**Noteworthy Decision Summary**

**Decision:** WCAT-2004-00793 **Panel**: Marguerite Mousseau **Decision Date:** February 17, 2004

***Description of the tests in sections 250(4) and section 99 of the Workers Compensation Act, and their application to speculative possibilities***

A hospital food service worker was stacking empty, plastic food tray lids on a counter when she felt a clicking sensation in her right shoulder. Twelve hours later when the worker was at home, she began feeling pain in that area. The Workers' Compensation Board (Board) accepted her claim and the employer appealed.

Policy #14.20 states that an injury is compensable if the evidence warrants a conclusion there was something in the employment that had causative significance in producing the injury: "a speculative possibility that this might be so is not enough". WCAT must apply the test set out in section 250(4) of the Workers Compensation Act (Act), which is the same test that the Board must apply under section 99(3). The test is essentially the same as that set out in section 99 of the Act prior to Bill 63, although the language has changed and it is now found in two separate sections of the Act. Policy #97.10 states that section 99(3) only applies to possibilities for which there is evidential support for which the evidence is evenly weighted; it does not apply to speculative possibilities. When an onset of pain occurs some length of time after the worker has performed the activity to which the pain and injury are attributed, it is necessary to have some sound evidence, usually medical evidence, which explains the link and the cause of the delayed onset of pain before one can conclude that the injury occurred in the course of the employment. In this case, there was no evidence that served to link, medically, the clicking sensation the worker felt while at work to the onset of pain 12 hours later. A clicking sensation while performing the activity, in the absence of any other symptoms whatsoever, was not a sufficient basis upon which to conclude that an injury occurred in the course of employment. The right shoulder strain could only be linked to the work activities by speculation. There was insufficient positive evidence that the injury either arose out of or occurred in the course of the employment.



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**Panel:** Marguerite Mousseau, Vice Chair

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## Introduction

The employer appeals a decision of the Review Division dated June 16, 2003. In that decision, the review officer concluded that the worker suffered an injury to her shoulder arising out of and in the course of her employment on December 13, 2002.

The Workers' Compensation Appeal Tribunal (WCAT) has jurisdiction to consider this appeal under section 239(1) of the *Workers Compensation Act* (Act), as an appeal from a final decision made by a review officer under section 96.2 of the Act. The employer's representative has provided a submission in support of the employer's appeal. The worker's representative has also provided a submission regarding the appeal.

## Issue(s)

The issue on this appeal is whether the worker suffered an injury arising out of and in the course of her employment on December 13, 2002.

## Background

At the time of the injury, the worker was employed by two different hospitals. She attributed her shoulder injury to activities performed during a shift at hospital S. She had been employed with this hospital as a patient food service worker since 1989. She regularly worked six-hour shifts, four days on and three days off. On each shift she rotated through four duties: tray line, dish room, ward stocker, and wagon running.

On the tray line, the worker served cereal for two hours. In the dish room, there were five different jobs, one of which was performed for one hour each shift. These jobs were as follows: stripper #1 - removed food trays from the food wagons or tables and removed lids from the beverage/food containers; stripper #2 - removed dishes and bowls from the trays; loader - loaded trays into the dishwasher; unloader - unloaded the dishwasher; and, wagon washer.

The worker also spent about one and a half hours as a ward stocker, which involved restocking supplies on the ward, and one hour wagon running, which involved placing and removing wagons as needed.

The worker states that, on December 13, 2002, while working in the stripper #1 job (for her usual one hour) she felt a sensation that she described as tingling or clicking in her

right shoulder. At the time she was stacking empty food tray lids on a counter. This occurred around 10 a.m.; she felt no pain at the time or subsequently and she continued to perform her usual work until the end of her shift. At approximately 9 p.m. that evening, she raised her arm and felt pain in her right shoulder.

Her physician, Dr. Tam, diagnosed a right shoulder strain. The physician's first report indicates that the worker strained her right shoulder while "stripping", "stacking lots of patients' dishes". I note that this is the physician's report of the worker's statement regarding what caused the injury. Dr. Tam did not provide an opinion or otherwise comment on the cause of the injury.

The worker was disabled for a period of six days due to the shoulder strain – between December 15 and December 22. She returned to work for two days but stopped working for another period of several days to two weeks; the precise period is unclear. She submitted receipts to the Workers' Compensation Board (Board) for 12 acupuncture treatments, 6 physiotherapy sessions, an anti-inflammatory medication and an antibiotic.

A Board officer denied the worker's claim on the basis that the worker's symptoms did not appear to arise out of her employment. She had performed her usual activities, the same job she had performed for years, and developed pain while at home. The worker appealed this decision.

The review officer concluded that it was reasonable to link the clicking sensation that the worker felt in the morning to the onset of pain in the evening and that it was reasonable to relate the "click" to the motion of raising the right arm to chest height in order to stack the trays. She, therefore, concluded that the injury arose in the course of employment. The review officer also noted the comments in Dr. Tan's report regarding the cause of the injury and she was satisfied that this was sufficient medical evidence to connect the right shoulder injury to the repetitive motion of stripping lids. The review officer concluded that the repetitive action of stripping lids was an unusual motion undertaken predominantly in the course of the hospital job and that the apparently minor incident of swinging the right arm had caused the shoulder strain. The employer appeals this decision.

**Reasons and Decision**

The worker's injury occurred after June 30, 2002, the transition date for a substantial number of changes to the Act. Since the worker's injury occurred after that time her entitlement to compensation is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002.* Additional amendments to the Act, which deal with the appeal structure, appeal rights, the application of policy and other procedural matters which are contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) are also relevant to the appeal.

WCAT panels must apply a policy of the board of directors that is applicable in any given case. The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM).

Section 5(1) of the Act provides that compensation is payable when a worker suffers a personal injury arising out of and in the course of the employment. Under section 5(4) of the Act, where the injury is caused by an accident that occurred in the course of the employment it is presumed to have arisen out of the employment and vice versa. The policy at item #14.20 of the RSCM discusses situations where a worker suffers a personal injury unrelated to any accident or specific incident. In those cases, the evidence must support a conclusion that the injury arose out of the employment as well as a conclusion that it occurred in the course of the employment. The policy states that, an injury is compensable if the evidence warrants a conclusion that there was something in the employment that had causative significance in producing the injury: "a speculative possibility that this might be so is not enough".

The worker's representative submits that there is sufficient evidence to establish "on the balance of possibilities" that the worker's injury arose out of and in the course of her employment under section 99 of the Act. Under the current legislative scheme, WCAT must apply the test set out in section 250(4) of the Act. This is the same test as must be applied by the Board under section 99(3) of the Act. This is, essentially, the same test as was cited by the worker's representative although the language has changed and it is now found in two separate sections of the Act.

Section 250(4) says, "if … the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker".

Item #97.10 of the RSCM deals with the weighing of evidence and the standard set out in section 99(3) of Act. It says, in part:

> The Board, as a quasi-judicial body, must make its decisions according to the evidence or lack of evidence received, not in accordance with speculations unsupported by evidence. Section 99(3) of the *Act* applies when "the evidence supporting different findings on an issue is evenly weighted in that case." However, if the Board has no evidence before it that a particular condition can result from a worker's employment, there is no doubt on the issue; the Board's only possible decision is to deny the claim. If one speculates as to the cause of a condition of unknown origin, one might attribute it to the person's work or to any other cause, and one speculated cause is no doubt just as tenable as any other. However, the Board can only be concerned with possibilities for which there is evidential support and only when the evidence is evenly weighted does section 99(3) apply.

The first consideration is whether the worker suffered an injury in the course of the employment. Usually, the onset of pain is indicative that an injury has occurred. In this case, the onset of pain occurred at home. When the onset of pain occurs some length of time after the worker has performed the activity to which the pain and injury are attributed, it is necessary to have some sound evidence, usually medical evidence, which explains the link and the cause of the delayed onset of pain before one can conclude that the injury occurred in the course of the employment. In this case, there is no evidence that serves to link, medically, the "clicking" or "tingling" sensation that the worker felt in her right shoulder while at work on the morning of December 13 to the onset of pain about 12 hours later. A clicking sensation while performing the activity, in the absence of any other symptoms whatsoever, is not a sufficient basis upon which to conclude that an injury occurred in the course of employment.

Even if the clicking sensation could be said to constitute evidence of the occurrence of an injury, it would still be necessary to determine whether the work activities had caused the injury. In this regard, the duties described do not appear to involve motions that would typically stress the shoulder. The tray lids in hospitals are usually made of plastic and light in weight. I expect the worker's representative would have indicated if this were not the case here. The worker said that she could remove as many as 300 lids while performing this job. Since she would only perform this job for one hour, this would involve performing the same motion twice per minute.

This is considered repetitive by Board policy but there is no evidence that this activity when performed for one hour would create a risk for a shoulder strain. There is no medical evidence to this effect and there is nothing in the activities themselves that suggests an obvious strain on the shoulder tendons. The fact that the worker performed this job for 13 years without an injury arising from that motion further suggests that it was not the mechanism of injury. Alternatively, if there was some stress involved, the shoulder tendons should be well accustomed to this type of activity and therefore not susceptible to injury from such a routine activity.

The nature of the activity, the lengthy history of performing this activity, and the absence of any medical opinion evidence that this activity could or did cause the right shoulder strain provide little by way of positive evidence that the activity caused a shoulder strain on December 13, 2002.

Given all of the above, I consider that the right shoulder strain can only be linked to the work activities by speculation; there is insufficient positive evidence that the injury either arose out of or occurred in the course of the employment.

For the reasons set out above I allow the employer's appeal and vary the decision of the review officer dated June 16, 2003.



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Marguerite Mousseau
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MM/gwo



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