

Decision of the Workers' Compensation Appeal Tribunal

Number: 2003-02677-RB

Date: September 25, 2003

Panel: Kathryn P. Wellington, Vice Chair

Subject: Jurisdiction to Consider New Diagnosis on Appeal

Introduction

On December 27, 2001 the worker submitted an application for compensation for right upper extremity, neck, and head pain that came on while she was working on December 19, 2001. The worker now disputes a January 17, 2002 decision of an officer of the Workers' Compensation Board, (Board) concerning her claim. In a letter of that date a case manager advised the worker that the Board would not accept a claim for right shoulder tendonitis/bursitis either as an injury, pursuant to section 5 of the *Workers Compensation Act* (Act), or as an occupational disease, pursuant to section 6.

A registered kinesiologist had assessed the risk factors for tendonitis/bursitis during a job site visit. Although the worker performed constant repetitive right shoulder motions, her job did not involve awkward positions on a frequent basis. The work did not require forceful right arm movement on a frequent basis either. Although the worker was working increased hours just prior to the onset of her symptoms, her actual work activities did not change.

The case manager concluded that the work activities did not include significant risk factors that would cause a right shoulder tendonitis/bursitis condition. The case manager also concluded that the worker did not suffer a traumatic tendonitis/bursitis and her condition was not due to a workplace injury or accident.

The worker disagreed with this decision and initiated an appeal.

On appeal the worker seeks acceptance of her claim and temporary disability benefits including wage loss and health care benefits from December 20, 2001 to April 28, 2002.

Issues

Did the worker suffer a personal injury arising out of and in the course of her employment; or, in the alternative,

Is the worker's right shoulder tendonitis/bursitis condition due to her employment?

Jurisdiction

This appeal was filed with the Review Board. On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38).

WCAT may consider all questions of fact and law arising in an appeal but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the WCB's Board of Directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Relevant Background Information and Evidence

The worker is 50 years old. She is right handed. In December 2001 she worked for the employer on a part-time basis as a cashier. The employer had employed her in this capacity since 1991. On December 19, 2001 the employer reported to the Board that the worker had pulled a muscle in her right shoulder while working on cash. She was lifting heavy shopping bags.

An accident investigation report dated December 19, 2001 indicated that the worker had been performing excessive lifting of heavy items. The store was having a pop sale.

The worker completed an application for compensation (form 6) on December 27, 2001. She listed the date of injury as December 19, 2001. She reported that on that date she was repeatedly scanning heavy objects and bagging. Pain in the worker's right shoulder worsened as the day progressed, and finally radiated into the worker's head and neck and extended down the arm to her right hand.

The worker saw her family physician the next day. Dr. EK wrote on his first report that the worker had recurrent right shoulder pain with sudden worsening the previous day. He diagnosed right shoulder bursitis. The worker attended another doctor in the same practice on December 31, 2001. This physician diagnosed right supraspinatus tendonitis. He described right neck and shoulder pain and occasional dysesthesia in the worker's middle three fingers. On examination the worker was tender over her paracervical muscles, and over the supraspinatus insertion. X-rays were taken of the worker's shoulder.

In a follow-up medical report of January 9, 2002, the worker's doctor indicated that she had right supraspinatus tendonitis and right C7 radiculopathy secondary to degenerative disc disease. He queried a possible disc lesion. He described neck pain radiating down the worker's arm, accompanied by tingling. The worker also reported continued tenderness over the trapezius muscle at the supraspinatus insertion.

In the process of adjudicating the worker's claim a case manager obtained a work history. The case manager's summary of the conversation with the worker is contained on file in a December 24, 2001 administrative log entry. The worker denied any prior right shoulder injuries. She described her work schedule prior to the onset of her symptoms in December. She denied any changes to her work activities, equipment or hours. She advised the case manager about the pop sale, but indicated that she had worked through these sales before. She described the onset of her symptoms. The case manager arranged for a job site visit.

The job site visit took place on January 10, 2002. The worker attended and participated. The evaluator set out the risk factors involved in the worker's job duties. In a January 17, 2002 claim log memo the case manager recorded her decision to deny the worker's claim.

Hearing Evidence

The WCAT held a hearing on August 7, 2003. The worker attended with a workers' adviser of the Ministry of Labour acting as her representative. The employer did not attend and did not participate in the appeal. The panel received into evidence and marked as Exhibit #1 the worker's November 22, 2002 statement to the workers' adviser.

The worker gave the following evidence under oath. She has no known medical conditions. She does not smoke. She has no hobbies. Before December 2001 the worker had no history of shoulder problems. The worker indicated that she does not recall a right shoulder injury she apparently had in 1983.

The worker said she felt fine when she went to work on December 19, 2001. She was scheduled to work from 0830–1700. She worked until 1500 but was not able to complete her shift.

The worker described her general job duties. She described the manner in which she scans and bags items and takes cash. She works at a right-handed till and scans items from right to left. She described the workstation. She said that the counter is 2'9" in height. The narrow counter space is cramped and the counter around her till is cluttered with items for sale. The worker said that she found it hard to manoeuvre items through this area. As she did not have access to a hand-held scanner, she had to scan even large items across the built-in scanner at the till. According to the worker, normally she works a five-hour shift. The week before her symptoms commenced she started with two eight-hour shifts, and then worked more five-hour shifts. The worker worked on December 18, 2001 but had no problems.

The worker was unable to state what had caused her shoulder problems.

The worker described December 19, 2001 as a busy day. The store held a pop sale every day in December and, as this was leading up to the Christmas holiday, the store was busy even at 0930 in the morning. There were long lineups. She assisted about 11 customers before she noticed symptoms in her shoulder. Not all the orders were large. In particular, the worker stated that she did not have to scan many larger appliance-type items till later in the shift. The worker described in some detail the manner in which she lifts and bags pop. The worker demonstrated the position of her right arm as she works. The worker uses her right hand to key in purchases as well as to move purchase items.

The worker said that her symptoms started in her right shoulder about 1000 hours. By 1500 she was experiencing pain down the back of her arm and into her neck. The worker said she left work at 1600. She attended her doctor the following day. She stopped working. Her symptoms did not improve at first, but later improved with time.

The worker commented on the job site evaluation. She said that on that day she had just come from physiotherapy. Her shoulder was stiff and sore. She told the assessor and the Board officer about her symptoms. In demonstrating her job duties, the worker said that she just scanned toothbrushes during the assessment. She did not scan any other objects. In particular, she did not scan any pop containers. On the day of the job site visit according to the worker, the store was not busy. The assessor did not assess what her co-workers were doing.

In submission the workers' adviser asserted that the claim should be accepted as an occupational disease pursuant to section 6(1) of the Act. He referred the panel to policy item 27.20. He noted that the work was repetitive, the workstation was not adjustable, the counter was cramped, and the worker demonstrated that she worked in an awkward posture. There is no evidence of non-occupational factors. Before the onset of symptoms the worker's hours increased. The decision to deny the worker's claim was not supported by a medical opinion.

Reasons and Findings

The panel must determine whether the worker's complaints for which she sought benefits are compensable, either as an injury or as an occupational disease. The case manager considered the worker's entitlement pursuant to both sections 5 and 6 of the Act, but apparently focused on an adjudication under section 6.

The panel notes that, in the decision letter, the case manager dealt with only one of the diagnoses on file. The case manager did not address the matter of cervical radiculopathy secondary to degenerative disc disease. The panel considers that WCAT has jurisdiction to consider not only the condition of bursitis/tendonitis but also cervical radiculopathy, since the worker initiated a claim for a symptom complex that could have been caused by either condition or both in combination, and the medical reports clearly identified both conditions.

To establish a claim pursuant to section 5 of the Act, a worker must suffer a personal injury arising out of and in the nature of employment. This means that:

- the person injured must be a worker at the time of the injury;
- there must exist evidence that an injury occurred;
- the injury must have arisen while the worker was engaged in activities considered part of the employment relationship; and,
- some aspect of the employment relationship must have caused the injury.

The Board has developed policies concerning personal injuries and these are set out in the *Rehabilitation Services and Claims Manual, Volume 1 (RSCM)*, in chapter 3. Policy item #14.20 concerns the occurrence or non-occurrence of a specific incident. It is not a bar to compensation when an injury occurs over a period of time rather than resulting from a specific incident. To be compensable however, the evidence must warrant a conclusion that something in the employment had causative significance in producing the injury. A speculative possibility that this might be so is not enough.

Policy item #15.10 concerns pre-existing deteriorating conditions. It instructs, in part, that in some cases, in the absence of some exceptional strain or other exceptional circumstance, a pre-existing condition might not likely reach a critical point and become a disability about the time of the work injury. The worker could well have survived without disability for months or years if something exceptional in the course of her employment had not triggered the disability. Here, the Board considers that the employment situation had substantial causative significance and the disability is compensable.

Policy item #15.20 concerns injuries following motions at work. If a job requires a particular motion and that motion results in injury, that is an indication that the injury arose out of employment and is compensable.

Section 6 of the Act allows the Board to accept claims for occupational diseases where a condition is due to the nature of the worker's employment. Policies concerning occupational diseases are set out in the *RSCM* in chapter 4.

The Board generally considers activity-related soft tissue disorders, or ASTDs such as bursitis and shoulder tendonitis, as occupational diseases. Both conditions are recognized by inclusion in schedule B of the Act. Board policy concerning bursitis is set out in the *RSCM* at item #27.11, while policy item #27.12 concerns tendonitis.

Did the worker suffer an injury arising out of and in the course of her employment on December 19, 2001?

As regards the condition of cervical radiculopathy, the panel finds that the worker is entitled to establish a claim for an aggravation of a pre-existing condition. The worker's attending physician described an aggravation of recurrent right shoulder pain with sudden worsening on December 19, 2001. Within a few days the medical reports indicated that the worker had symptoms radiating down her right arm and into her fingers.

At the hearing the worker described feeling well when she went to work on December 19, 2001 and developing symptoms within one hour of starting work. During that time she described serving 11 customers and lifting heavy containers of pop etc. The worker's symptoms worsened quickly during the course of the day and became sufficiently severe that the worker could not complete her shift.

The evidence indicates that the worker's symptoms came on during a particularly busy period, during which she worked somewhat longer hours; and during which she had to lift and move more than the usual number of heavy articles, including but not limited to pop containers. Her work area was cramped and to some extent she has described awkward movements due to the workstation design.

The medical reports indicate that the worker had an underlying degenerative condition of her neck. There is no indication that the worker's underlying condition was about to become disabling in the absence of her increased work activities on December 19, 2001. The worker associates her neck symptoms with her shoulder, but the panel notes that the symptoms the worker describes may as easily be attributable to neck pathology.

The panel accepts that the work conditions the worker has described on December 19, 2001 were sufficient to aggravate the worker's underlying degenerative disc disease and to provoke cervical radiculopathy. The panel notes that the worker's symptoms resolved relatively quickly when she went off work and have not returned subsequently when she returned to work. This suggests to the panel that the worker's symptoms were more consistent with a minor temporary aggravation-type injury than with an occupational disease.

Did the worker acquire an occupational disease tendonitis/bursitis due to the nature of her employment?

In the absence of a sudden trauma, shoulder bursitis conditions are treated as occupational diseases (see policy item #27.11). Sudden strains to the shoulder resulting in tendonitis are treated as injuries while shoulder tendonitis that occurs without a specific event are treated as occupational diseases (see policy item #27.12).

The case manager concluded that the worker's tendonitis/bursitis did not occur as a result of a personal injury and the panel concurs. The worker has not identified a specific incident on December 19, 2001. The foregoing policies require that the worker's entitlement to establish a claim for shoulder tendonitis/bursitis must be determined pursuant to section 6 of the Act.

The panel has first considered whether the worker is entitled to the Schedule B presumption set out in section 6(3) of the Act. For a condition of shoulder bursitis to be accepted under section 6(3) of the Act, there must be frequently repeated or sustained abduction or flexion of the shoulder joint greater than sixty degrees. This activity must represent a significant component of the employment.

The worker does not give a history consistent with this requirement, nor does the ergonomic intervention report suggest to the panel that the worker meets the requirements of Schedule B as it relates to bursitis. The panel finds that the worker is not entitled to establish a claim for shoulder bursitis pursuant to section 6(3) of the Act.

As regards shoulder tendonitis, Schedule B requires that there must be use of the affected tendon(s) to perform a task or series of tasks that involves any two of the following:

1. frequently repeated motions or muscle contractions that place strain on the affected tendon(s);
2. significant flexion, extension, ulnar deviation, or radial deviation of the affected hand or wrist;
3. forceful exertion of the muscles utilized in handling or moving tools or other objects with the affected hand or wrist; and where such activity represents a significant component of the employment.

Where there is frequently repeated or sustained abduction or flexion of the shoulder joint greater than sixty degrees and where such activity represents a significant component of the employment.

The panel has considered the worker's evidence and the information provided on the ergonomic intervention report. The panel notes that the worker's activities in moving items from right to left across the workstation (without a conveyor belt) on a very busy day did involve frequently repeated motions capable of straining the affected tendons. The purchase items the worker scanned included more than usual heavy items including pop containers etc.

The evidence does not suggest to the panel that the work involved significant flexion, extension, ulnar deviation, or radial deviation of the affected hand or wrist.

The panel was not persuaded that the work involved significant forceful exertion of the muscles utilized in handling or moving other objects with the affected hand or wrist. The evidence does suggest that such force as the worker uses to move purchase items represented a significant component of the employment on December 19, 2001.

The worker's evidence did not support a conclusion that frequently repeated or sustained abduction or flexion of the shoulder joint of greater than sixty degrees was present.

The panel therefore finds that the worker is not entitled to establish a claim for shoulder tendonitis pursuant to section 6(3) of the Act.

The panel has considered, finally, whether the worker is entitled to establish a claim for occupational disease for shoulder bursitis/tendonitis pursuant to section 6(1) of the Act.

The panel notes that the worker has performed the same job duties over a number of years without difficulty. She was well accustomed to the job duties. Although she was working slightly increased hours during the pre-Christmas season, the shift length was not excessively long. The worker did not describe working excessive overtime. She was busy on December 19, 2001, but she had worked during pop sales and other holiday seasons without problems. It is not clear why the work activities would have produced shoulder symptoms at this time and not earlier. Furthermore, if the work in December 2001 precipitated an occupational disease, the panel would expect that the worker would have experienced some symptoms when she later returned to work.

The worker described an onset of symptoms early in the shift where earlier she had none. Contrary to the description set out in the decision letter, the worker did not describe an injury that happened over time. Her symptoms started within one hour of commencing work on a particular day. In the panel's estimation the worker's job duties on December 19, 2001 were not of sufficient duration to cause an occupational disease where there was no evidence of one before. The panel does not doubt that the worker developed a bursitis/tendonitis at about this time. In the panel's view, however, there is not necessarily a direct cause and effect between the employment activity and the worker's condition. As Board policy points out, some cases of ASTD are ideopathic (occur without a known cause). In such cases, the work activities in which the worker engaged on December 19, 2001 could well have brought the condition to the worker's attention, without being causative.

Dr. EJ in a February 16, 2003 letter to the workers' adviser attributed the worker's right shoulder bursitis to her employment. She wrote in part that:

[The worker] is required to do constant repetitive right shoulder movements. She was working during the Christmas rush and having to lift and move large and awkward appliances, small home furnishings, large pop containers, etc. She was working longer hours during the Christmas rush. I also have seen her work station, and feel that she definitely would have had her shoulder in an awkward position frequently and would have been moving her shoulder forcefully frequently during the Christmas rush. I believe that [the worker's] symptoms developed because of the increased pressures of her job during this period.

The panel notes that the worker indicated during the hearing that, on December 19, 2001, her symptoms started before she did much in the way of lifting small home furnishings etc. On that day her symptoms started after she served only about 11 customers. Any heavy lifting in the first hour of that shift was comprised mainly of scanning and lifting pop containers. While the panel accepts that the holiday season did involve slightly increased hours of work, the work pressures were not elevated to such an extent that they caused a tendonitis/bursitis.

The panel finds that the worker's right shoulder tendonitis/bursitis is not due to the nature of her employment.

Conclusion

The panel accepts that the worker suffered an aggravation of a pre-existing degenerative neck condition on December 19, 2001, and is entitled to establish a claim pursuant to section 5(1) of the Act.

The panel finds that the worker's right shoulder tendonitis/bursitis is not due to the nature of her employment. She is not entitled to establish a claim for that condition either pursuant to sections 5(1), 6(1), or 6(3) of the Act.

The appeal is allowed to the extent described in the foregoing and the panel varies the decision set out in the January 17, 2002 decision.

The worker is entitled to recover the cost of one-day time loss to attend her hearing, and the Board should also determine whether the worker is entitled to reimbursement for travel to attend the hearing, pursuant to section 7 of the *Workers Compensation Act Appeal Regulation*. The worker could not tell the panel the precise number of kilometres she travelled to the hearing.