Noteworthy Decision Summary

Decision: WCAT-2007-02032 **Panel**: Andrew Elliot **Decision Date:** July 5, 2007

Expert Evidence – Section 5(1) of the Workers Compensation Act

This decision is noteworthy because of its analysis of expert evidence in the context of determining whether a worker sustained a personal injury arising out of and in the course of employment.

The Workers' Compensation Board, operating as WorkSafeBC (Board), denied the worker's claim for neck and upper back problems.

The worker's appeal was denied. The panel found that the evidence indicated the worker's condition consisted of muscle spasm and tightness, possibly complicated by some sort of pain syndrome, and possibly the result of a sprain or strain. The neurosurgeon, the osteopath, the walk-in clinic doctor, and the worker's family doctor failed to give any opinion on causation. The opinion of the neurologist was weakened by stating that the worker "appeared" to have suffered a musculoskeletal injury because of an unusual work task. The only strong opinion was from the rehabilitation specialist. However, this opinion lost some of its persuasiveness by quoting the other specialists as supporting workplace causation, when the documentary evidence of those opinions was lacking. Because the claim was denied at an early stage, it was never referred to a Board medical advisor for an opinion.

The fact that the only definite medical opinion supported the worker did not necessarily mean that the appeal would succeed. There is a common misconception that expert evidence is somehow evidence of great persuasiveness, which must prevail in the absence of expert evidence to the contrary. The expert opinion must not offend the "ultimate issue" rule. That is, it can never be a substitute for the decision-making function of the trier of fact. The final decision is that of the decision-maker, not the expert witness. The trier of fact reviews all of the evidence, while the expert witness does not.

In spite of the opinion by the rehabilitation specialist, the panel was unable to conclude that the worker's workplace activity of moving the baseboards caused his neck and upper back symptoms. Apart from the opinion by the rehabilitation specialist, the panel found there were difficulties in connecting the worker's symptoms with his work activities. The worker did not experience symptoms until two days later. It was almost a week later that the worker admittedly looked back, to find a workplace activity that could have caused his problems. The panel found it difficult to conclude that the work activities caused a sprain or strain which first made itself apparent one or two days later, with no symptoms at the time. The worker had a pre-existing neck and upper back muscle spasm problem. The worker's current problems involved muscle spasms. The panel concluded that the worker did not suffer a personal injury arising out of and in the course of his employment.

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Panel: Andrew J.M. Elliot, Vice Chair

Introduction

This appeal concerns the compensability of the worker's neck and upper back problems, which became symptomatic on December 16, 2005. The worker appeals from the decision, dated June 21, 2006, of a review officer of the Workers' Compensation Board (Board), doing business as WorkSafeBC.

On January 20, 2006, a Board entitlement officer wrote to the worker denying his claim for compensation for a neck and back strain. The worker asked for a review. On June 21, 2006, the review officer confirmed the entitlement officer's decision. Both the entitlement officer and the review officer adjudicated the claim as a possible personal injury.

Issue(s)

The issue before me is whether, on December 14, 2005, the worker suffered a personal injury which arose out of and in the course of his employment.

Jurisdiction and Procedure

This appeal was brought pursuant to section 239(1) of the *Workers Compensation Act* (Act), which provides for an appeal to the Workers' Compensation Appeal Tribunal (WCAT) from a final decision made by a review officer in a review under section 96.2. The appeal proceeded by way of an oral hearing, attended by the worker, a representative of the employer, and a member of the Employers' Advisers.

Following the oral hearing, I obtained the clinical records of the worker's family doctor, which were current up to February 8, 2007. The records were sent to the worker (who did not make a submission), and to the employer (who sent a submission). Meanwhile, a specialist medical consultation report, dated March 28, 2007, was faxed to the WCAT office. The worker's rebuttal to the employer's submission referred to that consultation, so it was sent to the employer for further submission (none was received). The worker sent another submission on May 4, 2007. On May 11, 2007, a further medical report was received directly from the doctor. That report was sent to the employer for further submissions, and the worker replied.

Background and Evidence

On Wednesday, December 14, 2005, the worker was a 32-year-old painter. That day (or the previous day; there is a discrepancy), he was working on newly constructed condominiums. One of his tasks was to carry 16-foot freshly painted sections of baseboard from one unit, where they were painted, to another unit. Because of the configuration of the units and the table on which the painting was done, and because the paint was still wet, the worker had to assume awkward postures, with his arms outstretched and to the side. He felt no particular aches or pain that day (according to his testimony at the oral hearing), but awoke the next day with pain and stiffness in his neck.

On Thursday, December 15, 2005, the worker came to work but was unable to work and so the employer sent him home. That occurred again on Friday, December 16, 2005.

The employer's report of injury has attached daily notes, stating that one of the employer's staff called the worker at home on December 15, 2005, and asked if the injury was work related. The worker told him that it was not, and that it had happened before. He said that it was just stiff. The next day, the staff member again called the worker at home, and the worker again confirmed that it was not a work related injury. However, on Monday, the worker stated that he would fill out the Board form because he had missed work.

On Monday, December 19, 2005, the worker saw his physiotherapist. On December 20, 2005, he went to a walk-in clinic. There, a doctor diagnosed him with a neck and back strain and possible C5 disc problem, and thought that he would be off work for two to three weeks. That day, an x-ray of the worker's cervical spine was reported as normal. On January 5, 2006, the worker again saw the clinic doctor with neck pain and dorsal scapular pain, which had not improved. After the x-ray, the doctor's diagnosis was a neck strain and a dorsal back strain. On January 18, 2006, the worker saw the clinic doctor for the last time. He had tried to return to work on January 16, 2006, but his back and neck had become acutely painful.

On December 29, 2005, the worker applied for compensation from the Board. On January 20, 2006, a Board entitlement officer denied compensation, on the basis that there was insufficient evidence to show that the worker's neck and back strain had been caused by his work. The worker asked for a review of that decision, but it was confirmed by a review officer on June 21, 2006.

Several times in the winter of 2006, the worker attended at the emergency department of the hospital with severe headaches which (he reported at the oral hearing) were diagnosed as migraine headaches. The emergency records are not in the Board file, but the records of the family doctor (obtained after the oral hearing) contain an x-ray dated February 1, 2006, of the worker's lungs and heart, which was normal. That

same day a CT scan was done of the worker's cervical spine, showing slight central disc bulging at four levels from C3 to C7. Otherwise, the worker's cervical spine was normal. On February 2, 2006 a CT scan was done of the worker's head, and this was also normal.

The emergency room doctor referred the worker to a neurosurgeon, whom he saw on February 8, 2006. The worker complained of neck and upper back pain, intermittent numbness of his left fourth and fifth fingers, and severe headaches. By then, he had been off work two months and was on Oxycodone. He complained that his head felt heavy. The neurosurgeon's examination of the worker was normal, except that the motion of the worker's neck caused pain at the extremes of the range. He was not tender to palpation. The neurosurgeon did not make a diagnosis, but reported "a series of symptoms which I was unable to connect". His consultation report does not contain an opinion on causation, although it reports that the symptoms arose a day after moving boards at work.

At the oral hearing, the worker stated that he then changed doctors, because the clinic doctor was not helping. He first saw his new family doctor on February 21, 2006. He reported persisting back pain and headaches to the point of nausea and feeling feverish. The left finger numbness had resolved. The doctor observed reduced range of motion in the neck, and mild spasm and tenderness of the rhomboid and paraspinal muscles. The doctor later (in a letter dated August 2, 2006) stated that he had diagnosed the worker as having severe neck and back muscle spasm, complicated by a regional pain syndrome.

On February 23, 2006, the worker saw an osteopathic physician. The osteopath's neurological examination was normal. He observed reduced flexion of the worker's neck, because of cervical and upper thoracic paravertebral muscle tension. Extension gave pain at the junction between the cervical and thoracic parts of the spine. The osteopath observed spasm of the paravertebral musculature, but no focal vertebral strain pattern. He prescribed non-steroidal anti-inflammatories, and thought that massage could be tried but was unlikely to be unhelpful. He did not offer an opinion on causation.

The worker continued to see his new family doctor. In his letter of August 2, 2006, the doctor reported that the worker's condition steadily improved, with decreasing pain and spasm and increasing range of motion and strength. By March 13, 2006, the worker began light duties at work, and he was working full time by May 24, 2006.

The worker's family doctor continued to report persisting upper thoracic pain and tenderness, sometimes with reduced range of motion. On October 17, 2006, a CT scan was done from C3 to T10, because of an eight-month history of thoracic spine pain. It showed no abnormalities at those levels of the worker's spine.

On December 4, 2006, the worker's physiotherapist wrote a letter "To whom it may concern". He stated that he had treated the worker for shoulder, neck and upper thoracic problems since 1997. He had seen the worker on December 19, 2005, when the worker's cervical range of motion had been markedly restricted with tenderness at C5. The worker's rhomboids and upper trapezius muscles had been in spasm. By the time of his letter, he thought that the worker's symptoms might be more related to his upper thoracic spine rather than the cervical spine. He thought that the worker had sustained an injury at work to his neck and upper back. He stated that the worker had received treatments to that area in the past, but never were the symptoms as severe as this past episode.

In submissions to the Review Division, the worker stated that he had awoken unable to move his head. He stated that it had been his foreman's suggestion that he had "slept funny". After the weekend, the worker had realized that it probably was not from sleeping, but from something that he had done the day before he had awakened with neck pain. He had then remembered the task which he had been performing: it had been to help carry baseboards, 16 feet long by seven inches by one inch. He stated that he had done that job from 9 a.m. until 4 p.m. and that his arms had to be extended into the right. He stated that this had caused one of his vertebrae to rotate or slip or move in some form, in turn irritating nerves and muscles in that region. He stated that it was the opinion of his physiotherapist, his family doctor, the osteopath, and his massage therapist, that the movement could cause the injury that he had received.

In preparation for the oral hearing, the employer's representative sent a diagram of the layout of the condominium building. Units faced each other across the hall. Access was through a door and a short hallway past the bathroom. The unit then widened out into a larger room. The unpainted trim had been brought straight in and laid down in the larger room in line with the door. It was painted off to the side, behind the bathroom. The result was that the painted pieces could not be moved straight out the door, but had to be lifted up over the pile of unpainted trim, carried out the door, carried into the opposite unit, and stacked to dry. This meant that the worker had to lift the pieces, extend his arms out so that the pieces would go down the hall, and then manoeuvre around the pile of unpainted pieces.

At the oral hearing, the worker described a meeting at the Board, which the employer attended. At that time, the worker had stated that he did not know whether he was injured at work. He had, in the past, awoken with neck pain because he had "slept funny". However, he stated that this was different. He stated that there had been no discrete injury at work, and that he had gone home feeling fine.

The worker stated that he had had a neck problem nine years earlier, and had seen his physiotherapist for muscle cramps. However, he stated that it was never for a vertebra problem.

At the oral hearing, the worker stated that he had bought a home and had moved in on December 10, 2005. He stated that all the heavy work had been done by friends, and he had moved some lighter items. He stated that he had had no after effects, had been fine at the beginning of the week and had not had any problems until Thursday morning, December 15, 2005.

On February 9, 2007, after the oral hearing, the worker saw his family doctor with pain between his scapulae, increased for the past two weeks. He was upset at denial of disability. The doctor referred the worker to a rehabilitation specialist, whose letterhead states his speciality as "impairment and disability evaluation".

The worker saw the rehabilitation specialist on March 28, 2007 (it appears that he also saw him on March 13, 2007 but WCAT does not have that report). The specialist reported that physiotherapy was being effective in reducing the worker's problems, and thought that another two or three weeks should suffice.

On January 16, 2007, the employer's representative sent its foreman's notes of activity for each day of the week of December 12 to 16, 2005, along with the diagram of the units. For Tuesday, December 13, 2005, one of the entries is "commence door trim third floor". The worker's name is next to that task. For Wednesday, December 14, 2005, the worker's name is associated with the task of "men's locker room".

On May 10, 2007, the rehabilitation specialist reported to the worker's family doctor. After a discussion regarding this appeal, the specialist reviewed his file and discussed causation. The specialist referred to a letter dated March 24, 2006 from a neurologist (that letter is not in the Board file or in the clinical notes of the worker's family doctor). The specialist quoted from the neurologist's letter: "This man appeared to have suffered a musculoskeletal injury of his upper thoracic and cervical spine because of an unusual work task which he performed over the course of one day." The rehabilitation specialist then remarked that the particular movements required when lifting baseboards in the manner described by the worker (which apparently was the correct lifting method) could indeed cause problems, and he stated he had seen them before in the thoracic region. The specialist then stated:

> I feel, as indeed do the other specialists who have seen him, a neurologist and a senior neurosurgeon, that this man's problems occurred as a result of his activities at work, and this should be recognized.

Submissions

The worker has made numerous submissions to the Review Division and to WCAT, at the oral hearing and in writing. The essence of his submissions is that, with the letter from the rehabilitation specialist, the medical chain of causation is now complete.

He submitted that he was fine after he moved to his new house, and was fine until the next day after moving the baseboards. Since then he has been in pain. He asks that the obvious conclusion be drawn.

In her submissions, the employer's representative pointed out the inconsistencies in the worker's testimony. He often got the dates wrong, stating that he moved the baseboards on Wednesday, December 15 instead of Wednesday, December 14, 2005. In fact, she argued that the records of the worker's foreman show that the worker was assigned to working on the baseboards on Tuesday, December 13, 2005, two days before he awoke in pain, and not on Wednesday, December 14, 2005. She pointed out that he did not attribute his problems to moving the baseboards until five or six days after the event, and at first blamed the problem on sleeping in the wrong position. She pointed to the absence of a solid diagnosis which could be considered an injury.

After receiving the rehabilitation specialist's letter of May 10, 2007, the employer's representative submitted that he speculated about the cause of the worker's condition, without offering a diagnosis. There was no factual basis for his conclusion, and he mis-characterized the opinion of the neurosurgeon. She submitted that the opinion on causation was not founded on evidence.

Findings and Reasons

Section 250(2) of the Act provides that I must base my decision on the merits and justice of the case but, in doing so, I must apply a policy of the board of directors of the Board that is applicable in this case. Applicable policy of the board of directors is found in the Board's *Rehabilitation Services and Claims Manual.* Because this appeal involves a condition which occurred after June 30, 2002, *Volume II* (RSCM II) of the *Rehabilitation Services and Claims Manual* applies.

Section 5(1) of the Act provides for compensation for a worker who suffers personal injury arising out of and in the course of employment. Policy item #13.10 sets out a list of disorders which are classified as injuries. It includes "sprains and strains, whether caused by a specific incident or by activity over time.

In general, the phrase "arising out of" means that the injury must be caused by the employment. The phrase "in the course of" generally means that the injury must have occurred during employment (as broadly defined).

The issue on this appeal is whether the worker's neck and upper back problems, which became apparent on Thursday morning, December 16, 2005, were caused by his work activities moving baseboards.

The investigations have consistently ruled out any bony injury. Although the worker has referred to an injury of his vertebrae (as opposed to his previous muscle spasms), the evidence does not support that he suffered an injury to his vertebrae. The evidence

indicates that the worker's condition was muscle spasm and tightness, possibly complicated by some sort of pain syndrome, as suggested by the family doctor. The neurosurgeon was unable to give a diagnosis, and the osteopath did not give a diagnosis. The neurologist, in the short quotation from his report available to us, spoke only of an unspecified musculoskeletal injury of the upper thoracic and cervical spine. The rehabilitation specialist, although stating that the worker's problems were the result of his workplace activities, did not give a diagnosis more specific than cervical and thoracic pain.

Reports from the doctor at the walk-in clinic give a diagnosis of neck strain and dorsal back strain (after the possibility of a C5 disc problem had been ruled out by x-ray and CT scan investigations). The worker's family doctor diagnosed "severe neck and back muscle spasm complicated by a regional pain syndrome".

The most definitive diagnosis appears to be muscle spasms in the back and neck, possibly complicated by a pain syndrome, possibly the result of a sprain or strain.

The neurosurgeon, the osteopath, the walk-in clinic doctor, and the worker's family doctor failed to give any opinion on causation. The opinion from the neurologist is weak, saying that the worker "appeared" to have suffered a musculoskeletal injury because of an unusual work task. The only strong opinion of causation is from the rehabilitation specialist. It loses some of its persuasiveness by quoting the other specialists as supporting workplace causation, when the documentary evidence of those opinions is lacking.

There is no medical opinion that the worker's problems are not due to his workplace activities. Because the claim was denied at an early stage, it was never referred to a Board medical advisor for an opinion.

The fact that the only definite medical opinion supports the worker does not necessarily mean that the appeal will succeed. There is a common misconception that expert evidence is somehow evidence of great persuasiveness which must prevail in the absence of expert evidence to the contrary. However, that is not my understanding of expert evidence.

At common law, opinion evidence is not generally admissible in a proceeding. However, it can be admissible if it is given by an expert, whose qualifications are such that his opinion is useful to the trier of fact. The opinion must be based on facts which are accepted as true (by the trier of fact). The expert opinion must not offend the "ultimate issue" rule. That is, the expert's opinion can never be a substitute for the decision-making function of the trier of fact. The final decision is that of the decision maker not the expert witness. The trier of fact reviews all the factors, while the expert witness does not.

In spite of the opinion by the rehabilitation specialist, I consider that there are difficulties in connecting the worker's symptoms on Thursday, December 16, 2005 with his workplace activity of moving the painted baseboards. It was almost a week later that the worker admittedly looked back, to find a workplace activity that could have caused the problem. The notes of the foreman, prepared contemporaneously, indicate that the blamed activity occurred on the Tuesday, two days before the worker awoke in pain, rather than the Wednesday. Even if the activity had occurred the day before the worker awoke in pain, he had no symptoms during the activity or later that evening.

The worker had been undergoing treatment by the physiotherapist for neck and upper back problems before December 2005. Those problems began in 1997. The letter by the physiotherapist does not suggest a short period of treatment in 1997 followed by a gap of many years. It suggests that the physiotherapist has been treating the worker since 1997. That is, the worker had a pre-existing neck and upper back muscle spasm problem. Although the worker has suggested that the new problem was different in kind, in that it involved his bony spine, that is not the case. The problem is still muscle spasm, as before.

The worker's work activities, as described in the Board file and as demonstrated at the oral hearing, do not appear to be strenuous. The postures were somewhat awkward and the weights, although not heavy, would have put some strain on his arms and back. However, I am not convinced that they caused an injury. In particular I find it difficult to conclude that the activity caused a sprain or strain which first made itself apparent one or two days later, with no symptoms at the time. In spite of the opinion by the rehabilitation specialist, I am not convinced that the worker's workplace activity of moving the baseboards caused his neck and upper back symptoms.

Both elements required by section 5(1) of the Act are lacking, even if it is accepted that he suffered an injury (which the specialists have not been able to diagnose). The worker's symptoms appeared two days after the blamed activity, and the evidence does not support a conclusion that an injury arose "in the course of employment". The evidence also does not support a conclusion that work activity caused the condition or, in the words of the Act, that it arose "out of the employment".

I therefore find that the worker did not suffer a personal injury, arising out of and in the course of his employment, on December 14 (or December 13, if that was the date of moving the baseboards) 2005.

Conclusion

The appeal is denied. The decision of the review officer is confirmed. I find that the worker did not suffer a personal injury to his neck and upper back, in December 2005, arising out of and in the course of his employment.

The worker, at his own expense, obtained the letter, dated December 4, 2006, from his physiotherapist and the letter, dated August 2, 2006, from his family doctor. At the hearing, he stated that those reports cost him $100 and $50 respectively. Those amounts are reasonable, and it was reasonable for the worker to have obtained those letters in preparation for the appeal. Pursuant to section 7 of the *Workers Compensation Act Appeal Regulation,* I order that he be reimbursed for the cost of those letters. The worker having failed in his appeal, there is no other order for the worker's expenses of the oral hearing.

At the oral hearing, the employer's representative asked for reimbursement of the employer's expenses of attending the oral hearing. As the employer is local and did not produce any medical evidence, the remaining possibility is reimbursement for the cost of attendance by the employer's human resources manager. There is no evidence that he lost wages to attend, and I am unaware of any basis for ascertaining the expense to a corporate entity of the attendance of one of its employees. In any case, I do not consider that this is an appropriate case in which to order reimbursement of the employer's expenses, and I do not make that order under section 7 of the *Workers Compensation Act Appeal Regulation.*

Andrew J.M. Elliot
Vice Chair

AJME/jm/jy