NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2013-01624 **Panel:** Melissa R. Clarke **Decision Date**: June 7, 2013

Section 5(1) and 5(4) of the Workers Compensation Act - Rehabilitation Services and Claims Manual, Volume II - Policy Item #C3-14.20 - Notice to parties not required

This decision explains that adjudication under section 5(1) of the *Workers Compensation Act* (Act) includes consideration of section 5(4). In deciding appeals under section 5(1), WCAT will not give notice to parties that section 5(4) will be considered.

Section 5(1) of the Act provides that where an injury arises out of and in the course of a worker's employment, compensation must be paid by the Workers' Compensation Board, operating as WorkSafeBC. Where a worker's injury is caused by an accident, as defined in section 1 of the Act, then the rebuttable presumption in section 5(4) of the Act is engaged. Section 5(4) provides that ***either*** the arising out of ***or*** the arising in the course of employment test must be met for a worker's claim to be accepted. Therefore, if the evidence shows that an injury either arose out of ***or*** in the course of employment, then the other component of the test in section 5(1) is satisfied, unless there is evidence to the contrary.

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WCAT Decision Number: WCAT-2013-01624
WCAT Decision Date: June 07, 2013
Panel: Melissa R. Clarke, Vice Chair

Introduction

[1] The worker appeals the April 19, 2012 decision of the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). I also have jurisdiction to consider the issues addressed in the Board's decision of October 3, 2011, which was the decision letter that the worker requested a review of by the Review Division. The Review Division decision (*Review Reference #R0137741*) confirmed the Board's denial of compensation for the worker's head injury and aggravation of a pre-existing left knee injury; denial of compensation for a permanent left shoulder condition other than chronic pain; denial of compensation for permanent low back chronic pain; and denial of a loss of earnings assessment.

[2] The worker is represented in this appeal by a workers' adviser. The employer filed a notice of participation. The worker requested an oral hearing of this appeal. The Workers' Compensation Appeal Tribunal (WCAT) Registry staff granted the worker's request and an oral hearing was held on October 29, 2012. The worker attended with her representative. The worker gave her evidence through an interpreter.

[3] The employer did not attend the oral hearing. In a letter dated October 30, 2010, the WCAT registry advised the employer that, pursuant to WCAT's *Manual of Rules of Practice and Procedure* (MRPP) item #14.2.3.5, the employer was deemed to have waived their right to participate further in the appeal.

[4] The worker's representative made written submissions with respect to this appeal. In this decision, I will generally refer to the submissions that have been made by the worker's representative as the worker's submissions.

Issue(s)

[5] The issues are:

- Is the worker entitled to compensation for a head injury and aggravation of a pre-existing left knee injury?
- Is the worker entitled to compensation for a permanent left shoulder condition other than chronic pain?
- Is the worker entitled to compensation for permanent low back chronic pain?
- Is the worker entitled to a loss of earnings assessment?

Jurisdiction

[6] This is an appeal of a Review Division decision pursuant to subsection 239(1) of the *Workers Compensation Act* (Act).

[7] Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it.

[8] This is a rehearing by WCAT. WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further evidence, although it is not obliged to do so.

[9] WCAT exercises an independent adjudicative function and has full substitutional authority. WCAT may reweigh the evidence and substitute its decision for the appeal decision or order. WCAT may confirm, vary or cancel the appealed decision or order. Evidence is weighed on the balance of probabilities. In the event that the evidence on an issue respecting compensation for a worker is evenly weighted, section 250(4) of the Act directs the panel to resolve that issue in favour of the worker.

[10] All reference to policy in this decision, unless otherwise specified, pertains to the Board's *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). As the worker's claimed injury is submitted to have occurred on (or after) July 1, 2010, the version of Chapter 3 of the RSCM II that became effective July 1, 2010 applies.

Background and Evidence

[11] It is not necessary to provide a detailed recitation of the history of the claim. The prior Review Division decision provides considerable detail which I have reviewed and accept as an accurate portrayal of the claim history. I adopt the facts as set out in that prior decision as my own.

[12] The worker, a hairdresser, was injured in a fall at work in April 2011. The Board accepted her claim for facial abrasions, neck strain, left shoulder strain, and a back strain.

[13] In a decision letter dated October 3, 2011, a Board officer accepted that the worker had permanent left neck and shoulder chronic pain which was compensable under the worker's claim. The Board officer said that the worker fell on April 14, 2011. The Board officer denied compensation for a head injury and for an aggravation of the worker's pre-existing left knee condition. The Board officer decided that the worker's chronic left shoulder pain had stabilized as a permanent condition as of October 16, 2011 and the

worker's temporary wage loss benefits were terminated as of that date. The Board officer referred the worker's claim to Disability Awards for consideration of a pension award for chronic left neck and shoulder pain. The Board officer decided that the worker was able to return to her pre-injury job and her circumstances were therefore not so exceptional and she was therefore not entitled to a loss of earnings assessment. The Board officer decided that the worker did not have any medical restrictions or limitations and was therefore not eligible for vocational rehabilitation assistance.

[14] The worker disagreed with that decision and requested a review by the Review Division. In a decision dated April 19, 2012, the review officer denied the worker's request for review. The review officer said that the worker fell on April 19, 2011. The review officer said that the worker had requested that the Board grant her a separate chronic pain award for her cervicogenic headaches, but that he did not have jurisdiction over that matter because it was not dealt with in the decision letter under review. The issues before the review officer were the same as the ones before me in this appeal and he denied the worker's request for review on all four issues.

[15] The worker appealed the April 19, 2012 Review Division decision to WCAT and it is that decision which is before me today.

Oral Hearing

[16] The worker testified on direct examination that she began working for the employer as a hair stylist and salon manager in December 2009. She said that she had been working as a hair stylist for 30 years. She said that her job duties as a stylist were cutting and styling hair. She said that as a manager, her duties included inventory counts, scheduling employees, cleaning, advertising, dealing with customer referrals, and working longer hours. She said that she did not do performance management tasks as there was a "head manager" who did that. She said that at the time of the injury, she was new in the job of salon manager.

[17] The worker said that if the salon was slow, she would do the various manager jobs. She said that on the day of injury, she was busy doing manager duties.

[18] The worker said that on March 31, 2010, she had fallen at work and hurt her left knee. She said that she went to her doctor and he gave her medicine for swelling in her knee. She said that she also used traditional medicines from her country of origin. She said that she was referred to a specialist who recommended that he "vacuum" her knee, but she said that the procedure scared her and she did not do it. She said that between March 31, 2010 and April 19, 2011, her knee was better. She said that she took Tylenol and Arthrotec, as well as using traditional medicine compresses almost every night. She said that during that time period, she was able to perform her job duties, but after the April 2011 incident, she was no longer able to. The worker said that between March 31, 2010 and April 2011, her left knee symptoms were daily swelling which was worse with activity.

[19] The worker said that prior to the April 19, 2011 incident, she performed her job duties with the left knee problems by taking breaks every 15 minutes when possible and, when doing paperwork, she would elevate her leg. She said that after the April 2011 incident, she needed a break every 5 minutes for her left knee symptoms. She said that she would try to schedule her time off so that she had the weekend and a holiday so as to have a longer rest, such as two to three days in a row.

[20] She said that she did not proceed with the left knee surgery recommended by the specialist. She said that she is on a wait list for knee replacement surgery, but that was not the surgery recommended by the specialist. She said that he recommended arthroscopic debridement.

[21] The worker said that on the day of injury under this claim, she was working alone. She said that she did not remember if she had any appointments that day. She said that she was in room at the back of the salon performing an inventory of product. She said that she was standing on a stool, holding a book in one hand and a pen in the other. She said that the stool was between two sinks. The worker said that when she fell, she hit the back of her head and neck on one sink and hit her lumbar spine, cervical spine, left shoulder, and left knee when she fell to the ground. She said that the floor was tile.

[22] The worker said that when she woke up after the fall, she said that she was "shy" and did not remember why she fell or why she could not move. She said that she was dizzy and had bad pain in her neck, head, and knee. She said that the pain in her knee was worse than her prior "daily" knee pain. She said that after she was found, she was taken to the employer's security office. She said that she saw Dr. McCallum the next day. She said that Dr. McCallum examined her, sent her for an x-ray and told her to see her regular doctor the next day. She said that she did not remember if Dr. McCallum asked her if she lost consciousness.

[23] The worker said that the night of the injury, she had pain in her neck, knee, and back and was dizzy and vomiting and had a headache. She said that the pain in her head, neck and shoulder were worse than the pain in her knee. The worker said that she saw Dr. Gill, her regular physician, the next day. She said that she told him she had pain in her back and shoulder and that her left knee was worse. The worker said that he focused on the neck, back and shoulder because he knew about the left knee from before. The worker said that she knows her left knee is worse than before because now she can only stand for 5 minutes whereas before she could do a haircut and stand for 15 minutes. She said that she takes more Tylenol, Advil and Arthrotec than before. She said that she has gained 60 pounds because she cannot move.

[24] The worker said that her vomiting and dizziness "got better" and went away, but she still vomits sometimes. She said that she still has pain in her neck, shoulder and knee. She said that she still gets headaches, but they are not the same as before and are now more in her neck and shoulder. She said that her headaches are less painful than they

used to be, but that whenever she is angry or upset she has a severe headache. She said that she has mild headaches every day and severe headaches once a week.

[25] The worker said that she cannot cut hair anymore because of her neck and shoulder symptoms. She said that she can read a book, watch TV as long as she changes position all the time. She said that due to her shoulder pain, she cannot move her hand up. She said that walking and sitting caused low back pain. She said that she cannot be a hair stylist anymore because she cannot wash, cut or style hair, and she cannot do inventory. She said that she cannot bring her hand or arm up to do job tasks. She said that she cannot cut hair because her knee symptoms make it hard to stand and she cannot reach up to cut the hair because of her shoulder. She said that she can use her left hand for some tasks "low down". She said that she used to dye her own hair and cannot do that anymore.

[26] The worker submitted that her head injury should be accepted as compensable. The worker submitted that she had the physiological signs of a head injury, including dizziness, nausea, and vomiting. The worker said that there was some evidence that the worker had injured her head, contrary to the statement of the review officer. The worker submitted that the mechanism of injury was consistent with an injury to her head either when she hit the sink or when landing on the floor. The worker submitted that the loss of consciousness was in dispute and the worker did not report it until the second day when she saw Dr. Gill. The worker submitted that when she saw Dr. McCallum, tenderness in the occipital area was noted. The worker said that she presented with classic head injury symptoms.

[27] The worker said that Dr. Gill's medical-legal opinion provided to the Review Division said that the worker had suffered a concussive head injury and suffered from post-concussive headaches. The worker noted that Dr. Kuan at the Medical and Return to Work Planning (MARP) had said that the worker had cervicogenic headaches, but the pain program staff noted that the worker's headaches were "not classic cervicogenic". The worker said that her concussion and post-concussion headaches should be accepted under the claim.

[28] The worker submitted that her claim should be accepted for a permanent aggravation of left knee osteoarthritis, as set out in Dr. Gill's medical-legal opinion. The worker noted that the worker had a permanent aggravation of her left knee osteoarthritis due to her weight gain and inactivity due to the claim injuries. The worker also relied upon her testimony that she has decrease postural tolerances due to pain. The worker relied upon policy item #16.00 that a significant pre-existing condition was not a bar to compensation. The worker noted that prior to the injury under this claim, she was able to perform her job duties despite her left knee symptoms and was no longer able to do that after her fall onto concrete. The worker said that her subjective left knee symptoms were worse.

[29] With respect to her left shoulder, the worker submitted that she uses it on a limited basis and has a restricted range of motion. The worker submitted that she had a permanent condition other than pain, as set out in Dr. Kuan's MARP opinion (diagnosing her with left shoulder impingement) and the MRI (bursitis). The worker said that the Board officer said that at the MARP discharge, the worker's only issue was pain. The worker submitted that Dr. Kuan said that pain was her major issue, not her only issue. The worker submitted that her shoulder condition had not resolved and she had ongoing range of motion restrictions.

[30] The worker submitted with respect to her low back chronic pain that Dr. Gill diagnosed her with upper back pain, but her sworn testimony, as well as the evidence from the occupational rehabilitation 2 (OR2) program and the pain program indicated that her back pain was in her low back. The worker submitted that her testimony should not be discounted because it was consistent with the evidence from the treatment programs. The worker submitted that her low back chronic pain should be accepted as permanent condition on her claim.

[31] The worker submitted that she could not return to her pre-injury job because it was not available. The worker said that the Board officer had terminated her claim before the Board had received the pain program discharge report that indicated that she could not return to work. The worker said that she had limitations with respect to sustained reaching with her left arm, and that was an essential component of her job duties as a hair stylist. The worker said that the review officer did not address that the worker has no meaningful use of her left arm because she cannot perform sustained or repetitive reaching. The worker said that if the panel accepted the submissions with respect to other conditions under the claim, she had further reasons for not returning to work, such as her five minute limitation on standing.

[32] The worker relied upon policy item #40.00 that she could no longer return to her pre-injury work or work in another occupation without incurring a significant loss. The worker relied upon Dr. Gill's opinion that she could not return to work and she noted that there was no contrary evidence to Dr. Gill's opinion. The worker asked for a referral for a loss of earnings assessment.

Post-hearing process

[33] After the hearing, I asked the WCAT registry to obtain new evidence from Health Insurance BC for April 2011. The WCAT registry staff sent a letter to Health Insurance BC on October 29, 2012. Health Insurance BC responded on November 8, 2012. After reviewing the Health Insurance BC records, I asked the WCAT Registry staff to obtain further records from the worker's attending physician, Dr. Gill; from Dr. McCallum; Dr. Van Wiltenburg; and from the worker's physiotherapist.

[34] Dr. Van Wiltenburg, a radiologist, responded on December 6, 2012. One report was not relevant to the issues before me in this appeal and was not disclosed to the parties.

The remainder of the reports were deemed relevant to the appeal and were disclosed. The other reports were x-rays (dated June 2, 2006, August 9, 2006, July 12, 2007, July 8, 2009, September 1, 2009, October 22, 2009, April 19, 2011, May 16, 2011, and October 13, 2011); ultrasound (dated September 5, 2006 and January 28, 2010); and bone density (dated January 9, 2009).

[35] The worker's physiotherapist responded on December 13, 2012. All of the physiotherapist's reports were deemed relevant to the appeal and were disclosed.

[36] Dr. McCallum responded on December 17, 2012. All of Dr. McCallum's reports were deemed relevant to the appeal and were disclosed. Dr. McCallum's April 20, 2011 physician's first report to the Board indicated (amongst other injuries) that the worker had a tender occipital area, as well as worse pain in her left knee and low back pain. Dr. McCallum said that the date of the injury was April 19, 2011.

[37] Dr. Gill responded on February 12, 2013. All of Dr. Gill's records, including a February 7, 2013 opinion, were disclosed. I will discuss Dr. Gill's evidence in more detail below.

[38] The worker received disclosure of the above documents on February 14, 2013. In a submission dated March 7, 2013, the worker said that Dr. McCallum's evidence confirmed the worker's evidence that she sought medical attention immediately after the injury. The worker also submitted that Dr. McCallum's chart notes indicated that the worker's injuries were from neck to foot, which the worker said was consistent with her evidence that she landed on her side after striking the back of her head against the sink and also that she suffered left knee trauma in the incident.

[39] The worker submitted that the physiotherapist's notes confirm the worker's evidence that she landed on her left side and that she was suffering left knee pain when she was treated on April 26, 2011. The worker submitted that the physiotherapist's chart notes also indicate that the worker was suffering from headaches.

[40] The worker said that the x-ray report for her knee dated October 13, 2011 showed progression of the left knee findings compared to the prior report of October 22, 2009 and that the radiologist said that the degree of progression was unusual. The worker submitted that the trauma of the work injury and the worker's subsequent weight gain led to an acceleration of the pre-existing condition.

Reasons and Findings

Head injury and aggravation of pre-existing left knee condition

[41] The Board adjudicated the worker's claim under section 5(1) of the Act. However, I find that the claimed injury should be adjudicated under section 5(4) of the Act.

[42] The first matter I must decide is the date of the worker's injury under this claim, as the Board has decided that the date of injury was April 14, 2011 and the review officer said April 19, 2011. I find as a fact that the worker's date of injury under this claim was April 19, 2011. I rely on Dr. McCallum's April 20, 2011 physician's first report to the Board in this regard, as well as the worker's sworn testimony at the hearing.

[43] I find that the April 19, 2011 incident was an "accident" under the Act. I am satisfied that adjudication under section 5(1) of the Act is inclusive of consideration of section 5(4) of the Act and no notice is required to be given to the parties. In the facts of this appeal, it is readily apparent that the worker was involved in an accident.

[44] Section 5(4) of the Act provides for the compensation of injuries that happen because of an "accident". The term "accident" is defined in section 1 of the Act as including "a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause". Where an incident is an accident, section 5(4) of the Act sets out a rebuttable presumption in favour of the worker. Policy item #C3-14.20 explains the presumption as follows:

> Where an injury occurs at work as a result of any traumatic experience or external cause, it is usually from an accident to which the presumption in section 5(4) applies. For injuries resulting from an accident, evidence is only needed to establish either that the injury arose out of the employment or that it arose in the course of the employment. The other component of the test is presumed, unless there is evidence to the contrary.

[45] The Board officer and review officer did not conduct an analysis of the worker's injury under section 5(4) of the Act. Both applied section 5(1) of the Act in their analysis. Section 5(1) requires that a worker's injury must both arise out of and in the course of employment to be compensable. Section 5(4), however, only requires that either the arising out of or in the course of employment tests be met, because the other is presumed, unless the contrary can be shown.

[46] I find that the April 19, 2011 incident meets the statutory definition of accident. I find that the worker's April 19, 2011 incident was a fortuitous event within the definition of "accident" in section 1 of the Act. It is not in dispute that the worker was in the course of her employment during the April 19, 2011 accident. I find that she was.

[47] In order to determine whether the worker is afforded the presumption under section 5(4) of the Act, I must next decide whether the worker's injuries under this claim resulted from the April 19, 2011 accident. Specifically with respect to my jurisdiction on this appeal, I must decide whether the worker has a compensable head injury and an aggravation of her pre-existing left knee condition as a result of the April 19, 2011 accident. The Board has previously accepted that the worker had compensable facial abrasions, neck strain, left shoulder strain and a back strain arising out of and in the course of her employment due to the April 19, 2011 accident. I have no jurisdiction over

the Board's acceptance of those conditions as compensable under section 5(1) of the Act. If I did, I would have accepted those conditions as compensable under section 5(4) of the Act, for the same reasons as set out below.

[48] Policy item #C3-14.20 provides that the presumption in section 5(4) of the Act is triggered when an injury is caused by an accident. Policy item #C3-14.00 discusses causation and causative significance in the context of the workers' compensation law. Policy item #C3-14.00 states in part with respect to the arising out of test that:

> Both employment and non-employment factors may contribute to the injury or death. The employment factors need not be the sole cause. However, in order for the injury or death to be compensable, the employment has to be of causative significance, which means more than a trivial or insignificant aspect of the injury or death.

[49] While not binding upon me, I also find guidance in the decision from the former *Appeal Division decision, AD-99-0149*, 15 WCR 291, which stated that:

> For the worker to be entitled to compensation in accordance with Section 5(1) of the Act, it must be shown that her injuries arose out of and in the course of the employment. If the injuries were caused by accident, Section 5(4) of the Act confers upon the worker a rebuttable presumption concerning whether the accident arose out of and in the course of the employment. It is important to remember that before the presumption may be applied, **a causal relationship between the worker's injuries and the accident must be established.** In establishing this causal relationship, the presumption cannot be relied on. It can be of no assistance to the worker in that regard.
>
> [emphasis added]

[50] Dr. McCallum's April 20, 2011 physician's first report to the Board clearly indicates that the worker a tender occipital area. Further, the Board accepted that the worker had compensable facial abrasions. It is illogical for the Board to accept that the worker had compensable facial abrasions, and to note that the worker had consistent head injury symptoms, but to say that the head injury could not be related to the April 19, 2011 accident. The evidence before me clearly indicates that something happened in the April 19, 2011 accident to cause a tender occipital area (Dr. McCallum's findings), as well as facial abrasions (one of the injuries accepted by the Board). The worker reported, consistently, that her dizziness and vomiting started immediately after the incident. The worker provided sworn testimony in this regard, and the documentary evidence before me also indicates this. The worker presented as honest and straightforward and I accept her testimony as credible.

[51] The Board-sponsored OR2 program intake report (dated June 13, 2011) noted that the worker reported headaches and dizziness following the incident. In his June 16, 2011 consultation report, Dr. Gouws said that the worker still had headaches, but her dizziness had resolved and that she was still tender over the occiputs. Dr. Gouws noted in his July 7, 2011 report that the worker still had headaches. In the July 19, 2011 OR2 discharge report, the worker was noted to have daily headaches.

[52] Dr. Kuan's August 2, 2011 MARP report noted that the worker reported post-injury headaches, dizziness and memory loss and that she was not sure if she lost consciousness in the April 19, 2011 incident. Dr. Kuan noted that the worker denied pre-injury headaches. He said that the worker described her headaches as "constant severe headache over her head". Dr. Kuan said that the worker may have had a brief loss of consciousness, and then dizziness, headache and memory loss. Dr. Kuan thought that the headaches were cervicogenic.

[53] In the August 25, 2011 pain program intake report, the clinic staff noted that the worker reported dizziness, headaches and vomiting "straight after the fall". The program staff said that while the worker's headaches may be cervicogenic, "their presentation does not fit the classic description of cervico-genic headache". The worker missed three days of the pain program due to vomiting. Dr. van der Meer said in her September 12, 2011 opinion that the worker's cervicogenic headaches were related to the compensable injury.

[54] I also note Dr. Gill's evidence (in his February 12, 2012 medical-legal opinion) that the worker's symptoms immediately after the injury were consistent with a concussive injury. Dr. Gill agreed that a significant component of her remaining headaches were cervicogenic in nature, but that a smaller component was still post-concussive.

[55] Having considered all of the evidence before me, I find that the worker's head injury symptoms resulted from the April 19, 2011 accident.

[56] With respect to the worker's submissions regarding an aggravation of her pre-existing left knee condition, the evidence also supports that her symptoms were aggravated by the April 19, 2011 accident. The employer's report of injury set out that immediately after the April 19, 2011 accident, the worker reported left knee symptoms. The OR2 treatment program documentation indicates that the worker reported left knee symptoms, but the program staff decided they were non-compensable. Dr. Gouws also reported that the worker was waiting for kneecap replacement, but Dr. Gill disputes this. Dr. Kuan noted that the worker reported increased left knee "problems".

[57] I have considered Dr. van der Meer's opinion that there was no clinical evidence to support that the worker suffered an aggravation of pre-existing left knee osteoarthritis. I note that Dr. Kuan said that the worker had left knee degenerative changes and a meniscal abnormality on MRI. I prefer and give greater weight to the evidence of Dr. Gill that the worker's left knee pain was "far in excess of what she was experiencing

prior to" the April 19, 2011 accident. Dr. Gill attributes the worker's increased left knee symptoms to both the worker's weight gain since the accident as well as her inactivity due to compensable symptoms.

[58] It is well established that the accepted injury need not be the only cause, or even the most significant cause of subsequent injury or condition, in order for the subsequent injury or condition to be compensable. In *WCAT-2010-01448*, dated May 27, 2010, a three-member panel summarized a number of prior Appeal Division, WCAT, and Court Decisions about the test of causative significance and concluded it is not necessary that the employment have been the sole cause, the predominant cause, or even a major cause of the disability, in order to establish employment causation. It is sufficient that the employment was of some causative significance, which was more than negligible or trifling (*de minimis*) in nature. Though not binding on me, I consider the above statement to be an apt explanation of the meaning of "causative significance." This recitation of the law is also found in policy item #C3-14.00, discussed above.

[59] Having considered all of the evidence before me, I find that the aggravation of the worker's left knee condition resulted from the April 19, 2011 accident.

[60] Having found that the April 19, 2011 incident was an accident, that the worker's head injury symptoms and aggravation of the worker's left knee condition resulted from the April 19, 2011 accident and that the worker was in the course of her employment during the April 19, 2011 accident, I must next consider whether there is evidence to rebut the presumption in section 5(4) of the Act that those injuries arose out of the worker's employment. I find that there is insufficient evidence to rebut the presumption in section 5(4) of the Act. I note Dr. Kuan's evidence with respect to the worker's headaches being cervicogenic in nature, but I also note Dr. Gill's evidence that the worker's headaches are both cervicogenic and post-concussive. Dr. Kuan's evidence was disputed by the staff in the pain program, who said that the worker's headaches did not present like classic cervicogenic headaches. And while Dr. Kuan discusses that the worker had headaches, dizziness and vomiting from immediately after the injury, he did not reach a diagnostic conclusion with respect to the worker's non-headache symptoms.

[61] Similarly, I find Dr. van der Meer's evidence insufficient to rebut the presumption with respect to the aggravation of the worker's left knee symptoms. I prefer and give greater weight to the evidence of Dr. Gill. I find that there is insufficient contrary evidence to rebut the section 5(4) presumption. Therefore, the worker's head injury symptoms and aggravation of the worker's left knee condition are compensable pursuant to section 5(4) of the Act.

[62] If I am wrong in my conclusion with respect to the applicability of section 5(4), in the alternative, and for similar reasons, I would find that the worker's head injury and aggravation of pre-existing left knee condition are compensable pursuant to section 5(1) of the Act.

[63] The worker's appeal on this issue is allowed.

Permanent conditions

[64] The worker has requested that her claim be accepted for a permanent left shoulder condition other than chronic pain and also that her claim be accepted for permanent low back chronic pain. With reference to Board policy, the question is whether the worker is entitled to a referral to Disability Awards for an "actual or potential permanent disability" pursuant to policy item #96.30 for a permanent left shoulder condition and for permanent low back chronic pain. Policy item #96.30 sets out that a Board officer to make the determination as to what conditions amount to an "actual or potential disability" under a claim.

[65] In this case, the Board accepted that the worker had a compensable left shoulder injury. In the decision letter before me, the Board officer said that there was no evidence of more significant injuries than a sprain/strain to the worker's left shoulder and the evidence indicated that that sprain/strain resolved. The worker disputes this.

[66] The worker's left shoulder x-ray on May 6, 2011 was negative. Her left shoulder range of motion as of the June 9, 2011 OR2 program intake report was much less than that of her right shoulder in flexion (80 degrees on left compared to 180 degrees right) and adduction/internal rotation (L2 level on left compared to T2 level on right). Global left shoulder weakness was noted.

[67] When Dr. Gouws examined the worker on June 16, 2011, he diagnosed left rotator cuff syndrome, as well as soft tissue injuries. Dr. Gouws also noted that the worker's left shoulder range of motion was reduced, she had a positive impingement test, and left shoulder weakness. When Dr. Gouws examined the worker on July 7, 2011, her left shoulder range of motion was "a bit better", but she still had a positive impingement test.

[68] At the OR2 discharge on July 19, 2011, the worker's left shoulder range of motion was "pain limited". Dr. Kuan also noted that the worker had loss of range of motion in her left shoulder, positive impingement and supraspinatus tendinopathy tests, as well as reduced strength in her left rotator cuff. Dr. Kuan also provided an opinion dated August 18, 2011, after the worker's MRI, which indicated that even though the MRI showed bursitis, Dr. Kuan still thought that the worker had an impingement syndrome in her left shoulder. The worker's left shoulder range of motion was significantly less than that of her right shoulder at the pain program and also significantly less than "normal" values.

[69] When the worker was discharged from the pain program on October 14, 2011, her left shoulder range of motion was still decreased from that of the right shoulder and she was noted to use an altered recruitment pattern. Dr. Gill said in his February 12, 2012 opinion that the worker's left shoulder injury was permanent and he did not expect improvement.

[70] I have considered Dr. van der Meer's opinion that the worker's left shoulder condition was a strain with subacromial/subdeltoid bursitis. I give much less weight to Dr. van der Meer's opinion because she did not examine the worker, nor did she discuss Dr. Gouws and Dr. Kuan's findings with respect to impingement, supraspinatus tendinopathy, and rotator cuff symptoms.

[71] While the worker had greater passive left shoulder range of motion at the OR2 intake and pain limited range of motion at OR2 discharge and the MARP testing, I am not persuaded that "guarding" due to pain, or pain limited range of motion, would prevent a worker from being assessed for a loss of range of motion award.

[72] I find that the evidence before me is sufficient to demonstrate that the worker has an "actual or potential permanent disability" with respect to her left shoulder condition. The worker is entitled to a referral to Disability Awards, pursuant to policy item #96.30.

[73] The worker also seeks to have permanent chronic low back pain accepted under her claim. Policy item #C3-22.00 provides that common sense must be used to adjudicate whether the work injury was a significant cause of a later injury, stating that:

> Looking at the matter broadly and from a "common sense" point of view, the Board considers whether the compensable injury, or the worker's condition resulting from the compensable injury, was of causative significance in the further injury, increased disablement, disease, or death. If the compensable injury, or the worker's condition resulting from the compensable injury, was of causative significance in the further injury, increased disablement, disease, or death, then the further injury, increased disablement, disease, or death is sufficiently connected to the compensable injury so that it forms an inseparable part of the compensable injury and is therefore also compensable.

[74] The specific Board policy with respect to chronic pain is found in policy item #C3-22.20. Policy item #C3-22.20 states that there are three stages of pain: acute; subacute; and chronic. The Board defines chronic pain as "pain that persists six months after an injury or occupational disease and beyond the usual recovery time for that injury or disease". Policy item #C3-22.20 refers to policy item #39.02 with respect to specific and non-specific chronic pain. The policy states that when the Board considers that the worker has chronic pain, a multidisciplinary assessment must be undertaken.

[75] Policy item #39.02 states that specific chronic pain is pain with a clear medical causation or reason. Non-specific chronic pain is pain that exists without clear medical causation or reason. This policy states that where a worker is referred for a pension assessment with respect to chronic pain, a multidisciplinary assessment may be undertaken. In assessing a worker's chronic pain, the Board may consider: the findings of any multidisciplinary assessments, information from the worker's physician and other

medical evidence; the worker's own statements; the worker's conduct and activities; and, with respect to specific chronic pain, the extent of the associated physical impairment and whether specific chronic pain is in keeping with that impairment.

[76] I have considered the requirement for the Board to conduct a multidisciplinary assessment. Some WCAT panels have taken the totality of medical evidence before them to constitute the equivalent of a multidisciplinary assessment. Others, including myself in prior appeals, refer to the former practice directive #61. I note that the requirement in policy item #C3-22.20 to conduct a multidisciplinary assessment is found under the heading "Early Intervention – Chronic Pain". I find this aspect of the policy of particular importance in this appeal. This worker has attended two Board-sponsored treatment programs. The time for "early intervention" with respect to her compensable conditions is, frankly, long past. The utility of a multidisciplinary assessment at this late date would be merely to comply with the strict wording of the Board's early intervention policy with respect to chronic pain in policy item #C3-22.20. In the context of this particular appeal, I am satisfied that the medical evidence on file, along with the worker's sworn testimony, is sufficient evidence upon which to base my decision.

[77] The worker reported low back pain symptoms throughout the course of her claim file. Her low back pain symptoms and loss of range of motion is set out in the OR2 intake report of June 9, 2011. Dr. Gouws also noted her reports of low back pain. In the OR2 discharge report of July 19, 2011, the worker continued to report low back pain. The worker reported continued low back pain to the pain program staff in the August 25, 2011 intake report. The pain program staff noted an improvement in the worker's low back range of motion at discharge, but no improvement in pain was noted. In his February 12, 2012 opinion, Dr. Gill said that he thought that the worker's back myofascial (pain) symptoms were permanent.

[78] I find that pursuant to policy item #C3-22.00 and policy item #C3-22.20, the worker has chronic low back pain that is a compensable consequence of her accepted injuries under this claim. I also find that the worker's chronic low back pain is permanent, within the meaning of policy item #96.30 (using the analysis above). In particular, I rely on Dr. Gill's February 12, 2012 opinion in this regard.

[79] The worker's appeal on this issue is allowed.

Loss of earnings assessment

[80] The Board officer's decision that the worker could return to her pre-injury employment and was not eligible for a loss of earnings assessment (or vocational rehabilitation assistance) was based only upon the diagnoses of chronic neck and left shoulder pain.

[81] I have accepted a number of further conditions as compensable, and also others as permanent, under the worker's claim. It is unclear to me why the worker was offered vocational rehabilitation assistance in a vocational rehabilitation intake report dated November 3, 2011 if she was able to return to her pre-injury employment.

[82] The Board officer in vocational rehabilitation noted that the worker would not be allowed to return to her pre-injury employment by the accident employer due to her time off on this claim. Given this fact alone, I would vary the Board officer's decision under appeal because it is clear that the employer would not permit the worker to return to her pre-injury employment. There is therefore insufficient evidence to demonstrate that the worker was "able" to return to her pre-injury job. I find as a fact that the Board officer's decision in this regard targeted the worker's specific pre-injury job and not the pre-injury occupation generally. The facts do not support the Board officer's decision.

[83] The Board officer in vocational rehabilitation said that the worker was eligible for 12 weeks of job search assistance, but was unable to return to work due to her non-compensable dizziness, knee, back and shoulder pain, as well as headaches. All of those symptoms are now compensable under the claim.

[84] I also note that Dr. Gill said in his February 12, 2012 opinion that the worker did not meet her pre-injury job demands.

[85] I find that the evidence before me is sufficient to indicate that the worker is entitled to a new decision from the Board with respect to her entitlement to a loss of earnings assessment based upon all of her compensable conditions, not just her neck and shoulder pain.

[86] The worker's appeal is allowed.

Conclusion

[87] I allow the worker's appeal and vary the April 19, 2012 decision of the Review Division. I find that:

- The worker has a compensable head injury and a compensable aggravation of her pre-existing left knee condition, both under section 5(4) of the Act;
- The worker has an actual or potential permanent left shoulder condition other than chronic pain;
- The worker has permanent low back chronic pain;
- The worker is entitled to a decision from the Board with respect to her entitlement to a loss of earnings assessment taking into account all of her now-compensable conditions.

[88] There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Melissa R. Clarke
Vice Chair

MRC/tv

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