Noteworthy Decision Summary

Decision: WCAT-2007-03458 **Panel**: Iain Macdonald **Decision Date:** November 5, 2007

Credibility - Personal Injury - Arising Out of and in the Course of Employment - Sections 5(1) and (4) of the Workers Compensation Act

This decision is noteworthy for its analysis of a worker's credibility where he could not clearly recall the item he was lifting in the workplace at the time he felt a pinching pain in the back of his neck.

The worker claimed compensation for a neck injury. The Workers' Compensation Board, operating as WorkSafeBC, denied his claim because there was insufficient evidence that his neck injury arose out of and in the course of his employment. The worker's appeal to WCAT was denied. Although there was sufficient evidence that the worker sustained a personal injury, the panel found that there was insufficient evidence that the injury arose out of and in the course of the worker's employment. The panel found that, even though the worker felt a sudden sensation in his neck, there was no accident within the meaning of section 5(4) of the *Workers Compensation Act* (Act) and policy item #14.10 of the *Rehabilitation Services and Claims Manual, Volume II*. Consequently, the presumption under section 5(4) of the Act did not apply in this case.

The focal point of the dispute in this appeal was the mechanism of injury. Specifically, the credibility of the worker's evidence was called into question. The principal concern was the worker's apparent inability to remember what he was lifting when he felt the sudden and unexpected pinching sensation in his neck. In conversation with the case manager, the worker was clear that he had been at an angle while bending when lifting the object. At the hearing he said that he had quickly set the object down when he felt the pinching in his neck. Yet, throughout, the worker remained vague about what he had been lifting. He narrowed the possibilities to either a pipe harness assembly, which weighed 15 or 20 pounds, or a box of hose clamps of insignificant weight. In considering the harmony of the worker's information "with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions", the panel found that it would not be reasonable to confuse the two.

Although the panel recognized that it would be unreasonable to expect a person to have perfect and consistent recall in all things, he found that the incongruity between the worker's ability to recall key information such as the position he was in when he carried out the lift in question, and his inability to identify the object he was lifting at the time, surpassed the bounds of credibility. Notwithstanding the fallibility of the average memory, the panel found it was not reasonable that the worker's powers of recall should be subject to such marked inconsistency. Therefore, the panel concluded that the worker's statement describing what he was doing when he felt neck pain was not evidence but conjecture.

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WCAT Decision Number: WCAT-2007-03458
WCAT Decision Date: November 05, 2007
Panel: Iain M. Macdonald, Vice Chair

Introduction

The worker has appealed a decision made by a review officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), and conveyed in a February 9, 2007 document.

In that document the review officer considered the September 15, 2006 decision of an entitlement officer, who had concluded that there was insufficient evidence to show that the worker's cervical strain, for which he sought medical attention on July 17, 2006, had been caused by personal injury arising out of and in the course of his employment that day.

The review officer observed that the worker had reported to his employer that he had been lifting something earlier in the day. He had felt a pinching pain in the back of his neck; however, the worker could not recall what he had been lifting at the time. The review officer concurred with the reasoning and conclusion of the entitlement officer and confirmed the decision not to accept the worker's claim.

An oral hearing was conducted on August 16, 2007. The worker participated and was represented by a workers' adviser. The employer participated in the appeal and was represented by an employers' adviser.

Issue(s)

The issue is whether the worker's diagnosed cervical strain was caused by personal injury arising out of and in the course of his employment on July 7, 2006.

Jurisdiction

The Workers' Compensation Appeal Tribunal (WCAT) may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (see section 250(1) of the *Workers Compensation Act* (Act)). WCAT must make its decision on the merits and justice of the case, but in so doing, 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, law and discretion arising or required to be determined in an appeal before it (section 254 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 under appeal.

All references to policy in this decision, unless otherwise specified, pertain to the Board's *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

On July 17, 2006 the worker, who was employed in a manufacturing operation, reported to first aid with complaints of numbness in the fingers of his right hand and pain in his right elbow. The worker also described pain in the back of his neck. The worker informed the first-aid attendant that earlier that morning, at approximately 9:30 a.m., he had been lifting something at work and had felt a pinching pain in the back of his neck. About a half hour afterward he had felt numbness developing in the fingers of his right hand, and pain in his right elbow. The first-aid attendant confirmed that the worker felt pain when he lifted his right arm and when he tried to move his neck. There was, however, no visible swelling in the affected area, and the worker had no problems at all on his left side.

That same day the worker consulted Dr. L.B., who diagnosed a cervical strain. Dr. L.B. noted that the worker had been lifting clamps or a harness and had felt neck pain. There had also been right hand numbness, but that had settled. On examination, the worker had a decreased range of movement of his neck, with tenderness over the cervical spine. He had a good power grip in his right hand. Dr. L.B. said that the worker should remain off work for a week and undergo physiotherapy.

The worker then completed an application for compensation, dated July 17, 2006. He said his injury had occurred between 9:30 a.m. and 10:00 a.m. that day. He had not immediately notified his employer because he believed he had simply experienced a pain in his neck; however, it later worsened. When asked to describe fully what had happened to cause the injury, the worker said he had lifted something and he had felt a pinch in his neck. Approximately 30 minutes afterward he had experienced numbness in the fingers of his right hand, as well as some pain in his middle back. He advised that his injuries consisted of neck pain and right-hand numbness. He made no mention of elbow complaints, and said he had not experienced previous pain or disability in the area of injury. There were no witnesses to the incident.

The July 20, 2006 x-ray of the worker's cervical spine showed some scoliosis convex to the left, presumably on the basis of muscle spam. There was a congenital fusion at C5-6. No bony injury was identified.

The employer protested the acceptance of the worker's claim. When asked whether the worker's activities at the time of injury had been for the purpose of the employer's

business, the employer said they did not know because the worker could not remember what he did. In the employer's view, if someone had picked up an object at work and had suffered a neck injury, it would be reasonable to expect the person to remember what the object was. The employer added that the worker had also been observed talking on his cell phone between 11:00 a.m. and 11:30 a.m. He had been holding the cell phone up against his right ear with no apparent problem. The employer contrasted this information with the contents of the first-aid report completed shortly after that, which indicated that the worker complained of numbness in the fingers in his right hand and pain in his right elbow.

A July 17, 2006 progress report from Dr. C.M. indicated that the worker was doing much better and his pain was settling. He had an improved range of motion in his neck and was ready to return to work. The doctor cautioned, however, that the worker should not lift heavy objects for the first few days; rather, he should "ease" back into full duties. The worker, however, did not return to work and advised that his neck had once again become very sore.

On August 21, 2006 a case manager spoke with the worker and asked him why he thought his injury was work related when he could not remember what he had been lifting at the time he felt symptoms suddenly come on. The worker said that he remembered that he had been lifting, but simply could not remember whether he had been lifting a harness or a box of clamps. He did not know how much a box of clamps weighed but said that a harness weighed between 15 and 20 pounds. He confirmed that he had not experienced prior neck problems before the sudden onset of neck pain at work. He recalled that when he felt the sensation in his neck, he had been lifting at an angle while bending. The worker's general job duties involved cutting and joining pipe, which he then glued together and clamped into a harness assembly. He then moved the assembly onto a cart, and when the cart was full of assemblies he pushed it to another location where other workers installed the harness assemblies he had made.

The worker also advised that, in addition to his neck pain, he had developed pain in his ear as a result of an infection. He had stopped going to physiotherapy because of his pain. It was unclear to the case manager whether it was the worker's neck pain or his ear pain that had caused him to stop attending physiotherapy.

On September 8, 2006 the case manager again spoke with the worker, who advised that he had been medically cleared to return to work; however, he planned to return to a new employer. The case manager informed the worker that she planned to visit the work site to try to determine what had happened, and she invited the worker to attend during the site visit. The case manager explained that she accepted the worker's evidence that he had a problem with his neck; however, she was seeking clarification that it had resulted from a work incident as described. The worker informed the case manager that he had both moved a box of clamps and he had moved a harness, and

his neck had only started to hurt approximately a half hour after that. That was why, when he had thought back, he was unsure which item he had been lifting when he had felt the pinching sensation in his neck.

The case manager arranged a site visit for September 15, 2006. The worker informed the case manager that he had started a new job and apologized for being unable to attend the site visit because he did not want to take time off from his new employment. The case manager then met with the worker's supervisor at the job site and received a copy of the first-aid report. The case manager reviewed the workstation in question and the supervisor explained how the job tasks were accomplished. The case manager had the opportunity to view some clamps, which were kept in a small cardboard box, and to lift up a completed harness. The weight of the box of clamps was insignificant. The completed harness was fairly bulky and weighed approximately 15 pounds.

In a September 15, 2006 claim log entry the case manager summarized the relevant information and acknowledged that the worker had been diagnosed as suffering from a cervical strain. It was, however, necessary under the terms of the Act for the evidence to show that the cervical strain was due to personal injury arising out of and in the course of the worker's employment. While there was evidence that the worker reported the cervical strain to the first-aid attendant at work, there was insufficient evidence to show that something in the work had caused the strain to occur. Although the worker had felt a pinch in his neck while lifting something at work on July 17, 2006, he could not identify what he had been lifting at the time. A job site investigation had failed to clarify the initial facts and the worker's description of the mechanism of injury remained vague. The case manager concluded that the fundamental facts necessary to bring the provisions of the Act into play had not been presented and therefore the worker's claim could not be accepted as a Board responsibility.

The worker disagreed with this decision and appealed to the Review Division.

The review officer noted the worker's argument that the evidence established the occurrence of a lifting incident, which triggered immediate symptoms in the worker's neck, and which had been properly reported a short time later. The presence of injury in the worker's neck consistent with the described mechanism had been established in the medical evidence. The worker had also raised the question of the applicability of section 5(4) because the evidence showed that the injury arose in the course of employment and therefore should be presumed to have arisen out of the employment, since the contrary had not been shown.

The employer's argument established that lifting articles such as pipes, clamps, and harnesses was part of the worker's routine duties. Simply picking something up in the course of regular work routine activity did not meet the definition of "accident" for the purposes of section 5(4) of the Act. The worker's description concerning the

occurrence of the injury was vague and unclear. Further, between 11:00 a.m. and 11:30 a.m. the worker had been observed talking on a cell phone, which he held for over ten minutes in his right hand with no visible signs of discomfort.

The worker responded to the employer's submission by pointing out that the objects that he regularly lifted were not always of the same weight. Neck injuries could occur from lifting heavy objects, and when a job routinely demanded heavy lifting the likelihood of injury increased. The only identified cause of the worker's neck strain had been lifting at work. The worker's evidence from the time he reported to the first-aid attendant had always been that the onset of significant symptoms had progressed over time. Therefore, an observation that he had used his cell phone did not negate the fact that he had suffered a work injury.

The review officer found that the circumstance described by the worker did not fall within the concept of "accident" as defined in the Board's policy item #14.10. Therefore, no presumption could be applied to the adjudication of the worker's entitlement.

Given the vagueness of the worker's description of what he had been doing at the time he felt the pinching sensation in his neck, the review officer concluded that the worker had been speculating when he had informed the first-aid attendant that his injury had been caused by his work. Although the worker might have experienced the onset of symptoms while in the course of his employment, no plausible mechanism of injury had been established, either through the worker's evidence or during the site visit.

The review officer consequently confirmed the case manager's decision that there was insufficient evidence to establish a cause-and-effect relationship between the worker's employment and the diagnosed cervical strain. The evidentiary burden established by section 5(1) of the Act had not been met and the claim could not therefore be accepted as a Board responsibility.

The worker disagreed with the review officer's decision and appealed to WCAT.

At the hearing the worker reiterated the evidence that he had given to the case manager. He emphasized that prior to the onset of pain at work in July 2006, he had not experienced any previous neck pain or injury. He did not participate in physical activities such as sports because of a congenital knee problem. With respect to the congenital cervical fusion shown in the x-ray, he said that he had not been aware of this in the past.

The worker's previous employment had been with a fast-food outlet and later, for one week, with a deck-construction company. Prior to starting work with the injury employer he had been unemployed for three or four months.

The worker described the nature of his activities with the injury employer, which was consistent with the description contained on the claim file. He said he had experienced no problems at all with the work at first. He handled objects that weighed between 5 pounds and 20 pounds on a regular basis, and sometimes picked up bundles of pipe that weighed 50 pounds. He said that the weights of the harness assemblies he made depended on the size of the harness and the type of pipe involved. He worked at a table at waist height. The lifting he did varied from straight up and down to lifting at angles.

At the start of his shift on July 17, 2006 the worker's back and neck were perfectly fine. Between the start of his shift and 9:30 a.m. he had worked on building a harness. He alternated between standing at the bench and standing at a pipe cutter. The work proceeded at a constant pace, and he had been able to keep up.

The worker recalled that somewhere around 9:30 a.m. he had noticed a pinching in his neck "like a bad sleep", which had become progressively worse. He said he had probably been assembling or lifting a harness when he had noticed the pinching. For the first few minutes his neck felt tender, and then it worsened. He recalled that he had then modified his work activities as a result of his neck symptoms. He said he had asked a co-worker to come and help him to apply a clamp because he found he was unable to squeeze it with his right hand. He recalled he had gone to see the first-aid attendant at approximately 11:45 a.m.

When asked what he had been doing between 9:30 a.m. and 11:45 a.m., the worker said he had focused on gluing pipes together. He had tried to avoid applying clamps and other activities that involved gripping or pinching.

The worker said he was "pretty sure" that he had been lifting a harness when his neck pain had appeared because a box of clamps was quite light. He said that he had initially mentioned the possibility that he had injured his neck while handling a box of clamps because they had been stored on a low shelf and he had had to bend in order to reach them. By the time of the hearing, however, he had become "pretty sure" that the neck pain had come on when he had been lifting a harness, "if anything".

The worker had had a break before going to see the first-aid attendant. He explained that during his break he had spoken with his mother by cell phone and told her about his symptoms. She had told him he should go to the first-aid attendant.

When asked by the employers' adviser whether he actually remembered feeling a sensation in his neck while lifting an object at work, the worker said that he was "positive" that it was "probably" while lifting a harness. He recalled that there had been a sudden tight pinching, which had appeared instantly. He said he felt sure he had been lifting something and that he had then set it down quickly. He could not, however, recall what he had actually been lifting or where he had set it down. The worker said

also that he had not mentioned his neck symptoms to anybody at work before he had seen the first-aid attendant. Although he had been working near someone else, he had not been working together with anybody.

The employer presented a witness, who said that he had observed the worker on July 17, 2006 sitting outside the lunch area and talking on a cell phone for what was, in the witness' view, an extended period of time. The witness gave his own impression of the worker's demeanour, which he thought was "furtive" and I find is not useful in determining the matter at issue before me in this appeal. A time record (exhibit #1) was also provided at the hearing, indicating that the worker had been off work for family reasons on the Friday previous to the onset of neck pain. I likewise find this evidence is not helpful in that it is not material to the issue I must decide in this appeal.

The witness said that in the course of ten minutes or so while he observed the worker talking on the cell phone, the worker had used both hands alternately to hold the phone, but mostly had used his right hand. He had displayed no obvious signs of discomfort while doing so. Nothing else about the worker's actions had been memorable for the witness.

The workers' adviser argued that the witness' evidence had provided no new information. The worker had already said that he had spoken by phone with his mother. Switching hands while using his cell phone was not damaging to the worker's credibility; in fact, it confirmed his evidence that he was having problems with his right arm.

In the workers' adviser's submission, section 5(4) of the Act should apply to the circumstances of the worker's appeal. "Something" had happened at work. The onset of symptoms had been sudden and unexpected. The injury had been reported to the employer in a reasonable time, and the first-aid attendant had confirmed the presence of symptoms consistent with a neck injury. Further, the medical report from the worker's physician that same day established the presence of a cervical strain. Since it was apparent that the cervical strain had occurred in the course of the worker's employment, and since the worker had been lifting something for the purpose of his employment at the time the symptoms suddenly started, it should be presumed that the injury also arose out of the employment.

In the alternative, the workers' adviser argued that the Board had improperly misconstrued the worker's evidence as hindsight, when in fact he had, from the outset, identified work-required lifting activity as the cause of his neck injury. Although he said he could not remember whether he had been lifting clamps, which were of insignificant weight, or a harness, which weighed between 15 and 20 pounds, it was logical to conclude that he was likely lifting a harness, since it was capable of causing the diagnosed injury, and since the worker had actually felt a sudden, pinching pain in his neck at the time.

In the event that the pre-existing congenital fusion detected on the x-ray should be viewed as rendering the worker more susceptible to injury, that would not preclude his claim from being accepted by the Board. The Board's policy, at item #22.20, clearly provided for the application of the "thin-skull" rule, and therefore a pre-existing susceptibility to injury would not, for that reason alone, constitute a bar to compensation.

Overall, the workers' adviser argued that there was sufficient evidence to establish that the worker had suffered personal injury arising out of and in the course of his employment on July 17, 2006 and consequently his claim should be accepted under section 5 of the Act.

The employers' adviser agreed that the worker's routine activities involved lifting pipes, harnesses, and clamps. The employers' adviser said that the appearance of symptoms while in the course of routine work activity did not match the profile of "accident" as described in the Board's policy. In order to satisfy the provisions of section 5(4) of the Act, an "accident" was interpreted in its basic traumatic sense, involving sudden force. No such incident had occurred in this case, and consequently it would be necessary to satisfy the evidentiary burden required under section 5(1) of the Act.

The employers' adviser pointed out that policy item #14.20 provides that a possibility must be supported by evidence, and that a speculative possibility is not sufficient to found a claim. The worker's description of his work activity at the time he felt symptoms in his neck was vague and unclear. He said he had been lifting "something", but he did not remember what he had been lifting. The worker's evidence at the hearing was characterized by modifiers such as "probably" and "possibly". The employer' adviser argued that the worker had not sufficiently identified the nature of the lifting activity such as to establish its causative significance in the mechanism of injury.

Further, the employers' adviser pointed to the evidence of the witness and queried how, if the worker had neck and arm problems, the symptoms had not been readily apparent to the witness who had observed him for ten minutes. The witness' observation did not confirm the worker's evidence that his symptoms had become severe to the point that it had been necessary to seek first aid shortly after he had been observed while using his cell phone.

The employers' adviser was also concerned that a number of new items of information had been mentioned for the first time at the hearing. It was puzzling that the evidence, which was reasonably relevant to the disputed matter, had not been brought forward earlier.

With respect to the application of the "thin skull" rule, the employers' adviser pointed out that even in such circumstances there still needed to be evidence establishing causative significance on the part of the work activity. The worker's evidence, in the employer's view, was too vague to establish this necessary causal link.

The workers' adviser, in rebuttal, reiterated the points that previously had been made on the worker's behalf and questioned the Board's policy practice of restricting the definition of accident to "trauma". The workers' adviser argued that in any event it would be unrealistic and impractical to try to separate a regular work-required movement resulting in traumatic injury from an irregular work-required movement resulting in traumatic injury. In either case, it is to the work-required movement that causative significance for the injury must be attributed; therefore, the claim should be accepted. The workers' adviser reiterated the worker's position that the evidence clearly established that the injury had occurred in the course of the employment. It would, in the circumstances, be speculative to say that the injury had not also arisen out of that employment.

Reasons and Findings

Section 5(1) of the Act provides that a personal injury or death must arise "out of and in the course of the employment" before benefits can be paid.

Section 5(4) of the Act provides that where the injury is caused by an accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment. Section 5(4) of the Act also provides that where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

The relevant Board policy is found in the RSCM II.

Policy item #14.10 (Presumption) discusses the intent of section 5(4) of the Act. The policy provides that the term "out of employment" relates to the cause of the injury and the term "in the course of employment" relates to the time and place of the injury. Where an injury results from an accident, evidence is only needed to show either that the injury arose out of the employment or that it arose in the course of employment. The balance is presumed unless there is evidence to the contrary. This presumption only applies when the injury is caused by an accident. The presumption is not a conclusive one because it will be rebutted if opposing evidence shows that the contrary conclusion is more likely. The policy provides that all reasonable efforts must be made to obtain the available evidence.

Regarding the point that the presumption applies only when the injury is caused by accident, the policy states:

> This term is defined in section 2 to include a "wilful and intentional act, not being the act of the worker…" and a "fortuitous event occasioned by a physical or natural cause". This is not an exclusive definition of the term, but the word has been interpreted in its normal meaning of *a traumatic incident*. It has not, for example, been extended to cover injuries resulting from a routine work action or a series of such actions lasting over a period of time.
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> [italic emphasis added]

This statutory presumption is also referred to in policy item #97.20.

Before it is possible to determine whether section 5(1) or section 5(4) of the Act may come into play, there must first be evidence to support the occurrence of a personal injury.

In this case there is evidence to support the occurrence of personal injury. The worker described an onset of symptoms consistent with a neck injury. He reported the injury to the employer and Dr. L.B. diagnosed a cervical strain that same day. The cervical spine x-ray taken three days later confirmed the presence of scoliosis, convex to the left, consistent with muscle spasm. On the basis of this evidence, I am satisfied that the worker, on July 17, 2006, had symptoms consistent with a cervical strain, which is consistent with "personal injury" in the context of the Act. The question remains, however, whether the worker's personal injury in the form of neck strain arose out of and in the course of his employment.

The worker said the onset of neck symptoms occurred when he was lifting an object in the course of his employment. Lifting objects was a regular part of his work, and he had done so many times in the past without incident. Nevertheless, in appropriate circumstances, I acknowledge that lifting an object could be a potential cause of injury. Whether injury by "accident" occurred in this case, however, will determine whether the presumption under section 5(4) of the Act may be applied. I note policy item #14.10 states that the term "accident" within the meaning of section 5(4) of the Act should be applied in its normal traumatic sense and has not been extended to cover injuries resulting from a routine work action. There was no traumatic event here. The information provided by the worker showed that he was engaged in a routine work action when he felt a pinching sensation in his neck. The work activity was so unremarkable that when he reported to the first-aid attendant a couple of hours afterward, the worker could not recall what he had been lifting at the time. I find that even though the worker felt a sudden sensation in his neck, there was no trauma within the meaning of section 5(4) of the Act and policy item #14.10. Consequently, the

presumption under section 5(4) of the Act does not apply in this case. That means that the evidence must establish that the worker suffered personal injury arising out of, as well as in the course of, his employment.

Policy item #97.00 (Evidence) outlines the approach the Board takes when dealing with evidence. After obtaining evidence relating to a claim, the evidence is weighed. Policy item #97.00 states, in part:

> The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the Adjudicator should consider what other evidence might be obtained, and must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached. But if it appears upon the weighing of the evidence that the disputed possibilities are evenly balanced then the rule comes into play which requires that the issue be resolved in accordance with that possibility which is favourable to the worker.

The policy goes on to provide that if after an investigation and weighing of evidence, there is nothing objective to indicate any activity at work was potentially causative of the condition complained of, at or near the time alleged by the worker, it can be fairly said that the claim has not been established. The policy also states in part as follows:

> The Board, as a quasi-judicial body, must make its decisions according to the evidence or lack of evidence received, not in accordance with speculations unsupported by evidence…If one speculates as to the cause of a condition of unknown origin, one might attribute it to the person's work or to any other cause, and one speculated cause is no doubt just as tenable as any other. However, the Board can only be concerned with possibilities for which there is evidential support…

The test of whether evidence is considered credible has been described as follows:

> The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
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> *Farnya v. Chorny* [1952] 2 D.L.R. 354 at 357

The appearance of a sudden pinching sensation in the neck while lifting, as described by the worker, was not witnessed. That is not surprising, since, although there was a co-worker in the vicinity, the worker was working alone at the time, on his assigned tasks. The worker did not report the incident immediately to his employer. I find that was reasonable in the circumstances because, according to the worker's evidence, his symptoms were not immediately severe and he thought at first that he had simply experienced a flare-up of "sleep pain". It was not until the symptoms reportedly became more severe that the worker sought first aid. The delay in seeking first aid was not excessive, and therefore should not, for reason of delay alone, be viewed as an impediment to accepting the worker's claim.

The focal point of the dispute in this appeal is the mechanism of injury. Specifically, the credibility of the worker's evidence has been called into question. The principal matter of concern is the worker's apparent inability to remember what he was lifting when he felt the sudden and unexpected pinching sensation in his neck that he described. The worker, in conversation with the case manager, was clear that when lifting the object he had been at an angle while bending. At the hearing he said that he had quickly set the object down when he felt the pinching in his neck. Yet, throughout, the worker remained vague about what he had been lifting at the time. He narrowed the possibilities to either a pipe harness assembly, which weighed 15 or 20 pounds, or a box of hose clamps of insignificant weight. In considering the harmony of the worker's information "with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions", I find it would not be reasonable to confuse in one's memory a pipe harness with a box of clamps. They are not only dissimilar in shape and size; they are considerably disparate in weight. Further, although I recognize that it would be unreasonable to expect a person to have perfect and consistent recall in all things, I find that the incongruity between the worker's ability to recall key information such as the position he was in when he carried out the lift in question, and his inability to identify the object he was lifting at the time, surpasses the bounds of credibility. Simply put, and notwithstanding the fallibility of the average memory, I find it is not reasonable that the worker's powers of recall should be subject to such marked inconsistency.

The worker's evidence at the hearing that he had probably been assembling or lifting a harness when he felt the onset of neck symptoms, and that he was "pretty sure" he had been lifting a harness rather than a box of clamps, because a box of clamps was quite light, is more consistent with speculative hindsight than with recall of an actual event or incident. When pressed in the hearing to state whether he actually remembered feeling a sensation in his neck while lifting an object at work, the worker said that he was "positive" that it was "probably" while lifting a harness that his neck pain came on. These statements from the worker, in context with his earlier statements to the first-aid attendant and to Dr. L.B., leads me to conclude that the worker does not, and did not, actually remember feeling the onset of symptoms while lifting something at work; rather, he thought back to the nature of his work activity and concluded that the most likely

explanation for the appearance of his symptoms was that he had injured his neck while lifting something at work. The worker's statement describing what he was doing when he felt neck pain is not, therefore, evidence; it is conjecture.

Section 5(1) of the Act requires that there be evidence to establish that personal injury arose out of and in the course of employment. In the case at hand, I conclude that, although he complained of neck pain to the first-aid attendant at work on July 17, 2006, there is insufficient evidence to establish that the worker suffered personal injury arising out of his employment. The statutory threshold tests for entitlement to compensation have not, therefore, been met and the claim cannot be accepted as a Board responsibility.

As the worker has acknowledged that he does not know what he was lifting when he felt the pinch in his neck, it could be argued that the disputed possibilities are evenly balanced and therefore, under section 99 (applicable to Board decisions) and section 250(4) of the Act (applicable to WCAT decisions), the issue must be decided in accordance with the possibility which is favourable to the worker. This only applies, however, where there is evidence of equal weight for and against the claim. As outlined in policy item #97.10:

> While an absence of positive data does not necessarily mean that a condition is not related to a person's employment, it may mean that there is a lack of evidence that any such relationship exists. The Board, as a quasi-judicial body, must make its decisions according to the evidence or lack of evidence received, not in accordance with speculations unsupported by evidence. Section 99(3) of the *Act* applies when "the evidence supporting different findings on an issue is evenly weighted in that case." **However, if the Board has no evidence before it that a particular condition can result from a worker's employment, there is no doubt on the issue; the Board's only possible decision is to deny the claim. If one speculates as to the cause of a condition of unknown origin, one might attribute it to the person's work or to any other cause, and one speculated cause is no doubt just as tenable as any other. However, the Board can only be concerned with possibilities for which there is evidential support and only when the evidence is evenly weighted does section 99(3) apply.**
>
> [emphasis added]

The evidence fails to establish that his neck strain was caused by something in his employment. The worker's evidence that he was lifting something at work at the time he felt sudden symptoms in his neck lacks credibility. While I can conclude that the worker had a neck problem, I cannot conclude that the neck problem was caused by

lifting at work as the worker described. Therefore, the disputed possibilities in this case are not evenly balanced. The evidence supporting different findings is not evenly weighted because the evidence does not support a conclusion that the worker's neck injury was due to lifting at work. The only possible decision, therefore, is to deny the claim.

In summary, I find that the worker's diagnosed cervical strain was not caused by personal injury arising out of and in the course of his employment on July 17, 2006. I deny the appeal.

Conclusion

In accordance with the foregoing reasons and findings, I confirm the review officer's February 9, 2007 decision.

No reimbursable expenses were claimed concerning this appeal and I make no order for reimbursement of expenses pursuant to section 7 of the *Workers Compensation Act Appeal Regulation*.

Iain M. Macdonald
Vice Chair

IMM/pmc/jd