WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1220/12

BEFORE:	G. Dee : Vice-Chair M.P. Trudeau : Member Representative of Employers R.W. Briggs : Member Representative of Workers
HEARING:	June 14, 2012, at Sudbury Oral
DATE OF DECISION:	September 11, 2012
NEUTRAL CITATION:	2012 ONWSIAT 2010
DECISION(S) UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) dated January 7, 2010 and February 9, 2011

APPEARANCES:

For the worker:	H. Conroy, Office of the Worker Adviser
For the employer:	Not participating
Interpreter:	N/A

REASONS

(i) Issues

[1] The worker seeks entitlement for a right shoulder impairment as being related to the overuse of that shoulder following a compensable left shoulder injury that occurred on March 15, 2004.

[2] The worker also seeks entitlement to partial Loss of Earnings (LOE) benefits from December 16, 2009 until February 8, 2010.

(ii) Background

[3] The worker was injured on March 15, 2004 when he slipped on ice at work and injured his left shoulder. The worker was 47 years old at the time.

[4] The worker continued to work for a period of time before undergoing three different surgeries on his left shoulder.

[5] The injury to the worker's left shoulder was determined to be permanent. The worker was awarded a Non-Economic Loss (NEL) award by the WSIB that has been increased such that it now stands at 20%.

[6] As the worker could no longer perform his work as a shop foreman with the accident employer the WSIB provided the worker with a Labour Market Re-entry (LMR) program. However, the worker remained unemployed following the conclusion of his LMR program.

[7] The worker has subsequently experienced difficulties with his right shoulder and underwent an operation on that shoulder. The worker claims that the difficulties that he experiences with his right shoulder have been caused by overuse of that shoulder due to his need to avoid activities with his left shoulder. The WSIB has denied the worker's request for entitlement for a right shoulder impairment. The WSIB's decision was confirmed in a decision of the Appeals Resolution Officer (ARO) dated January 7, 2010. The worker now appeals to the Appeals Tribunal on this issue.

[8] In December 2009 the WSIB requested information from the worker to assist it in determining the worker's ongoing entitlement to LOE benefits. While the worker eventually provided the requested information as of February 8, 2010, the WSIB suspended the worker's entitlement to LOE benefits from the date of a phone call to the worker in December 2009 until the time that the worker provided the desired information to the WSIB on February 8, 2010. The suspension of benefits was confirmed in a decision of the ARO dated February 9, 2011. The worker now appeals to the Appeals Tribunal on this issue.

[9] The employer did not participate in the appeal hearing.

(iii) The law

[10] As the worker's accident occurred in 2004, the worker's claim is governed by the *Workplace Safety and Insurance Act* ("the WSIA" or "the Act").

[11] In determining benefit appeals the Appeals Tribunal is required to apply WSIB policy in accordance with section 126 of the WSIA.

[12] WSIB policy on entitlement for secondary conditions resulting from work related disabilities is found in WSIB *Operational Policy Manual* (OPM) Document No. 15-05-01 that contains the following statement:

> Entitlement for any secondary condition is accepted when it is established that a causal link exists between it and the work-related injury. The development of a left knee disability/impairment due to an increased dependency following a work-related injury to the right knee, is an example.

[13] The law concerning non-cooperation with WSIB requests is discussed below in the Analysis section of this decision.

[14] In workers' compensation proceedings the standard of proof required is proof on the balance of probabilities.

[15] The following was stated about distinguishing between disablements caused by activities and the appearance of symptoms due to underlying pre-existing degenerative conditions in WSIAT *Decision No. 652/87*:

> This case raises the issue of the distinction between disabling symptoms appearing as the result of the impact of employment on a pre-existing degenerative condition which symptoms may be fairly taken as reflecting a compensable exacerbation or acceleration of a pre-existing condition, and the disabling symptoms appearing as a result of the impact of employment on a pre-existing degenerative condition which symptoms may be fairly taken as merely *evidence* of the disabling nature of the pre-existing condition.

[16] And from *Decision No. 592/01* at paragraph 21:

> It is now commonplace in Tribunal case law that for entitlement to succeed on an aggravation basis, one must be satisfied that the worker duties or a work incident changed the natural course of the underlying condition.

[17] In the present appeal the activities complained of are not necessarily employment related activities but the increase in all activities that the worker experiences with his right shoulder as a result of his experiencing a left shoulder condition. However, the principles of causation as expressed in *Decisions 652/87* and *592/01* remain the same.

[18] When determining whether a disability may have been caused by particular activities, the issue to be determined is whether the activities were significant contributing factors in causing the disability. See *Decisions No. 426/07* and *1668/09*.

[19] The question of what a significant contributing factor might be was considered in the Tribunal's *Decision No. 280*, 6 WCATR 27. In that decision, the Panel stated:

> A "significant contributing factor" is a factor of considerable effect or importance or one which added to the worker's pre-existing condition in a material way to establish a causal connection.…

[20] In reaching decisions under the Act, the Tribunal is required to apply the principle found in subsection 124 (2) of the WSIA that provides as follows:

> 124(2) If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.

[21] The Tribunal must also decide matters on the "merits and justice of a case" under the provisions of subsection 124(1) of the WSIA.

[22] The "merits and justice" and "benefit of the doubt" provisions of the WSIA are also discussed in the WSIB's OPM Documents No. 11-01-03 and 11-01-13.

(iv) LOE benefits from December 16, 2009 until February 8, 2010

[23] The Panel finds that the worker is entitled to partial LOE benefits from December 16, 2009 until February 8, 2010 as the worker did not fail to co-operate in providing the WSIB with information necessary to determine his LOE benefits at that time.

[24] The worker was sent an Earnings Questionnaire that he initially did not return but then did return without delay when he was prompted to do so by phone from the WSIB on December 14, 2009.

[25] In a subsequent phone call on December 15, 2009 the worker informed the WSIB that he had returned the requested form but had not included his income tax information as he had not previously filed his income taxes for 2007 and 2008. The worker was informed of the need to do so.

[26] The worker then filed his taxes and was able to provide the WSIB with copies of his Notices of Assessment that were dated February 1, 2010.

[27] The Panel finds that the form that was initially sent to the worker requesting information about his post-injury earnings is not clear with respect to the fact that the worker was expected to file copies of his income tax returns for the two prior years.

[28] Instead of asking for copies of the worker's income tax returns or asking for the Notices of Assessment for the last two years, the form instead made the following request to the worker:

> Please also attach your Canada Revenue Agency (formerly Canada Customs and Revenue Agency) Income and Deduction Print-outs for the last 2 years.

[29] The phase "Income and Deduction Print-outs" is not specific enough in the Panel's view to communicate precisely what it was that the worker was expected to provide.

[30] It was only during the phone call of December 15, 2009 that the worker was clearly made aware of the need to file his income tax returns and to provide a copy of his Notices of Assessment to the WSIB.

[31] Given the passage of only six weeks between the worker being informed of the need to file his taxes and provide Notices of Assessment and the obtaining of the Notice of Assessment from the Canada Revenue Agency, the Panel finds that the worker co-operated in a timely manner in obtaining assistance with filing his taxes and then filing those taxes. The Panel notes that the worker also forwarded the Notice of Assessment to the WSIB on February 8, 2010 within one week of the Notice of Assessment being prepared by the Canada Revenue Agency and then mailed to the worker.

[32] With respect to the further possible ground that the worker did not co-operate because he did not file proof with the WSIB that he had filed his income taxes as requested, the Panel finds that the requirements for reducing benefits for non-cooperation as found in WSIB OPM Document No. 22-01-03 have not been met. That policy document states:

> If the WSIB determines that a worker is not co-operating with the obligation(s) the decision-maker notifies the worker of the obligation to co-operate
>
> - Finding of non-cooperation, and

- Consequences of this finding (i.e., the reduction and/or suspension of benefits).
- Notice is given verbally (if possible), and in writing *in every case*.

The WSIB may reduce or suspend a worker's benefits if after notifying the worker of the obligation(s), the worker

- Fails to co-operate with the obligation(s), and
- Does not have a legitimate reason for not co-operating.

[33] The only letter that was sent to the worker concerning the need to file proof that he had filed his income taxes is a letter of January 5, 2010, that did not contain any finding of non-cooperation and provided directions to the worker that were not sufficiently clear to support a finding of non-cooperation based upon non-compliance. That letter stated:

> As you must obtain the requested information from a third party, I may consider a temporary extension of your LOE benefits beyond December 16, 2009 if you can demonstrate that you took all reasonable steps to acquire the information. Please submit any supporting documentation for consideration.

[34] The letter of January 5, 2010 was not sufficient notice of non-cooperation as it did not contain a finding of non-cooperation as required by WSIB policy. It was in the Panel's view also too vague and too difficult to understand with respect to what was being demanded of the worker. If the worker had to provide proof that he had filed his income taxes for 2007 and 2008 prior to the receipt of his Notices of Assessment but had not done so, the letter needed to state that.

[35] In addition, even if the letter of January 5, 2010, could have been considered a notice of non-cooperation despite its shortcomings, the reduction of benefits should only have taken place after the worker had received the letter and if he had then continued a pattern of non-cooperation. Under WSIB policy benefits are not to be reduced on a retroactive basis to a point in time prior to the non-cooperation letter.

[36] The requirements for reducing LOE benefits for worker non-cooperation have not been established. The Panel therefore finds that that the worker's LOE benefits are not to be reduced for non-cooperation during the period from December 16, 2009 until February 8, 2010. Any LOE benefits that during this time have been reduced or suspended on account of the previous finding of non-cooperation are to be restored to the worker.

(v) The worker's right shoulder impairment

[37] The Panel finds that the worker's right shoulder impairment was not significantly contributed to by the worker's left shoulder impairment.

[38] There are differences in opinion between the two orthopaedic surgeons as to the cause of the worker's right shoulder pain.

[39] The diagnosis provided by Dr. Randel is of arthritis related changes in his AC joint and an impingement.

[40] The initial diagnosis provided by Dr. J. Holmes was of a chronic tendonitis.

[41] The Panel prefers the diagnosis of the worker's impairment that has been provided by Orthopaedic Surgeon Dr. Randel to that of the referring Orthopaedic Surgeon, Dr. Holmes. The Panel notes that Dr. Holmes made the referral to Dr. Randel for treatment and that Dr. Randel

performed the surgery on the worker's right shoulder. The Panel further notes that following the provision of a diagnosis by Dr. Randel that the subsequent reporting by Dr. Randel no longer includes a diagnosis of chronic tendonitis although he does not go so far as to openly accept the diagnosis provided by Dr. Randel.

[42] In evaluating the opinions on causation provided by Dr. Holmes, who very emphatically supports the worker's claim for right shoulder entitlement, the Panel has noted the following excerpt from a Tribunal Medical Discussion Paper prepared by Doctors W.R. Harris and I.J. Harrington and titled "Symptoms in the Opposite or Uninjured Arm":

> Does a Rotator Injury Cause Symptoms in the Opposite Side?
>
> If the symptoms in the opposite side are similar to those of the injured one, then it must be proven that a) there is a rotator cuff injury and b) that favouring the injured side obliges the patient to strain the "normal" cuff by repetitive overhead use of the shoulder.
>
> If the symptoms in the opposite limb are different than those of the injured one, then it must be clearly shown how "favouring" the injured side could have caused them. Furthermore, other causes of arm pain, such as aging change in the neck with referred pain in the arm, must be ruled out.

[43] The opinions expressed in the Tribunal's Medical Discussion Papers do not necessarily represent the views of the Tribunal. However, Panels may consider and rely on the medical information provided in the Discussion Paper subject to the need to recognize that it is always open to the parties to an appeal to distinguish a Discussion Paper and challenge it with alternative evidence. See *Kamara v. Ontario* (Workplace Safety and Insurance Appeals Tribunal) [2009] O.J. No. 2080 (Ont Div Court).

[44] The opinion of Dr. Holmes is typified by his statements in his report of June 14, 2009 which is addressed to the worker's representative:

> I strongly feel that this man has been favouring the left shoulder ever since the original injury and as a result, he has put increased stress on the right shoulder.
>
> …
>
> In summary, I do feel that the right shoulder is related to the left shoulder problem and should be accepted by the WSIB. He has had both shoulders operated on and now he is left with pain and weakness in both shoulders and he is totally disabled.

[45] In the Panel's view it cannot rely upon the opinions expressed by Dr. Holmes for three reasons.

[46] First, there are contradictory medical opinions on causation that contain reasoning on causation that are more persuasive than the assertions made by Dr. Holmes.

[47] Second, while there is evidence that the worker has increased reliance on his right shoulder due to his left shoulder injury, this evidence does not go so far as to suggest highly repetitive work or frequent activities involving significant exertion that might be expected to cause an overuse injury.

[48] Third, Dr. Holmes initially provided his opinion regarding causation he was of the opinion that the worker was experiencing a tendinitis. That opinion on causation has not changed despite the different diagnosis that has been provided by Dr. Randel and the manner in which increased reliance on the left shoulder may have caused or contributed to either type of shoulder condition is not explained.

[49] Although the Panel accepts that the worker avoids using his left arm due to his compensable injury, the increased use of the worker's right arm does not appear to be excessive. The worker has not returned to employment performing repetitive or strenuous activities. There is no indication that such activities are required in the worker's activities at home either.

[50] The lack of such activities is significant in the view of WSIB physician, Dr. Hickman, who writes as follows on November 6, 2008:

> Altho IW was documented to be in a manually heavy duties prior to DOA in this claim I cannot find a record of his work activities since the DOA in this claim. As far as I can make out all his duties have been reduced to light, not just the ones in the left shoulder. He does not appear to have been doing risky duties as far as the opposite R shoulder is concerned. M#82 notes the IW was completely off work from Nov/04 til Sept/07, then only doing lighter modified after that.
>
> Opinion:
>
> I see no documentation that the IW was involved in duties that would lead to the current opposite right shoulder pathology, since the onset of the injury in the left shoulder. Altho he has reduced ability to use the left shoulder, I see no evidence that he was doing such a high demand of duties subsequently with the right side that it would cause the current right problems.

[51] The Panel notes and accepts the opinion provided by WSIB physician, Dr. Hickman, that concludes that the worker's post-injury activities were not of such a nature as to likely have caused an activity related disability in the worker's right shoulder even given the fact that the worker used his right arm in preference to his use of his left arm.

[52] In the Panel's view, the medical opinion that most accurately reflects the manner in which the worker's reliance on his right arm has affected the worker's right shoulder problem is the opinion of Dr. Randel who wrote very briefly as follows following the surgery that was conducted on the worker's right shoulder:

> He is still seeking Workmen's Compensation Board approval for his physiotherapy.
>
> I think that [the worker] did have a work related issue with regards to his shoulder. It may not have caused the arthritis nor the impingement from his type II acromion but it certainly contributed to his pain. He is going to remain on protocol #1. I will see him in six weeks' time.

[53] This report does not attribute the worker's underlying arthritis or impingement to activities with the right arm but it does confirm that activities with the arm certainly contribute to the pain.

[54] The Panel accepts that the worker's use of his right shoulder has been increased due to his left shoulder impairment.

[55] This increased usage has however not been shown, on the balance of probabilities, to have made a significant contribution in the causation of the underlying degenerative problems in the worker's right shoulder.

[56] The increased usage of the worker's right arm has caused usage related pain in the right shoulder that the worker may have been able to avoid were it not for his left shoulder injury. However, this is not sufficient to result in workers' compensation entitlement.

[57] As noted in *Decision No. 592/01*, which is quoted from above, for entitlement to succeed on an aggravation basis, one must be satisfied that the activities causing the discomfort changed the natural course of the underlying condition. That has not occurred in this case as the increased usage has not been demonstrated on the balance of probabilities to have advanced or worsened the underlying non-compensable condition that exists in the right shoulder. There is therefore no compensation entitlement for the worker's right shoulder.

[58] In reaching the decision it has the Panel has considered the case law submitted by the worker's representative where secondary shoulder conditions have been allowed.

[59] The Panel notes that the facts in those decisions are significantly different than the facts in the present appeal. In the decisions submitted by the worker's representative there were findings made indicating that the workers in those appeals had continued to perform repetitive or stressful work with the uninjured arm. That is not the case in the present appeal. In *Decision No. 1724/08* the Panel found that the worker was involved in heavy upper extremity work as a pipe fitter. In *Decision No. 2937/07* the Vice Chair found that the worker continued to perform heavy manual labour and over the shoulder work while favouring his uninjured shoulder. In *Decision No. 2570/10* a majority of the Panel determined that the worker was involved in physically demanding as well as heavily repetitive compensatory overuse of the uninjured extremity.

DISPOSITION

[60] The worker's appeal is allowed in part.

[61] The worker's LOE benefits are not to be reduced for non-cooperation during the period from December 16, 2009 until February 8, 2010. Any LOE benefits that have been reduced or suspended on account of the previous finding of non-cooperation during this period are to be restored to the worker.

[62] The worker is not entitled to recognition or a right shoulder injury as a secondary condition arising from his workplace accident of March 15, 2004.

DATED: September 11, 2012

SIGNED: G. Dee, M.P. Trudeau, R.W. Briggs