



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 254/07

BEFORE: B. L. Doherty: Vice-Chair

HEARING: February 2, 2007 at Toronto
Oral

DATE OF DECISION: April 16, 2007

NEUTRAL CITATION: 2007 ONWSIAT 1009

DECISION(S) UNDER APPEAL: WSIB ARO decision dated September 20, 2005

APPEARANCES:

For the worker: Mr. T. McConnell, Office of the Worker Advisor

For the employer: Ms. C. Huras, Consultant

Interpreter: N/A

REASONS

(i) The Appeal Proceedings

[1] This is an appeal by the worker from the decision of Appeals Resolution Officer (ARO) Cantwell of the Workplace Safety and Insurance Board (WSIB) dated September 20, 2005, denying entitlement for a left shoulder injury as a result of a workplace accident on April 18, 2004. Entitlement had been granted for a back injury in that accident. The ARO denied entitlement for the shoulder on the grounds that neither proof of accident (as it relates to the left shoulder) nor compatibility was established.

(ii) The Issue

[2] The issue on this appeal is whether the worker has established entitlement for the left shoulder condition as being causally related to her workplace accident on April 18, 2004.

[3] If the worker is successful on the entitlement issue, she may seek benefits such as loss of earnings (LOE), health care, and possibly non-economic loss (NEL) benefits from the WSIB.

(iii) Background

[4] The worker, then age 47, was working as a sales representative at the employer's store at the time of her workplace injury on April 18, 2004. She had been with the employer for approximately three and a half years. She is right-handed. Although she appears to have injured her right shoulder in an earlier workplace injury, she had no history of left shoulder problems.

[5] On April 18, 2004, the worker reached overhead to take a 25 to 40 pound microwave oven from a co-worker who was up on a ladder. She testified that she had her arms up, such that her hands were approximately six to eight inches above her head. She said that when she took the microwave oven, the upper part of her body moved backwards and she felt a crack in her back, a crack that she said another co-worker heard. This incident took place around the middle of her workday on April 18. The worker said that she did not report an injury immediately because she felt that it was just a crack, that she did not feel pain right away. She completed her shift.

[6] She said that she could not get out of bed the next morning because of back pain. The following day, April 20, 2004, she reported the injury to her supervisor and she saw her family doctor, Dr. J. Kim. Dr. Kim completed a Health Professional Report (Form 8) for the WSIB that day. It refers to a back injury. In the Clinical Information Section, Dr. Kim checked off upper back (and nothing relating to the shoulder) and provided a diagnosis of thoracolumbar strain (and "rule out" a fracture of a spinous process). He described the worker as having "+++" pain and stiffness, that she could not move her back.

[7] The worker was asked why she did not report a shoulder problem to Dr. Kim at the time. The explanation that she gave at the hearing was that her whole back hurt, from her tailbone to her neck, including her shoulders. The implication is that she did not distinguish a specific injury to her left shoulder in the overall pain that she was feeling.

[8] As noted earlier, the WSIB granted entitlement for a back injury.

[9] The day after she saw Dr. Kim, the worker was seen by chiropractor Dr. A. Guttman. Dr. Guttman completed an Initial Assessment Report form as part of the Program of Care for Acute Low Back Injuries. There is no reference in that form to a shoulder problem. The working diagnosis is described as lumbar facet irritation and there are no complicating factors identified.

[10] The worker was unhappy with the chiropractic treatment, and subsequently saw a physiotherapist, Mr. Desai, on April 29, 2004. Mr. Desai completed an Initial Assessment Report and also provided a three-page narrative report of his assessment to Dr. Kim. There is no reference to a shoulder problem in the Initial Assessment Report (for the low back program of care). There is a cursory reference to the shoulder in the narrative report:

Clear cervical spine and both shoulders for radiating pain. Range of motion grossly normal and symmetrical.

[11] Although this description is not entirely clear with respect to what the therapist is saying about shoulder range of motion and function, the worker testified that she did not disagree that the therapist tested the range of motion of her shoulders and that it was found to be full. She said that she was able to move her arms fully, albeit slowly.

[12] The physiotherapist's narrative report also refers to reported numbness in the left hand.

[13] On May 5, 2004, approximately two and a half weeks after her workplace accident, the worker reported a shoulder problem to Dr. Kim. She said that she first noticed pain specific to her left shoulder when her back started healing, about two weeks after her injury. The back was getting better, but the shoulder was not. Dr. Kim completed a Physician's Progress Report (Form 26) on May 6, 2004, relating to his examination the day before. He refers to two diagnoses, lumbar strain and left rotator cuff strain. The form asks about significant factors delaying recovery, and Dr. Kim has referred to degenerative disc disease of the thoracolumbar spine.

[14] The fact that Dr. Kim included the shoulder problem as one of his two diagnoses, and not, for example, as a factor delaying recovery, suggests that he was of the opinion that the shoulder problem was caused by the workplace injury.

[15] The worker described the location of the shoulder pain in her testimony, and it appears to have involved the entire shoulder.

[16] On the same day that she saw Dr. Kim, the worker spoke with her WSIB Claims Adjudicator. There was no mention of the left shoulder.

[17] Two days later, on May 7, 2004, the worker completed the Worker's Report of Injury/Disease (Form 6). That form asks: "What part/s of your body was/were injured?" The worker, who completed the form herself, answered "lower back." There is no reference to a shoulder injury in that form.

[18] The worker was asked about this during the hearing. Her explanation was that her doctor had suggested that it may be all related to the back and that she thought the shoulder would resolve as the back injury resolved.

[19] On May 10, 2004, Dr. Kim completed another Physician's Progress Report (Form 26). This was based on an examination of the same day and, interestingly, contained no reference to the shoulder, only the back. He completed a Functional Abilities Form on that date. Again, there is no reference to a shoulder injury (the area of injury is described as the lumbar spine) and the limitations and restrictions set out in that form relate to the lumbar spine and not, as is the case with a subsequent Functional Abilities Form, to shoulder activity.

[20] The worker had an ultrasound of her shoulder on May 18, 2004. The report of that procedure refers to a concern regarding a small, partial tear of the supraspinatus tendon (one of the tendons making up the rotator cuff) and suggests an MRI.

[21] On May 21, 2004, the worker's Claims Adjudicator (a new Claims Adjudicator) spoke with her regarding her return to work date. There is no reference to a shoulder injury in his memorandum of that conversation.

[22] A few days later, Dr. Kim completed another Physician's Progress Report (Form 26). This report, based on an examination of May 25, 2004, refers to the low back injury and the reference to the shoulder is in the context of a factor delaying recovery, left shoulder pain which is likely rotator cuff. However, on the same day Dr. Kim wrote to WSIB in support of the worker's claim that her shoulder condition was caused by the workplace injury. Dr. Kim's letter states that the worker was under the impression that she could only report one injury at a time and that she chose to report the more pressing problem of her thoracolumbar region. He said that, according to his notes, her left shoulder problem became clinically significant from May 5, 2004, two weeks following her initial injury, without any further intervening strain or trauma. He was satisfied with her explanation that, though the shoulder symptoms did not seem severe enough to report at the time of the accident, they did progress over the next two weeks. Dr. Kim referred to the preliminary investigation that revealed a probable partial tear to the left supraspinatus tendon, and that "this would be consistent with injury in her case, as opposed to degeneration." He concluded by stating that the worker had two areas of injury.

[23] The worker moved during the period that she was off work with her work-related injury. The date of the move, according to the records, was May 15, 2004. The worker was asked about her physical involvement in the move. She said that she was not involved in the packing or carrying, that she relied on others. In fact, when she was asked generally about her activities, and in particular in the time period between April 18 and May 5, 2004, she said that she did not use the left arm in activities such as reaching or carrying.

[24] The worker was paid full LOE benefits until May 27, 2004, and partial benefits until June 13, 2004.

[25] The WSIB was aware in late June 2004 of the worker's contention that she had hurt her left shoulder in the April 18, 2004 workplace accident. At that time, it received a call from a hospital concerning an MRI of the shoulder. The Claims Adjudicator called the worker on

June 28, 2004 to ask her about the onset of her shoulder pain. The Adjudicator's memorandum of that conversation indicates that the worker said she felt pain in her shoulder the evening of the accident, that she thought the pain was related to her back injury, and that the back pain was worse than the shoulder pain. She told the Adjudicator that her physician and physiotherapist also related the shoulder pain to the back injury but the shoulder pain did not improve when the back pain did.

[26] The adjudicator sought a medical opinion from the WSIB's medical consultant, Dr. M. Germansky. Dr. Germansky was asked whether the left rotator cuff strain/sprain was compatible with the accident history. He noted that the left shoulder was not mentioned until May 5, 2004. Dr. Germansky's response was that he saw no evidence in the contemporaneous medical records or the forms completed around the time of the workplace injury of the left shoulder being injured, that it was not mentioned until May 5, 2004, and that the worker would have to provide medical documentation supporting a left shoulder injury much closer to the time of the accident for further consideration.

[27] In September 2004, the worker had a Multidisciplinary Healthcare Assessment through a Regional Evaluation Centre (REC). This was at the request of the employer. The report of that assessment contains two diagnoses that the assessors (an orthopaedic surgeon and a physical therapist) relate to the workplace accident: (1) left shoulder strain with rotator cuff tendonopathy (possible tear) and (2) lumbar strain. The assessors' opinion that the left shoulder problem was a result of the workplace injury cannot be relied on according to the employer because it is based on an inaccurate history, that is, that the worker was aware of the left shoulder pain the morning following her workplace injury.

[28] The worker had the MRI of the left shoulder on November 18, 2004. The report of that procedure indicates that the worker had a focal full thickness partial tear of the supraspinatus tendon at its insertion point along with supraspinatus tendonopathy.

[29] The worker saw an orthopaedic surgeon, Dr. L. Weisleder, on March 8, 2005. In his report of that date, Dr. Weisleder referred to the finding on the MRI. He said that, on occasion, an MRI will result in tendonitis being interpreted as a tear, and he recommended an arthrogram to be sure that the worker did, in fact, have a rotator cuff tear.

[30] The arthrogram was done on March 30, 2005. No full thickness tear of the rotator cuff was identified.

[31] The most recent medical report in the file is Dr. Weisleder's June 6, 2005 report to Dr. Kim which states that the arthrogram was negative for a rotator cuff tear, that "Clinically, she has resolving rotator cuff tendonitis." He recommended that the worker use her left arm to see if symptoms were improving.

[32] The worker testified at the hearing that her shoulder is still bothering her and that she has been told that she may need surgery. She continues to work for the employer, doing regular duties.

(iv) Relevant Law and Policy

(a) Workplace Safety and Insurance Act

[33] The legislation that applies to this claim is the *Workplace Safety and Insurance Act, 1997* (WSIA). In general terms, a worker who sustains a personal injury and losses due to a workplace accident is entitled to benefits under the WSIA.

[34] The WSIA provides, in the context of decision-making, that where it is not practicable to decide an issue because the evidence for and against it is approximately equal in weight, the issue shall be resolved in favour of the worker. This is referred to as the “benefit of doubt” principle.

[35] The WSIA further provides, in the context of appeals to this Tribunal, that the Tribunal shall apply WSIB policies in its decision-making.

(b) Board Policy

[36] WSIB policies are set out in its *Operational Policy Manual* (OPM). OPM Document No. 11-01-01 relates to the adjudicative process and refers to the “five check system.” It states that all adjudicators use the same criteria for ruling on initial entitlement to benefits and that this system is known as the “five point check system.” Two of these five points are relevant here: (i) proof of accident and (ii) compatibility of diagnosis to accident history.

[37] The policy provides some points for adjudicators to consider when examining proof of accident. The point that is relevant in this matter is whether there was any delay in the onset of symptoms or in seeking health care attention.

[38] The policy also provides direction on the matter of diagnosis: if it is not clear that the diagnosis provided is the result of the accident, an opinion is sought from the Board’s medical consultant.

[39] The “benefit of the doubt” principle of the WSIA is discussed in OPM Document No. 11-01-13. It notes that the policy is not to be used as a substitute for evidence, that it is applied when the facts of the case are so evenly balanced that a clear decision is impossible.

(c) Tribunal Case Law

[40] There have been many Tribunal decisions that have considered delay in the onset of symptoms. In decisions such as *Decision Nos. 329/06, 1494/05, and 1383/04*, the Tribunal held that a delay in the onset of symptoms (one year, three weeks, and at least one year respectively) was not a bar to establishing a causal relationship between the condition and the workplace accident. There are other decisions, such as *Decision No. 1496/02*, which have found that delay (in that case three weeks) led the decision-maker to conclude that the condition was not so related.

(v) Analysis and Conclusions

[41] I will begin this section by setting out the following findings:

1. The worker first reported the shoulder problem on May 5, 2004, approximately two and a half weeks after the workplace accident. She reported the shoulder problem to her family physician, Dr. Kim.

I do not accept the suggestion of the worker's representative that the reference in the physiotherapist's April 29, 2004 narrative report to numbness of the left hand was a harbinger of the left shoulder problem. There was no medical evidence offered to support that submission.

2. Dr. Kim was of the opinion that the left shoulder problem was related to the workplace accident because he referred to the left rotator cuff strain as one of two diagnoses in his May 6, 2004 Physician's Progress Report. Having said this, I recognize that Dr. Kim did not, in his May 10, 2004 Progress Report and Functional Abilities Form, refer again to the shoulder problem, and it is not clear why he did not. By the time of his May 25, 2004 letter to the WSIB, Dr. Kim was relating the shoulder problem to the workplace accident.
3. The worker's explanation for not reporting a distinct shoulder problem sooner, as given at the hearing and as recorded in the adjudicator's memo of June 28, 2004 - that she thought the shoulder problem was part and parcel of the back problem and that a distinct injury to the shoulder did not become apparent until the back problem was resolving - is plausible. There were no grounds for my finding the worker not to be credible.
4. There was, as discussed earlier, another explanation for the delay in reporting the shoulder problem, and that had been offered by Dr. Kim in his May 25, 2004 letter, that the worker was under the impression that she could only report one injury at a time, and she chose to report the more pressing problem. I did not hear that from the worker. The Form 6, that the worker completed herself, clearly refers to part(s) of the body that was or were injured and clearly allows the worker to report more than area of injury. If that had been the worker's explanation, that she thought she could only report one injury at a time, I would not have accepted it. However, this was Dr. Kim's explanation, not the worker's. It is of concern that there are different explanations for the delay in reporting the shoulder problem; it is possible that Dr. Kim misunderstood the worker's reference to one injury extended over a broad area.
5. The shoulder condition, involving the supraspinatus tendon, is compatible with the workplace accident. The worker had her arms above her head taking the microwave oven. It is likely that the rotator cuff was stressed in this activity.
6. The Tribunal's discussion paper on Shoulder Injury and Disability was provided to the parties at the hearing and was made an exhibit. It states that rotator cuff tears occur in older individuals with a moderate external force, such as during the lifting of objects. The site of the tear has been weakened by age-related and possibly activity-related changes (in middle-aged and older persons) already present at the time of the incident.
7. There is no evidence that the worker engaged in an activity in the period April 18 to May 5, 2004 that could have caused the shoulder condition, and her evidence was that she did not.
8. The Board's medical consultant, Dr. Germansky, did not expressly comment on compatibility, in the sense of whether the worker's shoulder condition could have been caused by what she was doing at the time; rather, it appears to be his opinion that, if she

had hurt her shoulder at the time, she would have reported it earlier. That speaks to the delay factor. He does not say that the condition is not compatible with the activity being carried on at the time of the workplace accident, and indeed the REC assessors accepted that it was.

[42] Having made these findings, I turn to the fundamental question, which is whether the worker has established that her shoulder condition was caused by the workplace accident.

[43] The employer's representative, in her submissions, made a number of compelling arguments to support the contention that the causal connection had not been established.

[44] She referred to the five-point check system and the reference, under proof of accident, to the delay in the onset of symptoms and the seeking of medical attention. She listed the opportunities the worker had had to report a shoulder injury, including her initial report on April 20, 2004, to her supervisor, her Form 6 report, her April 29, 2004 telephone conversation with a representative of the firm that was acting on behalf of the employer, her May 5, 2004 telephone conversation with the Claims Adjudicator, and so on. It was her submission that it was not until June 2004 when the WSIB was contacted by the hospital in connection with the proposed MRI, that it first received notice that the left shoulder condition was being related to the workplace accident.

[45] The employer's representative referred to the early medical documentation that contained no reference to a shoulder injury, including Dr. Kim's Form 8, Dr. Guttman's Initial Assessment Report, and Mr. Desai's April 29, 2004 report (which referred to the neck and shoulders and said that range of motion was grossly normal and symmetrical). She submitted that even Dr. Kim's reference in his May 5, 2004 Physician's Progress Report to the left shoulder problem did not mean that Dr. Kim felt that it was related to the workplace injury. As discussed above, I do not accept that contention. She argued that it was not until May 25, 2004 that Dr. Kim related the shoulder problem to the compensable injury.

[46] She referred to the statement in the shoulder discussion paper that rotator cuff injuries can be caused by insignificant activities and pointed out that I do not have to find what caused the worker's shoulder condition, only whether the workplace accident was a significant contributing factor. I accept that.

[47] She submitted that the REC report, that concluded that the left shoulder condition was work-related, could not be given any significant weight because the history given to the assessors was inconsistent with what the worker had said on other occasions about the onset of shoulder pain.

[48] The delay in reporting the symptom is troubling. I have, however, found the worker's explanation, that she thought the shoulder pain was part and parcel of the back injury, plausible. I have as well found compatibility. In my view, the evidence for and against the proposition that the shoulder condition was caused by the workplace accident of April 18, 2004, is approximately equal in weight. In accordance with the WSIA and OPM Document No. 11-01-13, I find that the worker has entitlement for the left shoulder condition as a result of the April 18, 2004 workplace accident.

DISPOSITION

[49] The worker's appeal is allowed. The worker has established entitlement for the left shoulder condition as causally related to the April 18, 2004 workplace accident.

DATED: April 16, 2007

SIGNED: B. L. Doherty