues raised by this appeal.

Additional Investigation and Adjudication

The worker's counsel argued that the matter should not have been treated by the case manager and the review officer as a reopening under section 96(2) of the Act.

As discussed in *WCAT Decision #2005-05238* I agreed with the arguments posed by counsel for the worker concerning the application of section 96(2) of the Act. One can not reopen a matter that has not previously been closed off by a decision of the Board. Further, the Board had determined in policy item #C14-101.01 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) that health care benefits should be treated as new matters for adjudication. I determined that in the circumstances of this case there was a matter that should have been determined, but had not been determined by the Board. I referred the matter back to the Board pursuant to section 246(3) of the Act, with direction to determine whether the symptoms for which the worker sought physiotherapy benefits in 2004 were caused by, either directly or as a compensable consequence of, either or both of the 2001 and 2003 compensable injuries.

On November 18, 2005 a case manager decided, based on the November 10, 2005 medical opinion from a second Board medical advisor, that the reason the worker sought physiotherapy in February 2004 was not directly caused by, or directly related to, his compensable injuries in either 2001 or 2003. The second Board medical advisor

concurred with first Board medical advisor's opinion, and adopted the same reasons as had been expressed by the first Board medical advisor on April 16, 2004.

On January 20, 2006 the worker's counsel wrote to Dr. B and requested a medical opinion addressing the etiology of the worker's back pain when physiotherapy was requested in February 2004. The worker's counsel also asked whether there was anything in the doctor's clinical notes that suggested the worker's symptoms had not been caused "either directly or indirectly or as a compensable consequence of either or both of the 2001 and 2003 compensable injuries?"

On March 7, 2006 Dr. B wrote:

> Etiology of the back pain noted by me on the 2nd day of February/2004, is in my view from [the worker's] re-injuring his back on the 10th of July/2003, that had aggravated his chronic back pain from a previous injury sustained on the 16th day of May/2001. The nature of his pain will be characterized as mechanical back sprain, which was concurred by [Dr. J], the physical medicine specialist, who had seen him for this problem on a referral made by me….
>
> There is nothing in my notes to suggest any other cause for his back pain symptoms noted on February 2nd/2004 other than his original injury in May/2001 and re-injury in July/2003….
>
> Although not a direct cause, his excessive body weight was not helping his symptoms.
>
> [reproduced as written]

The worker's counsel argued that the physiotherapy treatment had been necessary to treat the effects of the worker's chronic low back pain, which had started with the injury in 2001 and had become worse with the injury in 2003. There was, in counsel's view, no evidence that any of the doctors where the worker had sought treatment had any doubts about "the reality of the symptoms he was reporting." Further, there were ten reports of low back problems made to the first aid attendant between July 10, 2003 and February 16, 2004.

Counsel for the worker said that the case manager's November 18, 2005 decision added nothing new. The Board medical advisor's opinion upon which the case manager had relied had merely been an endorsement of the existing opinion, and had provided no supporting rationale.

The worker sought a finding that the low back symptoms which continued to plague him in February 2004 were causally related to his earlier compensable injuries. The worker also sought a number of other findings; however only those remedies within the jurisdiction of this panel will be addressed in this decision.

As a final matter, the worker's counsel said in submission that no disclosure of information had been provided since the panel had referred the matter back to the Board. My review of the Board's records shows that updated disclosure was provided to both parties, up to and including December 29, 2005. No new documents material to the appeal were placed on file after that. I am therefore satisfied that the Board did not retain in its possession any documents that should have been disclosed, but were not disclosed, to the worker. I caused this information to be verbally communicated to the worker's counsel, and I confirm it in this document.

Findings and Reasons

The worker's claims in 2001 and again in 2003 were accepted by the Board for back strain, and for bruising and mechanical back strain, respectively. Imaging studies have not shown any underlying pathology caused by, or aggravated by either of the compensable injuries.

The question of a cause and effect relationship between the worker's persistent back complaints, and either or both of the compensable injuries was considered by a Board medical advisor, who stated in an April 16, 2004 claim log entry that although the worker appeared to be susceptible to recurrent "backache" with certain work and non-work related activities, the absence of any significant trauma or physical findings left the Board medical advisor unable to relate the current/ongoing back symptoms to either the 2001 or the 2003 compensable injury claims. The Board medical advisor had reviewed the medical records, including the attending physician's chart notes. The Board medical advisor further concluded that the worker's symptoms did not represent either a recurrence of, or a significant deterioration in the condition that the Board had previously accepted as compensable.

The second Board medical advisor concurred with the analysis of the first Board medical advisor, and concluded that the worker's symptoms for which he sought physiotherapy in February 2004 were not causally related to, either directly or indirectly, either or both of the work injuries in question. Both Board medical advisors have shared the same reasoning to support their conclusions.

Dr. B, the worker's physician, has said on the other hand that in July 2003 the worker had aggravated chronic back pain from the May 2001 injury. The diagnosis for the worker's symptoms in 2004, as stated by Dr. J, was mechanical back sprain. There was nothing in Dr. B's medical records to suggest any cause for the diagnosed back problem other than the work injury in May 2001 and the re-injury in July 2003. Dr. B and Dr. J, when assessing factors affecting the worker's problems, each mentioned obesity.

The worker's counsel has argued that the worker has experienced a continuity of symptoms since the time of the first injury in 2001, and that the symptoms became

worse following the second injury in 2003. The medical records show, however, that there were numerous gaps of several months in which the worker did not seek medical attention between the first injury and the second injury. Similarly the first aid reports, rather than a continuity of back pain symptoms, mostly reflect episodes of increased back pain following a number of different activities at work.

The injuries accepted by the Board in 2001 and again in 2003 were back strains, with no evidence of significant trauma that would affect the underlying structures of the low back, and no evidence of damage appearing on imaging studies. Disability from working in each injury instance was minimal. While I do not question the worker's evidence that he has suffered, and increasingly continues to suffer back pain that flares up with certain activities, I do not find it biologically plausible that the cause of that back pain should now be attributed to remote soft tissue injuries; particularly to a soft tissue strain caused by remaining in a forward flexed position for about an hour on July 10, 2003, with no other external force involved.

While I am satisfied that the worker has experienced recurrent flare-ups of back pain over a period of years and that he continues to do so, I am not satisfied that this is part of a continuum of symptoms caused by the two soft tissue injuries suffered at work in 2001 and 2003, respectively. While I appreciate the opinions expressed by Dr. B and by Dr. J, I find the reasoned opinion shared by the Board medical advisors to be more reflective of the overall evidence, and therefore more persuasive. I find the situation is best described by the Board medical advisor, who said that the worker appears to be susceptible to recurrent "backache" with certain work and non-work related activities. In view of the absence of any significant trauma or physical findings associated with either of the work injuries, I find it would not be reasonable to relate the worsening ongoing back symptoms to either the 2001 or 2003 back injury claims.

Health care benefits are provided pursuant to section 21 of the Act to cure and relieve from the effects of a work injury or alleviate those effects. While the worker suffers genuine back symptoms, they are not likely due to effects of either the 2001 compensable injury or the 2003 compensable injury, neither directly nor as a compensable consequence of them. Therefore, the worker is not entitled to receive physiotherapy treatments under either of the claims in question.

Conclusion

In accordance with the foregoing findings and reasons I confirm the case manager's decision not to provide physiotherapy treatment under either the 2001 claim or the 2003 claim.

The worker has requested reimbursement of expenses incurred in gathering evidence necessary to pursue his appeal. I find that it was reasonable for the worker to obtain the medical evidence submitted, including the physiotherapy reports. Although I have noted that the physiotherapy reports were not helpful as a contemporary record in establishing the nature of the worker's symptoms at the relevant times, I find it was nevertheless reasonable for the worker to have obtained them, given the contents of the December 6, 2004 decision. Both the case manager and the review officer led the worker to believe that he needed to show a significant change in his medical condition that the Board had previously decided was compensable. The description of the worker's condition recorded by the physiotherapist starting in early February 2004 was evidence that could reasonably be seen as relevant to that matter. Consequently, I find that the reimbursement of expenses pursuant to section 7 of the *Workers Compensation Act Appeal Regulation* should include the cost of the physiotherapy reports.

Iain M. Macdonald
Vice Chair

IMM/pm