

## Decision of the Appeal Division

**Number:** 92-0473  
**Date:** February 21, 1992  
**Panel:** Connie Munro, Walter N. Peain, Derrick Spooner  
**Subject:** A Claim for Epicondylitis (#3)

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This is an appeal from the decision of the Workers' Compensation Review Board dated September 6, 1991, which upheld the claims adjudicator's decision of May 23, 1990. The Review Board rejected the compensability of the worker's lateral epicondylitis of the right elbow.

The worker is a 46-year-old butcher, more particularly described as a ham boner. His job duties involve repetitive cutting of large pieces of meat with a 10-inch knife at the rate of approximately one ham per minute. The worker is said to hold the knife with his right hand with a fist-type grip and pull the knife toward his body in an "S" shape following along the contour of the bone. The motion involves a twisting movement of the arm, particularly the lower arm.

While the worker was deboning a ham on April 2, 1990, he felt a pain on the lateral side of his right elbow. Thereafter, the symptoms worsened and extended from his elbow into his lower arm. This worsening was felt primarily at work while performing his regular work activities and eased when he was away from work. By April 6, 1990 the pain was more constant and the worker reported to the first aid attendant. The report of the first aid attendant describes the worker as suffering from weakness, pain and some swelling of his right arm.

A co-worker of the appellant provided testimony at the Review Board hearing describing the duties of a ham boner and stating that the worker was the "fastest ham boner he knows." The Review Board accepted the evidence with regard to the speed with which the worker boned hams and the fact that the job duties placed great stress on the wrist and elbow.

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There was no evidence of any non-work activity thought to be causative of epicondylitis. The Review Board had evidence before them from the attending physician, Dr. N, which stated:

The patient presented in my office initially with radial epicondylitis, which can be classified either as an occupational disease if there is a sustained stressing of the right forearm, or following an acute injury. The patient required physiotherapy, anti-inflammatory medication and was eventually able to return back to work. There was nothing in the patient's history to suggest that this was not a work related injury.

There was a further medical report on the file from an orthopedic specialist. It also related the worker's right elbow problem to his employment, however, described an incident where the worker had "... hit the back of his right elbow against a bone machine."

The report of the specialist did not state an opinion as to whether the epicondylitis in this case was related to repetitive stress. No medical evidence was on file from a Board doctor. The only medical evidence before the Review Board was supportive of the causative significance of the worker's employment to his epicondylitis. Nonetheless, that evidence was rejected by the Review Board panel who stated:

We cannot agree with Dr. N that epicondylitis necessarily arises as a result of acute injury or 'repetitive stress' in or out of the work place.

The Review Board panel based that conclusion largely on their interpretation of medical journal articles submitted by the worker's counsel.

To assist the Appeal Division in considering this case, an opinion was sought from Dr. J. N, B.Sc., M.D., M.H.Sc., F.R.C.P.C. (Occupational Medicine), acting director and senior medical advisor to the W.C.B.'s Occupational Health Department. The panel asked Dr. J. N to provide:

... an opinion as to the causative significance of this worker's activities as a ham boner in the development of his epicondylitis.

Dr. J. N's opinion is contained in a memo dated January 22, 1992 which states, in part:

For a lateral epicondylitis to be occupationally related, I would expect there to be a history of frequent repetitive movements of the involved musculature, particularly the extensors of the forearm/wrist and/or the supinators/pronators of the hand. The degree of

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force involved in the work activities must be carefully considered. Unaccustomed work activities and/or a history of sudden strain may also be relevant.

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The process of ham deboning would involve frequently repetitious and forceful use of the worker's extensor musculature, particularly of his dominant hand. Though I would not conclude that the work is entirely unaccustomed to this worker, I note that there was some question of 'heavier' hams being manipulated on the day of the onset of the symptoms. Regardless, I would not conclude that the relatively accustomed nature of his work activities would preclude a reasonable occupational association.

In consideration of the risk factors for the development of a right lateral epicondylitis, I must conclude that this worker's medical diagnosis of right lateral epicondylitis would be reasonably related to his occupational activities as described.

This panel prefers the medical opinions of Doctors N and J. N to the analysis provided in the Review Board findings. In the circumstances we have no difficulty finding that the worker's right epicondylitis was a consequence of his work activities.

The foregoing reasons are clearly sufficient to dispose of this appeal. Much of Review Board findings, however, were devoted to a critical analysis of a previously published Appeal Division Decision No. 91-0014 regarding epicondylitis [(1991) W.C.R. 1, p. 57]. Further comment is, therefore, necessary.

The Review Board panel has misconstrued Decision No. 91-0014. The epicondylitis decision raised two general matters. The first relates to the burden of proof and the second concerns the adjudication of epicondylitis as an example of a repetitive stress injury. Decision No. 91-0014 stated:

... it is undisputed that this worker performs forcible, frequent and repetitive movements of the forearms and wrist in the course of her employment. There has not been any non-occupational activity by this worker implicated as a likely cause of epicondylitis.

The Review Board findings interpreted this statement as creating a general presumption in favour of a claim.

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They allege that the published decision stands for the proposition that if a worker performs forcible, frequent and repetitive movements of the forearm and wrist that this evidence is sufficient to find that the epicondylitis is work related unless there is evidence which implicates some non-work activity. It would seem obvious, however, that the mere fact that the decision makes the point that there was no evidence of a non-work cause does not mean that there was reliance on a general presumption in favour of the claim. An absence of evidence of non-work factors is always a relevant factor to be considered. On the issue of burden of proof the published decision ought simply to be regarded as a judgment on the facts of the claim under consideration.

With regard to epicondylitis generally the published decision makes the point that the governors' policy recognizes that a claim is acceptable if the condition is due either to repetitive stress or a single traumatic event. In addition, the prerequisite that the work activity be "unaccustomed" found in Schedule B with reference to other repetitive stress injuries (tendinitis, tenosynovitis) is not applicable to epicondylitis.

The Review Board panel interprets those statements in Decision No. 91-0014 to mean that no regard at all should be had to whether there has been any change in the work activity prior to the onset of the epicondylitis. This is an inaccurate representation of the published decision. Whether the work activity is unaccustomed is simply one factor to be weighed.

Clearly any person judging a case, whether in Compensation Services, the Review Board, or the Appeal Division, ought to consider all available evidence that may be relevant to an issue under consideration. Counsel's submission to the Review Board correctly characterized the interpretation that ought to be given to the term "unaccustomed" as discussed in the published decision when she stated:

As pointed out in decision #91-0014 of the Appeal Division, there is *no requirement* to show unaccustomed activity. (emphasis added)

The adjudication of causation issues addresses the relationship between the employment exposure and a worker's disability. Mr. Justice Sopinka in *Snell v. Farrell* (1990) 72 D.L.R. (4th) 289 (S.C.C.) explained the concept of causation in the following terms:

Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. (p. 298)

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All decisions on causation within the workers' compensation system must consider what evidence supports a work relationship as opposed to what evidence supports a non-work relationship. To satisfy the requirements of the *Act* there must be some positive evidence to show that the work activity played a significant role in causing the injury. It is not enough to say that if we do not know what caused it, then it must be the work. That is speculation, not evidence.

The Review Board findings stated:

The difficulty is that experts have not agreed that epicondylitis necessarily arises from external trauma. Many epicondylitis cannot be traced to any external cause whatever.

The Review Board panel contends that because differing medical opinions exist regarding the causes of epicondylitis:

... anyone who supports with confidence any particular theory of a general cause or precipitating factor in the onset of epicondylitis, is merely advancing a personal preference, not reaching a conclusion based on evidence.

The governors' policy with respect to the standard of proof required in claims decisions is set out in *Reporter Decision No. 52*. There is no burden of proof on the worker to prove a claim nor is there any presumption in the worker's favour. The claims adjudicator, in the first instance, collects information and examines it to see whether it is sufficiently complete and reliable to arrive at "a sound conclusion with confidence." If, on weighing the available evidence, there is a preponderance in favour of one view or the other that is the conclusion that must be reached.

There may, however, be situations where gaps exist in medical knowledge. For example, in some instances the evidence may strongly suggest that a condition is caused by a work activity and no available evidence point to an alternative possibility. In other instances, however, the condition might arise without apparent cause. Medical research may not have identified precisely all of the relevant causal factors. The reasoning of the Review Board panel would reject the claims first described as speculative.

It is quite possible, however, in many instances, to reach "a sound conclusion with confidence" without applying scientific standards of proof requiring the negation of all other rational possibilities. If the Board was to insist on conclusive medical evidence in every case requiring medical expertise they would, in effect, be placing a burden of proof on the worker. Either that or they would be applying a higher standard of proof than the balance of probabilities.

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The 1987 Ombudsman's *Workers Compensation System Study* discussed this issue. Two of the Ombudsman's recommendations were:

That the standard of proof used by the W.C.B. in deciding claims be clarified to require the recognition of the best available hypothesis supported by the evidence.

and

That the W.C.B. clarify its policy regarding the interpretation of Section 99 of the *Act* to provide that, on an issue where there is more than one hypothesis supported by evidence with roughly equal weight, the issue shall be resolved in accordance with that hypothesis which is favourable to the worker.

These recommendations did not propose a change in current policy. Neither do they suggest there is an onus on the Board to prove that a condition is not work related before it can reject a claim. Further, they do not suggest that a possibility or hypothesis in favour of the worker should be accepted if there is no evidence to support it or if there is stronger evidence supporting a contrary hypothesis. The recommendations do, however, urge a realistic assessment of the available medical evidence and expertise. They are completely consistent with *Reporter Decision No. 52* and the terms of the *Act*. Moreover, this approach to adjudicating questions of causation is in accord with the standard expressed by the Supreme Court of Canada in *Snell v. Farrell*, where Mr. Justice Sopinka said:

Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in *Alphacel Ltd. v. Woodward*, [1972] 2 All E.R. 475 (H.L.), at p. 490 '... essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.'

It is clear that in the present case the worker's epicondylitis is compensable.

THE APPEAL IS ALLOWED.