

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1624/05

[1] This written appeal was before Tribunal Vice-Chair J.P. Moore.

[2] The appeal was considered on September 13, 2005.

THE APPEAL PROCEEDINGS

[2] The worker appeals a decision of an Appeals Resolution Officer (“ARO”) of the WSIB, dated November 16, 2004.

REPRESENTATION

[3] The worker is represented by G. Charters of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers. The employer was notified of the appeal but is not participating.

THE RECORD

[4] The following were marked as exhibits:

Exhibit #1: the Case Record prepared by the Tribunal;

Exhibit #2: Case Record Addendum No. 1;

Exhibit #3: Case Record Addendum No. 2;

Exhibit #4: a “NEL Quantum Casebook” prepared by the Tribunal on December 18, 2003.

[5] Because the appeal proceeded by way of written submissions, there was no testimony. Submissions were filed by Mr. Charters on July 27, 2005.

THE ISSUE

[6] On January 24, 2001, the worker slipped and fell sustaining an injury to her right arm, shoulder, and upper back. At the time of the injury, the worker was employed as a registered nurse.

[7] The Board subsequently determined that the worker sustained a permanent impairment to both her right shoulder and to her thoracic spine. The worker was granted a 14% non-economic loss (“NEL”) award for the right shoulder and a 12% NEL award for the thoracic spine, resulting in a combined 24% award.

[8] The worker unsuccessfully objected to the 14% award for the right shoulder. She now appeals to the Tribunal

[9] The issue in this appeal is whether the Board has correctly determined the quantum of the NEL award granted to the worker for her compensable right shoulder injury.

THE REASONS

[10] I am allowing the worker's appeal on the basis that the Board has incorrectly calculated the worker's NEL award.

[11] In the decision under appeal, the ARO noted that the award for the right shoulder was based on range of motion findings made in a NEL assessment, which were combined with an impairment assessment that reflected the fact that the worker underwent a surgical procedure on March 20, 2001. The surgery involved resection of the acromion. In lay terms, a portion of the acromion bone was removed. The NEL assessment form described the surgery as "acromioplasty".

[12] In his submissions on behalf of the worker, Mr. Charters argued that the AMA Guides that the Board is obliged to use by Regulation entitled the worker to a greater award for the surgery she had on her shoulder. I note, in this regard, that Table 19 of the AMA Guides stipulates that a worker who has had "resection arthroplasty" will have a 24% impairment of the upper extremity. The Board initially allowed only a 10% impairment for the surgery, a figure that the ARO increased to 12%.

[13] Mr. Charters' argument was that Table 19 is intended to apply to any resection arthroplasty of the shoulder, regardless of the nature of the bone that has been resected.

[14] The ARO's response to this argument was that the 24% impairment was intended only to apply to resection of the humeral bone, since this was a more significant surgery. The ARO reasoned that, if the maximum degree of impairment was allowed for a less significant surgery, then the worker could potentially be deprived of an increase in the NEL award should there be functional worsening. The ARO went on to conclude that the most appropriate measure of the degree of impairment of the upper extremity in the present case was to assume there was no surgery but to allow an additional discretionary award because the measured anatomical impairment reflected in reduced mobility does not appropriately rate the severity of the worker's condition.

[15] With the greatest of respect, I cannot accept the ARO's reasoning. It is clear from the medical evidence that the worker had resection arthroplasty in that she underwent removal of a portion of one of the bones that makes up the shoulder joint. Arthroplasty is defined in the *Taber's Cyclopaedic Dictionary* as:

Surgical formation or reformation of a joint.

[16] Resection is defined in the same text as:

Partial excision of a bone or other structure.

[17] The operative note of the surgery done on March 20, 2001 states that the "anterior acromion was removed leaving a 'stump'".

[18] I am persuaded, therefore, that the worker underwent resection arthroplasty of the right shoulder.

[19] Table 19 does not distinguish among the types of resection arthroplasty that can occur. The fact that one type of resection arthroplasty may be more significant than another type does not, in my view, permit the Board to conclude that, where the less significant procedure occurred, it would be deemed not to have occurred. That is the effect of the Board's position.

[20] The materials before me included a memorandum prepared in another Board file and addressed to another ARO. In that memorandum, prepared on February 9, 2004 by Dr. D. Kanalec, the Board's Senior Appeals Medical Consultant, there is the following statement:

The operative note indicated release of the long head of the biceps & tenodesis excision of a diseased subacromial bursa, repair of the subscapularis tendon (rotator cuff repair) and *minimal acromioplasty* and release of the subacromial bursa. ...

Even though the AC joint is different from the glenohumeral joint, both these joints are involved in the overall function of the shoulder with the associated rotator cuff. We have no choice but to use Table 19, resection arthroplasty 24% impairment of the upper extremity in raising this NEL. This is the only category in which we can rate this operative procedure in AMA guided [sic] edition #3.

[21] I am persuaded that this opinion should be given considerable weight and find that the 24% impairment recognized in Table 19 is intended to apply to any resection arthroplasty involving the right shoulder, regardless of the nature of the bone that is, in fact, resected.

[22] On the basis of that finding, I direct the Board to recalculate the worker's NEL award on the basis that the worker has a 24% impairment of the upper extremity associated with a resection arthroplasty rather than a 12% discretionary impairment as determined by the Board. Once that determination has been made, the overall NEL award granted to the worker is to be recalculated, taking into account other findings of impairment previously determined.

THE DECISION

[23] The worker's appeal is allowed. The worker's NEL award is to be recalculated in accordance with paragraph 22 above.

DATED: November 8, 2005

SIGNED: J.P. Moore