

Noteworthy Decision Summary

Decision: WCAT-2010-03142 **Panel:** H. McDonald **Decision Date:** November 25, 2010

Section 5(4) of the Workers Compensation Act – Former policy items #17.00 (Hazards Arising from Nature) and #17.10 (Insect Bites) of the Rehabilitation Services and Claims Manual, Volume II – Bee sting – Current policy item #C3-14.30 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy for its analysis of insect stings under the old version of Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) in effect prior to July 1, 2010. The decision compares the old version of Chapter 3 to the new policy in effect after July 1, 2010.

On September 17, 2009 the worker, a delivery truck driver, was stung on his left cheek when a bee flew into his truck. The worker had a serious allergic reaction to the sting and was taken to hospital. He returned to work on October 5, 2009, and that same day was again stung by a bee on his left hand. He returned to full duties on October 13, 2009. The Workers' Compensation Board, operating as WorkSafeBC (Board), initially accepted the worker's claims for compensation for the bee sting injuries. The employer protested the claims. The Board reconsidered and denied the worker's claims for compensation on the ground that in each case there were no employment factors which attracted bees to the delivery truck and that the employment situation was coincidental to the bee stings. The Review Division confirmed the Board's decisions. The worker appealed to WCAT.

WCAT allowed the worker's appeals. The panel noted that, as the worker's claims occurred before July 1, 2010, the previous version of RSCM II, Chapter 3 applies. The panel found that as the bee stings occurred when the worker was in the course of carrying out his job as a truck driver the section 5(4) of the *Workers Compensation Act* (Act) accident presumption applied and, unless evidence established that the worker was at equal or less risk than the general population, under section 5(1) of the Act the worker was entitled to compensation for his injuries. The panel found that the worker's employment required him to drive a non air-conditioned vehicle outside for most of the day in warm weather so he kept his windows rolled down to keep cool. In this respect the worker's employment placed him in a situation that was more likely to attract insects than the public at large. While this matter fell under the old policy, the panel did note that the wording in the current policy, item #C3-14.30, makes it clear that a worker is entitled to compensation for an insect bite when during the course of employment, because of a particular activity required by the employment, the worker is exposed to the hazard of insect bites. Accordingly, the panel concluded that in this case the worker's bee sting injuries arose out of and in the course of the worker's employment as a truck driver with the employer.

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Panel: Heather McDonald, Vice Chair

Introduction

- [1] The worker drives a delivery truck for the employer. On September 17, 2009 a bee flew into the driver's side window of the worker's truck and stung his left cheek. The worker had a serious allergic reaction to the sting and was unconscious when emergency crew arrived to assist him. He was taken to the hospital and recovered. The worker returned to work on October 5, 2009. That same day the worker was again stung by a bee. While in the course of his employment the worker parked the truck in an outdoor parking lot. While still in the truck the worker put on his jacket not realizing there was a bee inside it. The bee stung the worker on his left hand. Again the worker suffered an allergic reaction. His hand began to swell and he immediately attended the local hospital. The worker returned to work on October 6 and 7, 2009 but the swelling in his left hand prevented him from working on October 8 and 9, 2009. The worker returned to full duties on October 13, 2009.
- [2] The worker made claims for compensation to the Workers' Compensation Board (Board)¹. The Board initially accepted the worker's claims for compensation for injuries sustained in the bee stings. The employer protested the claims and in two separate decisions dated November 17, 2009 the Board reconsidered the matters and denied the worker's claims for compensation. In each decision the Board accepted that the worker sustained an injury arising in the course of his employment and that the injury was due to an accident. In each decision the Board accepted that the presumption in section 5(4) of the *Workers Compensation Act* (Act) applied in the circumstances but decided that the presumption was rebutted by evidence proving that the worker's injury did not arise out of his employment. Applying policy items #17.00 (Hazards Arising from Nature) and #17.10 (Insect Bites) in Volume II of the *Rehabilitation Services and Claims Manual* (RSCM II) (the version in effect at the time) the Board concluded in each case that there were no employment factors which attracted bees to the delivery truck and that the employment situation was coincidental to the bee sting.
- [3] The worker requested the Board's Review Division to review the November 17, 2009 Board decisions. In a decision dated April 29, 2010 the Review Division confirmed both decisions.
- [4] On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the worker submits that the Board erred in denying his claims for compensation. He submits that he

¹ Operating as WorkSafeBC

suffered bee sting injuries which arose out of and in the course of his employment as a delivery truck driver.

Issue(s)

- [5] Does the accident presumption in section 5(4) of the Act arise in these incidents of bee stings? If so, does the evidence in the two cases rebut the statutory presumption? Did the bee sting injuries arise out of and in the course of the worker's employment as a truck driver with the employer?

Jurisdiction and Procedural Matters

- [6] The worker filed his appeals with WCAT under subsection 239(1) of the Act. Under section 250(1) of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. Pursuant to section 250(2) of the Act WCAT must make its decision based on the merits and justice of the case, but in doing so WCAT must apply a policy of the board of directors of the Board that is applicable in that case. In this case, no issue was raised regarding the lawfulness of the applicable Board policies and nothing in these proceedings has raised such a concern with me; therefore I will apply those policies in these appeals.
- [7] Relevant policy is found in the RSCM II, specifically Chapter 3. On July 1, 2010 the Board replaced RSCM II Chapter 3 policy items #12.00 through #24.00 with revised policy items #C3-12.00 through #C3-23.30 and policy item #34.55. Those policy revisions apply to all injuries, mental stress claims, and accidents that occur on or after July 1, 2010. As the worker's claims in this case occurred before July 1, 2010, the previous version of RSCM II Chapter 3 applies. Particular policies of relevance are policy items #14.00 (Arising Out of and In the Course of Employment); #14.10 (Presumption); #17.00 (Hazards Arising from Nature) and #17.10 (Insect Stings).
- [8] Section 250(4) of the Act provides that if WCAT is hearing an appeal regarding the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.
- [9] The worker was represented by a workers' compensation consultant in these appeal proceedings. WCAT invited the employer to participate in the appeals but it did not respond to the invitation. On his notice of appeal the worker requested an oral hearing but I decided that an oral hearing was unnecessary. The criteria referred to in Rule #7.5 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) did not apply to suggest that it would be appropriate to convene an oral hearing in these appeals. The worker's credibility is not in issue and there is no dispute about the events that led up to the worker's bee sting injuries. The worker is represented by a workers' compensation consultant and therefore there are no issues surrounding literacy or inability to

effectively present a case in writing. The issues in these appeals turn on the interpretation of RSCM II policies and thus an appeal process by way of written submissions would give the worker a reasonable and fair opportunity to present his case.

Relevant Law and Policy

- [10] Section 5(1) of the Act provides that where a personal injury arising out of and in the course of employment is caused to a worker, the Board must pay compensation out of the accident fund as provided by Part 1 of the Act.
- [11] Section 5(4) of the Act says that in cases where an 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; and 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.
- [12] Section 1 of the Act defines “accident” as including a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause.
- [13] RSCM II policy item #14.00 (Arising Out of and in the Course of Employment) provides a non-exhaustive list of criteria as guidance for determining whether an injury arose out of and in the course of employment. The criteria include questions such as whether the injury occurred on the premises of the employer, in the course of doing something for the employer’s benefit or in response to instructions from the employer, or in the course of using equipment or materials supplied by the employer. Other criteria ask whether the injury occurred during a time period for which the worker was being paid or whether the injury was caused by some activity of the employer or a colleague. A criterion that is of particular relevance in “insect bite” claims is whether the risk to which the worker was exposed was the same as the risk to which the worker is exposed “in the normal course of production.”
- [14] RSCM II policy item #14.10 (Presumption) says that the term “accident” in section 1 of the Act has been interpreted in its normal meaning of a traumatic incident. It has not been extended, however, to cover injuries resulting from a routine work action or series of such actions lasting over a period of time.
- [15] RSCM II policy item #17.00 (Hazards Arising from Nature) notes that an injury may result from “natural elements” such as an insect or plant sting or exposure to extreme weather conditions. The policy says that compensation in these types of cases “is limited to situations where the job is of such a nature as to place the worker in a greater position of hazard to these elements as compared with the public at large.”

- [16] RSCM II policy item #17.10 (Insect Bites) gives an example of the application of policy item #17.00, stating as follows:

A logger stung while working in the bush would have a claim accepted, as would a letter carrier who is stung while walking through a flower garden in summer to deliver a letter. Claims have also been accepted from people bitten by tropical insects while unpacking bananas.

On the other hand, an office worker stung by a bee in the course of office work would not generally qualify.

Evidence, Reasons and Findings

- [17] The initial Board decisions and the Review Division decision describe the evidence in detail. The worker is familiar with those decisions and accordingly it is unnecessary for me to repeat that detail in this decision. I will focus on the key evidence relevant to the appeal issues.

- [18] There is no dispute that the bee stings occurred when the worker was in the course of carrying out his job duties as a truck driver for the employer. Therefore, I agree with the approach of the Board and Review Division decisions which applied the section 5(4) accident presumption in relation to insect stings. For examples of a similar approach in appellate decisions, see *WCAT-2008-02713* (September 16, 2008), *WCAT-2010-00242* (January 26, 2010) and *WCAT-2010-01913* (July 13, 2010). As noted in *WCAT-2008-02713* at paragraph 75:

A sting is an accident and the swelling associated with the sting would be an injury. If a sting occurred in the course of a worker's employment, the issue would switch to an examination of whether the presumption was rebutted. *WCAT Decision #2003-00254* illustrates the effect of subsection 5(4): the presumption is rebutted if evidence establishes the worker was at equal or less risk than the general population. The issue is not whether the evidence affirmatively establishes the worker was in a greater position of hazard.

- [19] In this case the bee stings were accidents causing the worker injuries that arose in the course of his employment with the employer as a delivery truck driver. Therefore, section 5(4) of the Act applies and unless evidence establishes that the worker was at equal or less risk than the general population, under section 5(1) he is entitled to compensation for his injuries. This brings into issue the interpretation and application of RSCM II policy item #17.00 which says that compensation in insect bite cases is limited to situations where the job is of such a nature as to place the worker in a greater position of hazard to these elements as compared with the public at large.

[20] The Board concluded that the fact that the worker sustained insect bites while at work was coincidental and not a hazard in his employment. In proceedings before the Board the worker submitted that the employer used two products on its tempered glass to transport it during delivery. The worker said that these products attract bees and wasps, thereby placing him at a greater risk of sustaining an insect bite than the public at large. The worker further noted that in any event, bees sting to protect themselves or their hives or territory and any person who works outdoors, including drivers who drive with their windows open during warm weather, is susceptible to bee stings. The weather was warm and sunny on the two days, September 17 and October 5, 2009, when the worker was stung. The worker's truck was not equipped with air conditioning and he had his windows rolled down to keep cool.

[21] The Board obtained the Material Safety Data Sheets (MSDS) for the products in question and determined they were both odourless. One product is tan in colour; the other is white in colour. The MSDS sheets indicated that the use of the products on the glass to be delivered did not attract bees and/or wasps. The Board entitlement officer also found there was no evidence of any work items which would have attracted bees to the delivery truck. The entitlement officer did not find any employment factors which would attract bees to the delivery truck. Therefore, the Board entitlement officer found the worker was not exposed to a greater risk of being around bees/wasps than the general population as a result of his employment. She denied the worker's claims for compensation.

[22] The review officer focused on the MSDS information for the products used on the tempered glass delivered in the employer's delivery trucks. The evidence did not indicate the products attracted bees and/or wasps. She concluded:

Accordingly, as there is no evidence to support that the use of this material increased the risk of attracting wasps and/or bees (and therefore increase the likelihood of being stung), I am unable to find that the worker was placed at higher risk than the general population as a result of using this material during the course of his employment...

Therefore, I am satisfied based upon the available evidence that the section 5(4) presumption is rebutted.

[23] In his submission to WCAT the worker submitted that it was irrelevant whether an odour or other substance inside the truck attracted bees. He said the important evidence is that he is required to operate the employer's truck throughout the day outside and he is exposed to bee stings in the same way any other worker who is required to work outdoors such as a logger working outdoors in the bush or a mail carrier delivering mail.

[24] In considering whether the section 5(4) accident presumption is rebutted, RSCM II policy item #17.00 says that a key question is whether the worker's employment placed him in a situation that was more likely to attract insects than "the public at large". The

problem with the policy is that it does not provide a definition of “the public at large”. In *WCAT-2010-01913* (July 13, 2010) the panel observed it could be said of any worker who works outside, including the policy examples of a logger in the bush or a mail carrier delivering mail outside, that they might have experienced an insect bite on a day off work if they were gardening outside or camping outside in the bush. Therefore the panel characterized the relevant issue as whether the worker’s employment required the worker to be outside near a hazard that occasioned the bites.

[25] I agree with the worker that in this case his employment required him to be driving a non air-conditioned vehicle outside for most of the day in warm weather. Understandably he kept his windows rolled down while working to keep his work environment cool. In my view the worker’s employment placed him in a situation that was more likely to attract insects than the public at large. This is because most members of the public do not spend most of their day, be it a work day or a school day, driving around out of doors, moving from one environment to another, in a non air-conditioned vehicle. The fact of the worker experiencing two bee stings on consecutive days at work (albeit some weeks apart due to the time required by the worker to recover from the effects of the first sting) suggests that it was not a coincidence. I find that bee stings on two consecutive days at work would not likely happen to any member of the public at large. The worker’s employment situation puts him in a situation where he is more likely, in warm weather, to be exposed to insect bites. Therefore, I find that in this case, the section 5(4) presumption has not been rebutted by contrary evidence. I find that the presumption applies, namely, that the worker’s injuries not only occurred while he was in the course of his employment but also arose out of his employment.

[26] I am aware of *WCAT-2007-03476* (November 7, 2007) which denied a claim by a bus driver who was stung by a wasp which entered the bus after the driver opened the door to admit passengers. I disagree with the result in that case. RSCM II policy items #17.00 and #17.10 have been difficult to interpret and apply. I note that in Chapter 3 of the current version of RSCM II (that is, the version that applies to injuries/accidents that occur on or after July 1, 2010), policy item #C3-14.30 (Hazards Arising from Nature) now states:

An injury or death may result from natural elements. For instance, a worker may be stung by an insect or plant or suffer from exposure to extreme weather conditions. *An injury or death resulting from a natural element is considered to arise out of and in the course of the employment where a particular activity required by the employment exposes the worker to these natural elements.*

If an injury is caused by accident, the rebuttable presumption contained in section 5(4) of the Act applies.

[italic emphasis]

- [27] The “History” comments subsequent to policy item #C3-14.30 state that the policy results from a consolidation of former RSCM II policy items #17.00 (Hazards Arising from Nature); #17.10 (Insect Bites); #17.20 (Plant Stings); and #17.30 (Frostbite, Sunburn and Heat Exhaustion). My view is that the wording in the current policy makes it clearer that a worker is entitled to compensation for an insect bite when during the course of employment, because of a particular activity required by the employment, the worker is exposed to the hazard of insect bites. In this case, this was the worker’s situation of experiencing two bee stings while in the course of his employment as a delivery truck driver for the employer. Under both versions of RSCM II policy he is entitled to compensation for his bee sting injuries.

Conclusion

- [28] For the foregoing reasons I allow the worker’s appeals and vary the Review Division decision dated April 29, 2010. I find that the section 5(4) accident presumption arises with respect to the two bee stings experienced by the worker. I find that the evidence in this case does not rebut the accident presumption with respect to either bee sting injury. I find that the bee sting injuries arose out of and in the course of the worker’s employment as a truck driver with the employer. The Board must now determine the extent of the worker’s benefit entitlement.
- [29] There was no request for reimbursement of appeal expenses, none are apparent from the file, and therefore I make no order in that regard.

Heather McDonald
Vice Chair

HMcD/hb