

Noteworthy Decision Summary

Decision: WCAT-2014-01931 **Panel:** Guy Riecken **Decision Date:** June 25, 2014

Section 5 of the Workers Compensation Act – Personal injury – Section 6 of the Workers Compensation Act – Occupational disease – Date of disablement – Section 55 of the Workers Compensation Act – Special circumstances – Federally regulated employer

This decision illustrates how to determine whether an application for compensation should be adjudicated as a personal injury under section 5 or as an occupational disease under section 6 of the *Workers Compensation Act* (Act). For claims adjudicated under section 6 of the Act, no ‘date of disablement’ exists for section 55 purposes if the worker has taken no time off work.

The worker was employed by a federally regulated entity, and developed neck, shoulder, and elbow pain. The worker held the mistaken belief that the provincial workers’ compensation system did not cover workers of federally regulated employers. The Workers’ Compensation Board, operating as WorkSafeBC (Board), adjudicated her claim under section 5 of the Act and determined that her claim was filed out of time. The Board found no special circumstances precluded the worker from making a timely application, and denied her claim. The Review Division upheld the Board decision, and the worker appealed to WCAT.

WCAT determined that the diffuse nature and gradual onset of the worker’s symptoms, as well as the absence of a specific trauma or incident meant her claim was appropriately adjudicated as an occupational disease and not an injury. The panel noted that when the worker submitted the application to the Board, she had not taken time off from work. Thus, she had not been disabled from earning full wages and the one-year period for filing a claim had not yet begun to run. WCAT found that the worker’s claim was not barred by section 55, and that the Board was required to adjudicate the worker’s entitlement to benefits under section 6 of the *Act*.

With respect to the worker’s arguments regarding sections 5 and 55 of the Act, WCAT found that the worker’s belief that provincial workers’ compensation did not apply to federal employees was an unreasonably held mistaken belief that did not constitute “special circumstances” as described by section 55 of the Act.

WCAT Decision Number : WCAT-2014-01931
WCAT Decision Date: June 25, 2014
Panel: Guy Riecken, Vice Chair

Introduction

- [1] The worker is appealing a decision (*Review Reference #R0157920*) of a review officer in the Review Division of the Workers' Compensation Board (Board)¹ respecting her application for compensation for her neck, upper back, shoulder, and elbow symptoms. The review officer confirmed the Board's decision that the worker had not filed her application within one year of the date of injury as required by section 55 of the *Workers Compensation Act* (Act), and that special circumstances had not precluded her from doing so. In the July 10, 2013 decision the review officer confirmed the Board's decision to deny the claim.

Issue(s)

- [2] The issue in this appeal is whether the payment of compensation for the worker's neck, upper back, shoulder, and elbow symptoms is barred under section 55 of the Act. This involves consideration of whether special circumstances precluded the worker from filing her application within one year of the date of injury or disablement by occupational disease.

Jurisdiction and Method of Hearing

- [3] Section 239(1) of the Act provides for appeals to the Workers' Compensation Appeal Tribunal (WCAT) of final decisions by review officers regarding compensation matters.
- [4] This is an appeal by way of rehearing, in which WCAT considers the record and also has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal. WCAT has inquiry power, including the discretion to seek further evidence, but is not obliged to do so.
- [5] WCAT must make its decision on the merits and justice of the case, but in doing so, must apply a policy of the Board's board of directors that is applicable in the case. The applicable policy is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).
- [6] The worker is represented by an adviser from the Workers' Advisers Office. The employer is not participating in the appeal although given an opportunity to do so.

¹ The Board operates as WorkSafeBC.

[7] The worker and her representative attended an oral hearing on May 13, 2014.

Reasons and Findings

[8] Considering the worker's appeal as relating to a personal injury claim under section 5 of the Act (as in the decisions of the entitlement officer and the review officer), I find that the worker was not precluded by special circumstances from filing her application for compensation within one year of the date of injury.

[9] However, I find that the worker's application to the Board is more appropriately adjudicated as an occupational disease claim under sections 1 and 6(1) of the Act, and that as the worker had not been disabled from earning full wages from work at the time she submitted her application to the Board, the one-year period after the date of disablement had not yet begun to run. Accordingly, the payment of compensation is not barred under section 55 of the Act. My reasons follow.

Section 55 of the Act and related policy

[10] Generally speaking, section 55 of the Act requires a worker to file a claim within one year of the date of an injury or disablement by occupational disease. That section provides, in part, as follows:

(1) An application for compensation must be made on the form prescribed by the Board or the regulations and must be signed by the worker or dependant; but, where the Board is satisfied that compensation is payable, it may be paid without an application.

(2) Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease, no compensation is payable, except as provided in subsections (3), (3.1), (3.2) and (3.3).

(3) If the Board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), the Board may pay the compensation provided by this Part if the application is filed within 3 years after that date.

(3.1) The Board may pay the compensation provided by this Part for the period commencing on the date the Board received the application for compensation if

(a) the Board is satisfied that special circumstances existed which precluded the filing of an application within one year after the date referred to in subsection (2), and

(b) the application is filed more than 3 years after the date referred to in subsection (2).

(3.2) The Board may pay the compensation provided by this Part if

(a) the application arises from death or disablement due to an occupational disease,

(b) sufficient medical or scientific evidence was not available on the date referred to in subsection (2) for the Board to recognize the disease as an occupational disease and this evidence became available on a later date, and

(c) the application is filed within 3 years after the date sufficient medical or scientific evidence as determined by the Board became available to the Board.

[11] Policy item #93.22 (Application Made Out of Time) provides that before an application for compensation can be considered on its merits, it must satisfy the requirements of section 55. The general effect of section 55 is that two requirements must be met before an application received outside the one-year period can be considered on its merits. These are:

1. There must have existed special circumstances which precluded the application from being filed within that period, and
2. The Board must exercise its discretion to pay compensation.

[12] The application cannot be considered on its merits if no such special circumstances existed or the Board declines to exercise its discretion in favour of the worker.

[13] Policy item #93.22 also provides that:

It is not possible to define in advance all the possible situations that might be recognized as special circumstances which precluded the filing of an application. The particular circumstances of each case must be considered and a *judgment made*. However, it should be made clear that in determining whether special circumstances existed, the concern is solely with the worker's reasons for not submitting an application within the one-year period. No consideration is given to whether or not the claim is otherwise a valid one. If the worker's reason for not submitting an application in time are not sufficient to amount to special circumstances, the application is barred from consideration on the merits, notwithstanding that the evidence clearly indicates that the worker did suffer a genuine work injury.

The following facts illustrate a situation where special circumstances were found to exist. The worker suffered a minor right wrist injury on October 20, 1976, which at the time caused him no disablement from work and did not require him to seek medical attention. There was, therefore, no reason why he should claim compensation from the Board, nor any reason why his doctor or employer should submit reports to the Board. It was not until 1978 when the worker began to experience problems with his right wrist that he submitted a claim to the Board. It was only then that he was incurring monetary losses for which compensation might be appropriate.

- [14] Various WCAT panels have cited *WCAT-2005-03006* in the course of their consideration of section 55. *WCAT-2005-03006* has been identified by WCAT as a noteworthy decision. While I am not bound to follow previous WCAT decisions, including noteworthy decisions, I agree that, when considering “special circumstances” under section 55, the appropriate approach is to consider whether unusual and extraordinary circumstances existed, and, if so, whether such circumstances made it difficult or otherwise hindered the worker from undertaking his or her claim.
- [15] In *WCAT-2005-03006* the panel also noted that there are no set criteria for determining what are “special circumstances” but that a number of factors had been cited in previous appellate decisions including:
- Characteristics of the worker such as language difficulties, which would create obstacles to understanding that there is a system of workers’ compensation and how to access it.
 - Lack of knowledge that an injury or disease might be work related because of delayed onset of the condition, minor nature of the original injury, or failure to recognize that it is related to work.
 - Reliance on the advice of others, such as a physician or employer, where the worker is dependent on such advice owing to language difficulties.
- [16] I agree with these examples, while recognizing they are not an exhaustive list. As stated in policy item #93.22, the particular circumstances of each case must be considered and a judgment made.
- [17] I am also aware of the analysis in *WCAT-2010-01650* and *WCAT-2010-011291*, which have also been identified as a noteworthy decisions. In *WCAT-2010-01650* the panel concluded that in considering whether there were special circumstances under section 55, it is necessary to evaluate the worker’s reasons for the delay in applying through the lens of whether his or her actions were that of a reasonable person. However, the worker’s reasons for not submitting an application on time, along with other circumstances identified, must still amount to special circumstances that

precluded him or her from filing the application on time. I consider the central question to be whether there were “special circumstances” which precluded the worker from applying within one year of the injury as contemplated by section 55. In *WCAT-2010-01291* the panel concluded that it is appropriate to consider what a reasonable person would have done, for example, when the worker argues that the reason he or she did not file a claim within the time required was ignorance of the requirements of the Act and Board policy. The panel considered it appropriate to consider all reasonable steps that the worker ought to have taken in order to ensure a timely application. In addition, it is not sufficient to merely identify special circumstances. The nature of the special circumstances must be such that they precluded the person from filing the application in time. While not bound by these decisions, I find their analysis respecting section 55(2) to be helpful, and I have considered it in the circumstances of this appeal.

Background and Evidence

- [18] The worker is a financial service associate. Her employer is a bank. It is significant to her position on appeal that the employer is a federally regulated entity. She states that at all times preceding her application to the Board she believed that the provincial workers’ compensation system does not cover her for injuries sustained in her work as an employee of a federally regulated employer.
- [19] The Board opened the worker’s claim after a receiving a physician’s first report dated November 29, 2012 from Dr. Klopper, the worker’s family physician. Dr. Klopper noted that the worker reported that she had diffuse neck pain from two and one-half years ago. After an ergonomic assessment, some adjustments were made (to the worker’s workstation). She still has neck pain, right shoulder pain, left shoulder pain, and a sore right elbow. On examination, she was tender at the rhomboid, trapezius, and sternocleidomastoid. She had full range of motion in her shoulders. Her neck is sore at the limits of rotation. Dr. Klopper recommended physiotherapy and non-steroidal anti-inflammatory (NSAID) medication. The worker was medically capable of working full duties, full time.
- [20] In a January 14, 2013 letter to the worker the Board informed her that her claim for an injury in a work-related incident or activity on November 29, 2012 was allowed. The Board would pay for health care benefits, and the worker was asked to inform the Board if she had missed any time from work, or if the information in the letter was incorrect.
- [21] The employer submitted a report of injury or occupational disease to the Board dated January 23, 2013. The form indicates that it was signed on behalf of the employer by an individual with the employer’s “Health Services.” The employer confirmed that the worker had reported an injury to her supervisor on January 2, 2013. She reported ongoing chronic neck, shoulder, and elbow pain due to the configuration of her desk/office over the last several years. The employer noted that an ergonomic assessment was done by the employer two and one-half years ago, which resulted in

the worker being provided an ergonomic chair and a headset. However, the worker said that there were minimal changes made to her office equipment or desk set up and configuration. The employer did not object to acceptance of the claim.

- [22] On January 25, 2013 an entitlement officer wrote to the worker and explained that her application for compensation was not received within one year of the date of injury, and that section 55 of the Act must be considered. The entitlement officer enclosed an application form. The entitlement officer also asked the worker to send a detailed description of the special circumstances she feels prevented her from filing her application within one year of the date of injury.
- [23] In a February 5, 2013 letter to the Board the worker stated, in part, that during her 20 years working in the financial services sector, never has the Board been brought in to a meeting, a staff room, or on a conference call, to explain that the Board is part of “our world.” She had always been led to believe that the Board “did not apply to us as we are Federally Regulated and that being a corporation we have our own [Human Resources], Health and Safety Board etc etc.”² Never has she seen one of the Board’s posters, pamphlets, or information hanging on a staff room board, or on a table.
- [24] The worker questioned where the Board has been, and why there was no code requiring all corporations to post information in a staff room about the Board, and making it very clear that when employees are injured at work that they must file a report with the Board. She asked why the Board does not come around to large corporations and talk to people. She stated that she asked around to co-workers in other branches of the bank to ask if they knew that the Board pertains to them and that not one of them knew this. The worker asked why she only found out from her physician that the Board applied to her.
- [25] The worker also stated that she went to her managers at work, and did not hide her “issue” and her pain. She brought in doctors’ notes, changed her lunch breaks to accommodate her physiotherapy, and booked appointments after work for physiotherapy. She also provided the employer with proof of payment for the physiotherapy. She asks why no one approached her to tell her she should file a report with the Board.
- [26] The worker also asked where the Board was “when this building had the mold issue.”
- [27] The worker stated that she simply did not believe “for a second” that the Board applied to the financial sector (banks).
- [28] In her application for compensation dated February 12, 2013 the worker reported the injury as “neck, shoulders [and] right elbow.” She indicated that both sides of her body were injured. From a list in the application form she selected “repetitive factors” as

² all quotations reproduced as written, except where indicated.

contributing to the injury. She described the incident as “over time.” She had not missed work after the date of injury or exposure. She did not identify a date of injury.

- [29] In the February 15, 2013 decision letter giving rise to this appeal, the entitlement officer found that the worker filed her application at least two and one-half years after she began experiencing neck and shoulder pain. After reviewing the information received from the worker’s physician, her employer and the worker, the entitlement officer decided to reconsider the January 14, 2013 decision that allowed the claim for health care benefits. The entitlement officer found that the worker had not applied within one year of the date of injury, and that she did not see any special circumstances that precluded the worker from filing the application within one year of the date of injury. The claim was disallowed.
- [30] At the oral hearing the worker provided testimony under affirmation. She provided the following information. When Dr. Klopper (who has been her physician since 2011) sent in the report to the Board in November 2012, the worker had been in pain for at least two or two and one-half years. Her symptoms had started in 2008 or 2009. She went to see her physician at the time, Dr. Nanton about her stiff, sore neck. Her shoulder was also sore. She was having problems doing filing at work. She continued to work, but was using 8 to 12 Advils per day. She had an x-ray, and Dr. Nanton assessed her as having muscle tissue damage. Dr. Nanton wrote a note for her regarding ergonomics at the workplace. The worker gave this to her supervisor, and explained to the supervisor about her symptoms and the problems she was having doing some of her work. The supervisor sent the doctor’s note to the employer’s head office. The head office arranged for an ergonomist to do an assessment. The worker was present for the assessment, but did not see the report. After the assessment the employer got her a new chair.
- [31] The worker confirmed that she did not report her symptoms or the ergonomic issues to the Board because the employer is federally regulated, and in all of her years working in banking, she has never heard anything about the Board. The bank employees are told that if they ever have a problem, to go to their supervisor. The worker has never filled out a first aid report at work. Since working in banking starting in 1991 she had never reported a claim to the Board, and had never had contact with the Board prior to a report by the employer in December 2011 regarding an injury to the worker related to sewer smells entering the bank building (2011 claim).
- [32] I pause to note that at the hearing I disclosed to the worker the following documents printed from the 2011 claim file: the employer’s December 7, 2011 report of injury; a letter from the Board dated December 13, 2011 to the worker confirming that a claim had been registered with the Board; a second December 13, 2011 letter from the Board to the worker inviting the worker, if she was injured at work, to contact the Board by telephone or online to complete an injury report and application for compensation; and, a January 9, 2012 letter from the Board to the worker explaining that as far as the Board knew she did not seek medical attention for her injury and did not take time off from

work. Accordingly, the Board would keep the employer's report of injury for information purposes. If this was incorrect, the worker was invited again to submit a claim by telephone or on the Board's Internet site.

- [33] The worker explained how the 2011 claim came about. She was one of a number of employees who complained to the bank manager about smells in the bank. The employees were using sprays to cover the smells, and there were customer complaints. The manager was in contact with head office about it, but nothing had been done. One of the employees suggested they file a report with the Board, and the worker said "yes, let's call the WCB [Board]," but did not mean it seriously. The manager said that a physician with the bank's head office said smells are not dangerous, but because the worker had mentioned the Board, he had to file a report. The worker confirmed that the employer filed a report and that she received correspondence from the Board. The correspondence said that if she was injured she should call the Board. The Board did not come and investigate. The correspondence from the Board did not "raise any red flags" for her, because she knew the employer is federally regulated, and that at the staff meetings every two weeks there had never been any discussion about the Board generally or about reporting injuries to the Board.
- [34] The worker confirmed that she has access to a long-term disability plan at work, but that she did not use it for her neck, shoulder and other complaints because she did not miss any time from work.
- [35] The worker stated that the first person to suggest that she report her injuries to the Board was Dr. Klopper. She said it might be necessary to report the injuries to the Board because they were work-related. It was Dr. Klopper who initiated the claim by submitting her report to the Board. The worker did not believe that the Board would do anything because the bank is federally regulated. There is no union at the bank, and she reiterated that she had never seen any Board posters at work. The worker stated that if Dr. Klopper had not filed her report, she would not have filed a claim. She would not have thought of it. She knew nothing of the ability to make a claim with the Board, and certainly knew nothing of a one-year limit for doing so. She now knows about this, and to ask questions about the Board if she is injured at work. But at the time she knew nothing about it. The worker asked why the employer was not held accountable for not telling employees about the claim process.
- [36] In answer to a question from her representative about whether she felt comfortable at work asking questions, the worker said that it depended what the questions were about. She stated that "this" will go on her file.
- [37] In answering my questions the worker explained that as a financial services associate she provides support to a financial advisor. They work with high net worth clients. Her work includes doing "maturity calling," and "MLM" (managing local markets) tactics. This involves making phone calls, filing, and making appointments. She also deals with loan applications and mortgages. "Maturity calls" involve using a monthly list that shows

clients' holdings. If a client has a holding with something due, they are called; for example, a GIC (Guaranteed Investment Certificate) maturity date, or a significant birthday like turning 60 years of age. "MLM" tactics involve marketing to get a client into different investments; for example if they are turning 60, suggesting investments that might be more suitable.

- [38] The worker confirmed that she gets five days of sick leave per year, and if she is off work longer than that, she can apply for a long-term disability.
- [39] She has never known of a co-worker at the bank who filed a claim with the Board for a workplace injury.
- [40] She did not think much about the December 2011 and January 2012 letters from the Board about the 2011 claim. She did not think "for a second" that the information about calling the Board to make a telephone claim pertained to her because the claim was really just about the smell in the bank building.

Analysis

- [41] Item #3.3.3 (Personal Injury (section 5) and Occupational Disease (section 6)) of the *WCAT Manual of Rules of Practice and Procedure (MRPP)* provides that where a decision denying acceptance of a claim adjudicated under section 6 (occupational disease) is appealed to WCAT and the panel concludes that it should have been adjudicated under section 5 (personal injury), or vice versa, the panel may address the issue if no further evidence is required and there are no procedural fairness concerns.
- [42] I have determined that the worker's claim should have been adjudicated under section 6 of the Act as an occupational disease claim. I have decided that no further evidence is required to determine the section 55 matter and that there are no procedural fairness concerns. As my decision with respect to section 6 is in the worker's favour, I do not consider it necessary to seek further submissions on this issue which was not addressed at the oral hearing. As the employer did not object to acceptance of the worker's claim in its January 2013 report of injury or occupational disease, and chose not to participate in either the Review Division or WCAT proceedings, I do not consider that procedural fairness requires further prior notification to the employer with respect to my consideration of the appeal under section 6 of the Act. In addition, my decision does not involve a final adjudication on the merits of the claim under section 6(1), but is limited to a decision that the claim under section 6(1) is not barred under section 55, and that the Board is required to adjudicate the claim on its merits under section 6(1).
- [43] Although I have found that the worker's claim should have been decided under section 6 of the Act, I am including findings with respect to the worker's appeal related to the decision under section 5, in light of MRPP item #3.3.1. That item provides that the appellant is entitled by right to a decision on the issues expressly raised in the appeal.

- [44] The essence of worker's position is that she had a mistaken but reasonably held belief that because she worked for a federally regulated employer workers' compensation was not available to her from the Board. She also argues that given the lack of information about the Board at work, the failure of the employer to inform her of her right to apply to the Board and the lack of any contact with the Board at her workplace over the years, her belief was not only reasonable but amounted to special circumstances that precluded her from applying within one year of the date of injury.
- [45] The initial question in considering the application of section 55 is when the one-year period began. In other words, what was the date of injury or disablement (in cases of occupational disease).
- [46] If the matter is considered as a personal injury under section 5(1) of the Act, the specific date of injury is not clear. Dr. Klopper's report, the worker's application and her evidence at the hearing refer to the onset of symptoms two to two-and one half years earlier. At one point in the hearing the worker indicated that her symptoms began in 2008 or 2009. While this is not sufficient to establish a precise date of injury, it is sufficient to establish that the date of injury was considerably more than one year before the worker applied to the Board in February 2013. The worker has not disputed that her symptoms began more than one year before she applied. For the purposes of this appeal, I find that the date of injury (for the purposes of sections 5 and 55) was considerably more than one year before the worker filed an application.
- [47] I do not find the worker's explanation with respect to her lack of knowledge of her ability to file a claim with the Board due to working in a federally regulated industry to be persuasive evidence of special circumstances that precluded her from filing an application in a timely manner. In saying this, I do not disagree with the worker about the federal regulation of the banking industry. I acknowledge that under federal laws the federal government regulates the financial services component of banks operating in Canada.
- [48] However, the federal government's regulation of banking does not mean that compensation under Part 1 of the Act for injuries and occupational diseases is not available to bank employees who are workers in B.C. The worker's belief about this was clearly mistaken.
- [49] I have no reason to doubt the worker's evidence about what she believed about compensation from the Board not being available to her as bank employee. I do not accept that her belief was reasonable in the circumstance that she has described, and I do not accept that her actions were the actions of a reasonable person. In particular, I observe that the worker took no steps within one year of the time she had experienced the onset of her symptoms and sought medical attention, to find out about whether compensation through the Board was available. I do not agree that her failure to take any steps to inquire about the matter during that time involved the actions of a reasonable person in the circumstances.

- [50] The worker has not suggested that she was unaware of the existence of the Board, or of a system of workers' compensation in British Columbia.
- [51] In the absence of other circumstances that would explain a failure to take any steps, (for example, reliance on others because of a language barrier or because of some form of cognitive impairment, or being actively misled or prevented from taking any steps by an employer), I consider that a reasonable person would take some steps to inquire into the matter. Simple lack of knowledge of the details of how the workers' compensation system operates, and a mistaken belief about the availability of coverage, in my view do not explain the failure to take any steps whatsoever to inquire.
- [52] The worker has not referred to circumstances other than her mistaken belief about the Board not providing compensation to bank employees. She has not referred to a language barrier, an impairment, or other circumstance that would have hindered her from making some inquiries of the Board about possible coverage if she wished to do so. Although the worker suggests that the Board and her employer should have been responsible for ensuring that bank employees were aware of the availability compensation from the Board, and she refers to the employer's advice to speak to a supervisor about any problems, she has not stated that the employer actively dissuaded her from contacting the Board to make inquiries. While she informed her supervisor about her symptoms, and the employer arranged for an ergonomic assessment, the worker has not suggested that she inquired to her supervisor about the possibility of a claim to the Board. I find it significant that when the worker said (without intending to be serious) that she and co-workers should make a claim to the Board about the smells in 2011, the supervisor immediately filed a report with the Board. Whether or not the worker believed anything would come of that, it is not consistent with a work environment where the employer was actively preventing claims from being filed.
- [53] I find the worker's evidence about her response to the December 2011 and January 2012 correspondence from the Board related to the 2011 claim to be unhelpful to her position. While she received it after the one-year period for applying for an injury that occurred in 2009, I found her testimony about it telling. She stated that even when she saw that correspondence, which informed her of her "claim number," and which advised her to contact the Board by telephone (or through the Board's Internet site) to commence a claim if she had sustained an injury, she did not think this had anything to do with her because the 2011 claim was just about the smells in the bank building. Based on her testimony at the hearing, even after receiving correspondence from the Board that clearly stated she could submit an injury claim to the Board, she persisted in her firmly held belief that the Board did not provide coverage to employees in a federally regulated bank. Even after receiving the December 13, 2011 letter from the Board inviting her to submit a claim (under the 2011 claim) if she was injured, the worker took no steps to contact the Board to inquire about the extent of possible coverage for her neck, shoulder, and other symptoms that had been bothering her since 2009.

- [54] The worker's response to the December 2011 correspondence from the Board is more consistent with a person who persists in a firmly held belief even in the face of evidence to the contrary. I find this inconsistent with the worker's actions being those of a reasonable person.
- [55] While the one-year period to file a claim for her neck, shoulder and other symptoms, ended prior to receiving the December 2011 correspondence from the Board, I find that her response to it, or lack of response, is consistent with an earlier choice (during the one-year period after seeking medical attention for her symptoms) not to take any steps to inquire about possible workers' compensation coverage.
- [56] I do not accept the worker's argument that her mistaken belief about the availability of workers' compensation coverage was reasonable in the circumstances.
- [57] I do not consider the worker's case to be similar to the example in policy item #93.22. In this case the worker has described experiencing serious, if not disabling, symptoms well more than one year before her application, that required her at times to take up to 12 Advils per day in order to go on working. She was incurring an expense related to their use. She had sought medical attention and investigations had included x-rays. She clearly related her symptoms to her employment, since her physician had given her a note to take to the employer to request an ergonomic assessment.
- [58] Considering the matter as one involving a personal injury claim under section 5, I find that the worker was not precluded by special circumstances from commencing a claim within one year of the date of injury. I deny the worker's appeal on this issue.
- [59] However, I find that the worker's claim should be adjudicated under section 6(1) of the Act as an occupational disease. The one-year time limit to submit an application to the Board had not yet begun at the time she submitted her application.
- [60] This is not a case in which the worker experienced a single incident or a series of incidents to which she attributes her symptoms. Her symptoms appear to involve the soft tissues of the affected areas (diagnosed by Dr. Klopper as neck/upper back/shoulder strain) which she attributes to ongoing activities at work and poor workplace ergonomics.
- [61] Conditions associated with repetitive work-related activities that affect the soft tissues of the limbs (which the Board refers to as activity-related soft-tissue disorders (ASTDs)) are usually adjudicated as occupational disease claims under section 6 of the Act.
- [62] In a case such as this one, where there was a gradual onset of symptoms related to activities over time rather than to identifiable "incidents," in my view consideration of the matter as an occupational disease claim is appropriate.

[63] The Board's consideration of the claim as one involving a personal injury may have resulted from Dr. Klopper's "strain" diagnosis. The distinction between an injury and a disease is not always clear. The term "personal injury" is not defined in the Act. RSCM II policy item #C3-12.00 states that:

"Personal injury" is defined as any physiological change resulting from some cause. It may result from a specific incident or a series of incidents occurring over a period of time.

Personal injury is not confined to injuries which are readily and objectively verifiable by their outward signs, e.g. breaks in the skin, swelling, discolouration, deformity, etc. It includes, for example:

- strains and sprains;
- ...

[64] Under this definition, the diagnosis of the worker's condition as a "strain" would appear to mean that it should be adjudicated as a personal injury. However, the wording of policy item #C3-12.00 suggests that the inclusion of "strains and sprains" may be intended as an example of injuries that are not objectively and readily visible by outward signs, rather than as a definition that categorically treats all strains as injuries in all circumstances.

[65] RSCM II policy item #25.10 provides that a disease which is attributed to or is the consequence of a specific event or trauma, or to a series of specific events or traumas, will be treated as a personal injury and will be adjudicated in accordance with the policies set out in Chapter 3 (which pertain to personal injury claims).

[66] Policy item #27.00 explains that the terms "cumulative trauma disorder," "repetitive strain injury," "repetitive motion disorder," "occupational overuse syndrome," "occupational cervicobrachial disorder," "hand/arm syndrome," and others, are broad collective terms used to describe a diverse group of soft tissue disorders which may or may not be caused or aggravated by employment activities. The common elements of the disorders included in these collective terms are that they are related to physical activity and they affect muscles, tendons, and other soft tissues. The Board uses the term ASTDs in Chapter 4 of the RSCM II when referring to them.

[67] A number of ASTDs have been recognized as occupational diseases by inclusion in Schedule B, including knee and shoulder bursitis, and shoulder and hand/wrist tendinitis. A number of other ASTDs have been recognized by regulation of general application, including carpal tunnel syndrome and epicondylitis.

[68] As provided in section 1 of the Act, a condition not recognized as an occupational disease in Schedule B or by inclusion in a regulation may be recognized by an order dealing with a specific case.

- [69] The diagnosis in this case does not relate to any of the ASTDs recognized in Schedule B or by inclusion in a regulation. However, given the gradual onset and diffuse nature of the worker's symptoms (involving her neck, both shoulders, upper back and elbow), the absence of any report of a specific trauma or incident, or of any series of traumas or incidents, and the worker's claim that the symptoms were the result of ongoing activities over time along with ergonomic factors at her work site, I find that her condition is appropriately adjudicated as an occupational disease claim. In the circumstances of this case I do not consider the inclusion of the term "strains" in the definition of "personal injury" in policy item #C3-12.00 limits the adjudication to consideration of the claim to section 5(1) of the Act on the basis that Dr. Klopper used the term "strain" in her diagnosis.
- [70] There is no evidence that the worker has had any period of disablement from work as a result of her symptoms. She has stated that she has not taken time off from work, and the evidence does not suggest that other parts of the definition of "disabled from earning full wages at work" in policy item #26.30 are met. It follows that the one-year period for submission of an application for compensation for an occupational disease under section 55 had not yet begun to run at the time the worker filed her application in February 2013.
- [71] I note that section 6(1) includes a provision for the payment of health care benefits although a worker is not disabled from earning full wages at the work at which he or she was employed.
- [72] The worker's appeal is allowed in part. If considered as an injury claim, I would find that the worker's application was filed more than one year after the date of "injury," and that the worker was not precluded by special circumstances from filing her application within one year from the date of injury. However, I find that the claim is more appropriately adjudicated as an occupational disease under section 6(1), and that as the worker had not been disabled prior to filing her application for compensation, the payment of compensation to the worker is not barred under section 55(2) of the Act. The Board is required to adjudicate the worker's claim for compensation on its merits under section 6(1) of the Act.

Conclusion

- [73] I allow the appeal in part and vary the review decision dated July 10, 2013. I conclude that the worker's February 12, 2013 application respecting her neck, shoulder, upper back and elbow complaints, which she relates to repetitive activities over time and ergonomic problems in her workplace, is appropriately considered as involving an occupational disease claim under section 6(1) of the Act. As the worker had not been disabled from earning full wages at work prior to filing her application, the one-year period from the date of disablement had not yet begun to run when the worker filed her application. The payment of compensation is not barred under section 55(2) of the Act.

The Board is required to adjudicate the worker's claim on its merits under section 6(1) of the Act.

Expenses

- [74] The worker seeks reimbursement for the expenses associated with her attendance at the oral hearing. She informed me that she took one-half of a day off from work to attend the hearing, and that she lives approximately 91 kilometres away from the hearing location.
- [75] As the worker was successful in the appeal, I order the Board to reimburse her for one-half day of lost wages and for her travel to and from her home to attend the hearing, subject to the Board's tariff for reimbursing mileage expenses.

Guy Riecken
Vice Chair

GR/cv/gw