

Noteworthy Decision Summary**Decision:** WCAT-2005-05582-RB**Decision Date:** October 20, 2005

Panel: Wallace Auerbach

Personal Injury – Evidence - Hindsight - Sections 5(1), 6(1) and 6(3) and of the Workers Compensation Act - Item #97.00 of the Rehabilitation Services and Claims Manual, Volume I

This decision is noteworthy for its analysis of how testimonial evidence provided in hindsight is considered speculative in nature.

The worker claimed compensation for a right shoulder injury. The Workers' Compensation Board, operating as WorkSafeBC, denied her claim for either a personal injury or an occupational disease. The worker's appeal was denied. The panel found the worker did not suffer a personal injury or an occupational disease arising out of and in the course of or due to the nature of her employment.

The panel observed that the worker appeared to relate the onset of her right shoulder problems to combative residents that she was dealing with at the time of the onset of her symptoms. However, the panel found that there was no evidence to indicate that the worker specifically believed at the time that this was the cause of her problem. Her evidence to the panel in this regard appeared to be hindsight.

When considering policy item #97.00 of the *Rehabilitation Services and Claims Manual, Volume I* which relates to the weighing of evidence, the policy cites an example of where a claim is denied when a worker is away from employment and begins to feel some pain and discomfort, such as in the lower back. In seeking to find a reason for the condition the worker thinks back to work done over a period of time, and concludes that the problem must have resulted from something which occurred on a certain day when certain heavy work was being performed; circumstances not too different from this case. The policy indicates that the question then arises whether there was anything other than the worker's hindsight which would allow a conclusion that the work done some weeks or months previously had causative significance.

In the circumstances of this case, in the absence of any specific reference in the reports the worker made at the time related to the circumstances she described as occurring on the job, the panel found that the worker's hindsight only lead to a speculative possibility. The panel found that, had these particular circumstances been of significance at the time, the worker would have mentioned them and they would have been recorded in the reports and evidence on file, rather than in hindsight during the worker's evidence at the oral hearing.

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Introduction

The worker appeals a decision made by an officer of the Workers' Compensation Board (Board) dated October 23, 2002, in which the case manager (CM) advised the worker that her claim for right shoulder calcific tendonitis was denied under both section 5(1) as a personal injury arising out and in the course of employment, and under section 6(1) or section 6(3) of the *Workers Compensation Act* (Act) as an occupational disease due to the nature of the worker's employment.

Issue(s)

The issue in this appeal is whether the worker's right shoulder problem was due to the nature of her employment as contemplated either under section 5(1) of the Act as a personal injury or as an occupational disease as contemplated by section 6 of the Act.

Jurisdiction

This appeal is governed by the provisions of the Act as it read prior to June 30, 2002 and the Board's *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Review Board and the Appeal Division of the 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.)

Method of Appeal

This appeal was considered by way of a read and review of the evidence and information on file and the information provided by the worker at the oral hearing on September 20, 2005. The employer although notified of this matter did not participate.

Background and Evidence

The worker aged 55, has been employed as a long-term care aide with the employer since September 18, 1992. According to the CM's decision (the subject of this appeal), the worker noted the development of stiffness in her right shoulder when performing her

regular duties. As there was no indication of an injury, the worker's claim therefore was not acceptable under section 5(1) of the Act for a personal injury arising out of and in the course of employment.

In considering the worker's claim under section 6 with respect to the issue of whether the worker's right shoulder problem was an occupational disease that was due to the nature of the worker's employment or one that is described in Schedule B of the Act, the CM advised that x-rays of the worker's right shoulder dated June 11, 2002 showed a faint soft tissue calcification in the region of the supraspinatus tendon. This was indicated to be "calcific tendonitis of the rotator cuff" of the right shoulder. With respect to whether the condition could reasonably be related to the worker's employment, the CM noted section 6(3) of the Act which relates to the presumption of work causation provided for those occupational diseases appearing in Schedule B, when certain criteria are met. Item 13(b) of Schedule B outlines that for shoulder tendonitis to be deemed to be caused by the work, the work must involve "frequently repeated or sustained abduction flexion of the shoulder joint greater than 60 degrees and where such activity represents a significant component of the employment."

The CM noted that in the worker's circumstances, her employment activities as described in the work site evaluation of July 2, 2002 were not consistent with the description of the process contained in Schedule B of the Act with respect to shoulder tendonitis, and therefore her claim was not accepted under section 6(3) of the Act.

The CM also considered the worker's claim under section 6(1) with respect to the occupational disease being due to the nature of her employment. A Board medical advisor (BMA) reviewed the worker's case with regard to epidemiological research for work-related musculoskeletal disorders specific to shoulder tendonitis. Based on the epidemiological research, the BMA provided a medical opinion about the worker's condition and whether it was related to her employment. The worker was provided with a copy of the CM's memo to the BMA and also the BMA's opinion which included some of the medical science references related to shoulder tendonitis.

The CM indicated that the diagnosis of calcific tendonitis was confirmed by the attending physician and supported by the x-ray results. However, the CM concluded that there were insufficient occupational risk factors for the development of the worker's right shoulder tendonitis. As a result, the condition was found not to be due to the nature of the worker's employment. The CM found that the work activity had insufficient frequency and duration, and was characteristic of significant biological recovery time from any repetitious, forceful, awkward or sustained activities involving the worker's right shoulder musculature. The CM indicated that there was nothing to explain why the condition occurred and there was no indication as to why the condition occurred exclusive to her shoulder. The CM also indicated that certain activity and work activity may serve to bring the condition to the worker's attention, as it seemed to have done in

early June 2002. However, these circumstances did not satisfy the criteria under section 6(1) of the Act for her right shoulder calcific tendonitis to be due to the nature of her employment. Therefore her claim was not accepted by the Board.

Oral Hearing Evidence and Submissions

The worker's description of her employment activities as a long-term care aide, were essentially reflected in the ergonomic intervention report related to the site visit of July 2, 2002. The worker's employment as a full-time long-term care aide in an extended care hospital involves working either day or night shift. Her job consists of washing, toileting, dressing, feeding and pushing residents in chairs. No physical lifts are performed without the use of the mechanical lifting device, although transferring (assistance) of residents is required for those who need assistance when moving from bed to chair. According to the ergonomic report all tasks were simulated during the assessment to avoid irritating the worker's symptoms. The worker said that on the day of the onset of right shoulder problems on June 3, 2002, she found that by the end of the day shift her right arm was sore. The worker said that she is right hand dominant. She saw her attending physician who had been her doctor for some 20 years. The worker said she was advised to rest and take physiotherapy and to fill out an incident report. Initially the worker felt that it was not necessary because everyone in the extended care hospital works with sore muscles.

The worker said that she had physiotherapy on June 5, 2002 which involved application of hot packs, ultrasound and massage. The worker was also provided with a schedule for home treatment to her right shoulder. She said that she had three days off and then returned to work on June 9, 2002, on the day shift which is from 7:00 a.m. to 3:00 p.m. The worker said that her right shoulder seemed okay although she was guarded about it.

On June 10, 2002, the worker was again working day shift from 7:00 a.m. to 3:00 p.m. During that time, she was able to get six residents up for breakfast by 8:30 a.m. The worker said that normally she handles between six to eight residents. However, the last resident was resistant and combative. The resident was pushing against the bars of the bed and was generally resisting the worker's efforts to dress him. Later during the shift, she was unable to raise her right arm and was unable to make the beds with one hand.

After her coffee break, she went back to the floor but was unable to continue work because of her right arm weakness. She saw the charge nurse and then the staff nurse who called the first aid attendant and the first aid report was filled out. The worker said that although she was able to drive home, she used her left arm to assist driving with her right hand.

The worker was off work on June 11, 2002 and was able to see her doctor on June 13, 2002, who advised her that she could be off work from two to four weeks. She had

x-rays and was given some prescription medication by the physician. These were anti-inflammatories and pain relievers. The worker also received physiotherapy along with prescribed home exercises, all of which helped. Gradually her right arm got better. However, she was forced to use all her vacation and sick time during the period she was off work. She saw her attending physician on July 5, 2002 who cleared her for a graduated return to work (GRTW). The GRTW commenced on July 9, 2002 for about four hours and again on July 10 from about 7:00 a.m. to 1:30 p.m. The worker said that she was able to return to her full duties on her regular shifts and has fully recovered. The worker also said she had no right shoulder problems previously.

The worker believes she hurt herself on the job. She also believes it was a combination of things, such as working in a heavy wing which, of the 21 residents, 16 were large men suffering from Alzheimer's. They were combative and she believes this was a significant factor in the onset of her right shoulder problem. The worker does not believe any of her non-work activities were responsible, as she is not an outdoor person and only does some modest activities such as crocheting.

The worker also said at the time of the job site visit of July 2, 2002, three of the most combative male residents had passed away. However, the worker agreed with the job site evaluation of the repetition and the awkward postures involved in her work.

In submission, the worker's union representative contends that the worker suffered an injury at work because of her increased workload in June 2002 and also the repetition of shoulder activities which are noted in the ergonomic report. The worker also had no prior right shoulder problems. The union representative contends the worker's right shoulder problems were caused by her employment in June 2002, and should be accepted by the Board.

Reasons and Decision

The basis for the CM not accepting the worker's right shoulder calcific tendonitis as a Board responsibility was the BMA's opinion contained in a claim log memo dated August 9, 2002, a copy of which was provided to the worker. The BMA indicated that the x-rays of June 11, 2002 confirmed that the worker had calcific tendonitis of the rotator cuff of the right shoulder. The work site visit of July 2, 2002, according to the BMA, revealed that there was no unaccustomed activity regarding the motions of her shoulders. The force involved in her work activities was in the medium category. Furthermore, the BMA noted that although there were occasional awkward postures, there were a lot of mini-bio breaks where the tendon tissues could recover. The BMA recognized that the worker's employment activities involved some repetition. However, as the work activities involved different muscle groups, such as the forearm and the arm muscles and not always the shoulder muscles, there was no specific stress placed on the right shoulder cuff tendons. As a mechanical lift was utilized, the force that had to be sustained by the worker's shoulders was reduced significantly. The BMA also

recognized that both shoulders were utilized in her work activities. The BMA noted that the report indicated that there was no evidence of true repetition or awkward posture at the worker's work site. Her work activities therefore were not considered capable of stressing the tendon tissues in her right shoulder. The BMA found support for this conclusion in the relevant medical literature referred to in his opinion noted in the claim log entry of August 9, 2002.

I find that the evidence provided by the worker does not lead to a contrary conclusion.

In reaching this finding, like the CM, I note section 5(1) of the Act establishes that compensation is paid for a personal injury that arises out of and in the course of employment. In this case, while no specific incident or event is necessary to bring about an injury, the worker noted that the development of the stiffness in her right shoulder occurred when she was performing her regular duties on June 3, 2002. She did not find it necessary to specifically report that she related the stiffness to her work, but nevertheless sought medical treatment in the form of physiotherapy.

While policy item #14.20 of the RSCM I states that 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 the evidence must warrant 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. In this regard, the worker appears to relate the onset of her problems to the combative residents that she was dealing with during this period. However, I find that there is no evidence to indicate that the worker specifically believed at the time that this was the cause of her problem. Her evidence to the panel in this regard appears to be in hindsight. When considering policy item #97.00 which relates to the weighing of evidence, the policy cites an example of where a claim is denied when a worker is away from employment and begins to feel some pain and discomfort, such as in the lower back. In seeking to find a reason for the condition the worker thinks back to work done over a period of time, and concludes that the problem must have resulted from something which occurred on a certain day when certain heavy work was being performed; circumstances not too different from this case. The policy indicates that the question then arises whether there was anything other than the worker's hindsight which would allow a conclusion that the work done some weeks or months previously had causative significance. In the case at hand, in the absence of any specific reference in the reports made at the time related to the circumstances she described as occurring on the job in her evidence to the panel, I find that the worker's hindsight only leads to a speculative possibility. In reaching this conclusion, I find that had these particular circumstances been of significance at the time in question, there would have been some mention made of them in the reports and evidence on file, rather than in hindsight during the course of the worker's evidence at the oral hearing before this panel. As such, I agree with the CM that the worker did not suffer a personal injury arising out and in the course of employment as contemplated by section 5(1) of the Act.

With respect to the question of whether the calcific tendonitis of the rotator cuff of the worker's right shoulder can be accepted as an occupational disease under section 6 of the Act, Board policy item #26.20 of the RSCM I indicates that there are two approaches to establishing work causation. The first relates to a Schedule B presumption which is stated under section 6(3) of the Act and provides as follows:

If the worker at or immediately before the date of the disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.

In this regard, item 13(b) under Schedule B sets out shoulder tendonitis as an occupational disease. However, to be accepted by the Board there must be "frequently repeated or sustained abduction or flexion of the shoulder joint greater than 60 degrees and where such activity represents a significant component of the employment."

The BMA found that the criteria of forceful repetitive and frequent resistant motions of the right shoulder as well as awkward postures such as described in Schedule B are not revealed in the job site report which the worker agreed with.

As such the worker is not afforded the presumption under section 6(3) of the Act.

The question now arises as to whether the claim can be accepted under section 6(1) as an occupational disease due to the nature of the worker's employment. However, like the CM, I have difficulty reaching a conclusion that the worker's calcific tendonitis of the right shoulder was due to the nature of her employment. I agree with the CM that the work activities did not provide sufficient occupational risk factors for the development of the worker's right shoulder tendonitis. There was insufficient frequency and duration because there was significant biological recovery time from any repetitious, forceful, awkward or sustained activities involving her shoulder. I note the worker's evidence indicated that she believed her condition was caused by her employment, but she was not specifically sure as to what the nature of that cause was. The ergonomic intervention report related to the July 2, 2002 job site visit, however, failed to reveal anything of causative significance that would meet the standard of proof required under section 250(4) of the Act related to the balance of probabilities. Specifically, I find that the worker's belief is in hindsight and reflects the example described in policy item #97.00 of the RSCM I.

Furthermore, the BMA on reviewing the worker's case with respect to the epidemiological research concluded that there were quite likely non-occupational risk factors that were responsible for the onset of the worker's calcific tendonitis of the right shoulder.

Conclusion

For the above noted reasons, the worker's appeal is denied and the decision of the CM dated October 23, 2002 is confirmed.

No expenses were requested and none have been awarded.

Wallace I. Auerbach
Vice Chair

WIA/sc/cdh