



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1864/12

BEFORE:

G. Dee : Vice-Chair
V. Phillips : Member Representative of Employers
D. Felice : Member Representative of Workers

HEARING:

October 2, 2012, at Toronto
Oral

DATE OF DECISION:

October 26, 2012

NEUTRAL CITATION:

2012 ONWSIAT 2392

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) dated July 5, 2011

APPEARANCES:

For the worker: G. Breda, Paralegal

For the employer: M. Carroll, Lawyer

Interpreter: N/A

REASONS

(i) Issues

[1] The worker seeks recognition that she received a permanent neck injury as a result of her workplace accident of April 28, 2009.

[2] The employer seeks to overturn the worker's entitlement for a permanent left shoulder injury as a result of the same accident and also opposes the worker's appeal for entitlement for a neck injury. The employer asserts that the worker's continuing impairments are the result of degenerative changes and not the result of the workplace accident.

[3] An employer appeal of the worker's Loss of Earnings entitlement following October 16, 2009, was withdrawn on the day of hearing.

(ii) The Law

[4] As the worker's injury occurred in 2009, the *Workplace Safety and Insurance Act* ("the WSIA" or "the Act") applies.

[5] Under section 2 of the Act "impairment" and "permanent impairment" are defined as follows:

"impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss

"permanent impairment" means impairment that continues to exist after the worker reaches maximum medical recovery.

[6] "Maximum medical recovery" is not defined by the Act. However, the phrase is defined by WSIB policy in *Operational Policy Manual (OPM)* Document No. 11-01-05 as follows:

Workers reach maximum medical recovery (MMR) when they have reached a plateau in their recovery and it is not likely that there will be any further significant improvement in their medical impairment.

[7] The WSIAT must apply WSIB policy in rendering appeal decisions in accordance with the provisions of section 126 of the Act.

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

[9] 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:

(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.

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

[11] 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.

(iii) Analysis

[12] Both the worker and employer appeals are denied.

[13] The worker worked as a bus driver and she injured herself while turning the wheel of a bus on April 28, 2009. The worker missed a short time from work before returning to work to modified duties. She subsequently was away from work starting in September 2009 before returning to work with the accident employer in the spring of 2012.

[14] With respect to the worker's appeal, the Panel finds that it has not been established that the worker experienced a permanent neck injury as a result of the workplace accident of April 28, 2009.

[15] The most recent available report from a treating specialist is the report of Physiatrist, Dr. P. Kirwin dated October 20, 2010. That report states in part as follows:

Since my last assessment there has been no change in [the worker's] symptoms but she clarifies that her primary complaint is anterior left shoulder pain into the left upper trapezius there is no neck pain to speak up (sic) clearly this localized left shoulder pain is the issue which is preventing her from returning to work.

...

Her primary complaint is over the anterior aspect of the left shoulder into left upper trapezius. The rest of her pains are unchanged from previous including a minor complaint of neck pain which is clearly minor compared to this left shoulder pain. There are no complaints of any chest pain heart palpitations or fainting spells.

[16] The Panel finds that the statement "no neck pain to speak up" was intended to read "no neck pain to speak of".

[17] Two subsequent Functional Abilities forms dated July 27, 2011 and August 28, 2011, identify the workers area of injury as being the left shoulder with no mention of neck pain. The July 27, 2011 report was completed by Dr. Paul Forman. It is not clear who prepared the second report dated August 28, 2011.

[18] Although the worker testified to experiencing ongoing difficulties in her neck, this testimony on its own is not sufficient to establish the existence of an impairment, particularly in light of the above mentioned medical reporting.

[19] While the Panel accepts that the worker did complain of neck pain shortly following the workplace accident of April 28, 2009, and in a number of the medical reports following that time, there is insufficient medical evidence to establish that, on the balance of probabilities, the worker experienced a permanent impairment to her neck as a result of the accident.

[20] In reaching this conclusion the Panel has taken into consideration the MRI results of May 5, 2010 that noted mild degenerative changes in the worker's cervical spine including an associated disc bulge. The Panel notes in this regard that degenerative changes are not to be unexpected in diagnostic tests involving an individual who was 50 years old at the time of the testing and also that Dr. Kirwin had access to this MRI result at the time when she completed her above quoted report of October 20, 2010. The degenerative changes have simply not been demonstrated to be the cause of any impairment in the worker's neck. See also the Tribunal's Medical Discussion paper on Neck and Arm Pain which was included in the appeal record wherein it is noted with respect to degenerative changes that "The vast majority of individuals

with these aging changes, even though the changes are quite advanced, are free of pain or any other symptoms.”

[21] 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).

[22] With respect to the employer’s appeal concerning left shoulder entitlement, the Panel finds that there is no reliable evidence that the worker had a pre-existing shoulder impairment at the time of the workplace accident. The only indication of a prior shoulder problem was of a remote workplace accident that occurred in 2006. There is no evidence of the worker undergoing ongoing treatments or experiencing ongoing pain or limitations at work following that accident.

[23] Since the time of the workplace accident in the worker’s current claim, the worker’s complaints of ongoing shoulder problems have been continuous and well documented. There has not been a time from April 28, 2009 until the present when the worker has not been undergoing treatment for the left shoulder.

[24] The Panel does however, based upon the available medical reporting, accept the submission of the employer’s representative that the worker’s medical condition improved since the time of the accident. In this regard the Panel does not accept the worker’s testimony that her condition has remained essentially the same from the time of the accident to present. The medical evidence does not support such a conclusion.

[25] However, even though the worker’s shoulder restrictions have shown some signs of improvement the medical reporting does not support that the worker no longer had shoulder restrictions. The Panel notes in particular the report of Dr. Kirwin dated October 20, 2010, that found that the worker had a left shoulder anterior impingement syndrome, supraspinatus tendonopathy and subacromial sub deltoid bursitis and a left A-C joint arthrosis. This is just the last report of a number of reports from Dr. Kirwin which support the existence of an ongoing shoulder problem. The worker’s family doctor, Dr. Foreman, also confirms an ongoing shoulder problem in his reports of August 3, 2010 and July 27, 2011.

[26] The only medical report that would appear to indicate that the worker no longer had a significant shoulder injury is the October 13, 2009 report from the Regional Evaluation Centre (REC) which concluded that the worker’s “ongoing constellation of symptoms can best be explained on the basis of a cervical strain, not a shoulder strain”. This same report, which was prepared by Orthopaedic Surgeon B. Malcolm and Physiotherapist L. Mayer, projected a favourable prognosis for functional and symptomatic recovery over the next 8 to 12 weeks.

[27] In considering this report, the Panel notes that the findings of the report were made following one assessment only; that the findings concerning the worker’s shoulder are out of keeping with the remainder of the medical reporting in the claim file; that the projection of a recovery over 8 to 12 weeks proved not to be accurate; and that the findings pre-dated the MRI testing results of May 13, 2010, that Dr. Kirwin had the opportunity to review in coming to the conclusions that she did wherein she concluded that the worker did have an ongoing shoulder impairment.

[28] The Panel therefore prefers the opinions expressed by Dr. Kirwin to the opinion expressed in the REC report.

[29] Given:

- the lack of a shoulder impairment prior to the workplace accident of April 28, 2009;
- the continuous history of complaint and medical treatment for the left shoulder since April 28, 2009; and
- the accepted findings of Dr. Kirwin documenting a continuing impairment in the left shoulder,

the Panel concludes that the worker experienced a permanent impairment in her left shoulder as a result of her workplace accident of April 28, 2009.

DISPOSITION

[30] The worker's appeal is denied. The worker does not have a permanent neck impairment as a result of her workplace accident of April 28, 2009.

[31] The employer's appeal is denied. The worker has a permanent left shoulder impairment as a result of her workplace accident of April 28, 2009.

DATED: October 26, 2012

SIGNED: G. Dee, V. Phillips, D. Felice