

## **WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL**

### **DECISION NO. 2403/03**

[1] The appeal was held in Sudbury on December 11, 2003, before Vice-Chair, T. Carroll.

#### **THE APPEAL PROCEEDINGS**

[2] The worker appeals the decision of Ms. J. Cantwell, Appeals Resolution Officer (ARO) at the Workplace Safety and Insurance Board (the Board), dated November 1, 2001.

[3] The worker attended the hearing and gave testimony. She was represented by Mr. Wally Devoe of the Canadian Union of Public Employees.

[4] The employer was represented by Ms. Clara O'Reilly, its Health and Safety Co-ordinator. Ms. H. Cottreau appeared as an observer.

#### **THE RECORD**

[5] The Vice-Chair had before him the Case Record that was marked as Exhibit #1. Addendum No.1 to the Case Record was marked as Exhibit #2. Addendum No.2 to the Case Record was marked as Exhibit #3. Addendum No.3 was marked as Exhibit #4. A hearing ready letter from the Tribunal was marked as Exhibit #5.

#### **THE ISSUES**

[6] The Vice-Chair has to determine whether the worker is entitled to benefits for a right ankle injury that occurred while at work on October 12, 2000.

#### **THE VICE-CHAIR'S REASONS**

##### **(i) Background**

[7] The facts contained in this section are, generally speaking, not contested and the Vice-Chair relied upon them when reaching his final conclusions in this matter.

[8] On October 12, 2000 the worker, a dietary aide, fell in the lunchroom during her normal working hours and injured her ankle.

[9] On October 12, 2000 the worker spoke to a representative of the employer and an Employer's Report of Injury/Disease (Form 7) was prepared on the same day. In the Form 7 the employer explained what had happened to cause the injury. It states:

Trip/Fall - Horseplay!!!! Broken Ankle

[10] In describing the worker's activities at the time of injury the Form 7 states:

Worker was on coffee break. Demonstrating to others a self defence move that she saw on TV when she fell. This did not occur within Sect. 13(1) WSIA, Falls under section 17 WSIA.

[11] The Accident Prevention Officer signed and sent the Form 7 to the Board on October 16, 2000. The worker subsequently signed the Form 7.

[12] On October 26, 2000 the worker signed a Worker's Report of Injury/Disease (Form 6). In the body of the Form 6 the incident of October 12, 2000 is described as follows:

While on coffee break @ 0830 hours, we were showing self defence type leg kicks to each other. I did a jump up type movement and as I came back down slipped on strawberry juice and foot and ankle turned.

[13] On November 23, 2000 the worker spoke to a Board adjudicator in regard to the incident of October 12, 2000. The adjudicator stated in a memo:

We discussed the F6. [The worker] confirmed the exact information as explained on her F6 signed on 26 Oct. 2000. She confirmed she was on her coffee break, and she was demonstrating self defence skills to co-workers. She stated on one kick she landed on her RT leg, her leg gave out when she slipped on strawberry juice on the floor.....

**(ii) The Worker's Testimony**

[14] The worker testified that she was in the lunchroom at about 8:30 a.m. The lunchroom is approximately 15' by 20' in size and is an area where workers take their rest breaks. The lunchroom contains a table and chairs and a refrigerator, and a toaster. Workers have coffee and the refreshments and eat their lunches there.

[15] On October 12, 2000 there were about five persons in the lunchroom. She was in a corner of the lunchroom talking to co-workers N and T. There was a conversation with the two workers and she told the co-workers she had been performing a kicking move with her son on the night previous. One of the co-workers stated that she did not believe the worker could kick as high as the co-worker's waist level.

[16] She then circled in an open area in the dessert room and turned to face the co-workers. The area in which she performed the kick was an open area where the workers walked through to get to where the chairs are located.

[17] After circling in the room she made one kick with her right foot. (She was not sure how high) and she came down on her right foot. Her right foot gave out under her and she fell to the floor and felt pain in her right ankle.

[18] Immediately after the fall, when she was on the floor, she noticed a sticky red substance on her hands. This substance was strawberry juice that was being served that day in the hospital and she believed a co-worker had probably brought some into the room earlier and it had been spilled on the floor. She asked for a tea towel to wash her hands. She was subsequently taken by wheelchair to the emergency room of the hospital where she was treated for her ankle injury.

[19] The worker remembered speaking to a representative of the hospital on October 12, 2000 but couldn't remember whether she advised her of the strawberry juice on the floor of the lunchroom. She did not recall signing the Form 7.

[20] The worker stated that the kick move did not arise out of self-defence discussions nor was it part of a demonstration to show how to protect hospital patients.

[21] In regard to the Form 6 the worker stated that her co-workers were not involved in performing any kicks in the lunchroom. The worker insisted that she performed only one kick. She noted that the writing describing the accident in the Form 6 was not hers but she admitted that she signed the document.

[22] The worker testified that she had been employed as a dietary aide with the employer since 1971. A dietary aide checks meal trays on a belt line, prepares food items, takes trays containing food items to patients and removes trays when patients have completed their meals. Dietary aides also wash dishes when required.

### (iii) Law and Policy

[23] The Board's *Operational Policy Manual*, Document #03-01-02 speaks to accidents in the course of employment. The policy states, in part:

A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to place, time and activity indicate the accident was work related.

[24] The Board's *Operational Policy Manual*, Document #03-02-11 speaks to Fighting, Horseplay, and Larking. It states that the Act does not provide coverage for worker's injured while participating in horseplay or larking unless they are innocent victims. The policy also states that workers who initiate horseplay take themselves out of the course of their employment.

[25] In regard to the criteria of activity the policy states, in part:

If a personal injury by accident occurred while the worker was engaged in the performance of a work related duty as in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

[26] In determining whether an activity was incidental to the employment, the decision maker should take into consideration:

- the nature of the work
- the nature of the work environment
- the customs and practices of the particular workplace.

### (iv) The Vice-Chair's Conclusions

[27] The Vice-Chair, prior to reaching his ultimate conclusions in this matter, had to make findings of fact in regard to the worker's activities at work around 8:30 a.m. on October 12, 2000 as there were differences between the worker's testimony and documentation in the file.

[28] The Vice-Chair concludes that the worker was demonstrating self-defence kicks to her co-workers during her coffee break on October 12, 2000. Self-defence kick (or kicks) were mentioned on three different occasions in file documentation (Form 6, Form 7, adjudicators memo - November 23, 2000). The statements contained in these documents have been outlined in detail in the "Background" section of this decision. The Vice-Chair did note that the Form 7 refers to one kick but it is the Vice-Chair's impression that the accident history refers to the kick that resulted in the injury.

[29] The Vice-Chair preferred the information contained in the documentation to the worker's testimony as both the Form 6 and 7 were signed by the worker and were prepared at a time closer to the accident event when the worker's memory would be clearer as to the events of October 12, 2000.

[30] The Vice-Chair also finds, from the worker's testimony and file documentation, that the worker performed the kicks in an open area of the lunch room in front of two co-workers and it was while performing one of these kicks that she fell and injured her right ankle. The Vice-Chair also finds that the worker put herself, by jumping up and down, and throwing her weight from one foot to the other in a precarious position that could result in a fall.

[31] The Vice-Chair concludes that the action of performing kicks in the lunchroom was not an incidental activity related to her duties as a dietary aide. The duties of a dietary aide include checking meal trays on a belt line, preparing food and taking meals to patients and removing food trays. Further, self-defence kicks were not incidental to worker's activities associated with a lunchroom break as cooking and eating foods, conversing with co-workers or speaking on the telephone. The worker's kicking activities can be reasonably characterized as horseplay and take the worker, by Board policy, out of the course of her employment.

[32] The Vice-Chair also concludes that the worker's final kick was a significant contributing factor in the worker's fall and right ankle injury in October 2000.

[33] The worker's representative argued that the strawberry juice on the lunchroom floor caused or significantly contributed to the worker's fall.

[34] The Vice-Chair in considering this argument finds that there was insufficient evidence to conclude that the strawberry juice contributed to the worker's fall. The worker, on the day of the accident, did not inform the employer that her fall was related to a substance on the floor but rather related it to a self-defence kick. The worker, in her testimony, stated that she did not know the reason for her fall but when she struck the floor she placed her hand on a sticky substance which she felt was the residue of strawberry juice. It was not until October 26, 2000, (signing of the Form 6), that the worker related her fall to this sticky substance. There was no evidence that the worker stepped in the substance prior to the fall or that the substance was in liquid form or slippery and likely to contribute to a fall.

[35] In addition, the strawberry juice was a red substance on the floor of an open area (walking area) in the lunchroom and would have been clearly visible to the naked eye. The worker by moving and circling in this area performing kicks failed to take the usual precautions to avoid a hazard, if indeed, there was one. It is the Vice-Chair's opinion that, if the strawberry juice was potentially dangerous, the worker could have avoided the danger by paying the usual attention expected of a worker in similar circumstances.

[36] The Vice-Chair ultimately concludes that the worker's kicking activities (horseplay), and her failure to take reasonable care and caution for her own safety, resulted in the worker's fall and ankle injury on October 12, 2000. The worker, by these kicking activities, was not in the course of her employment and is not entitled to benefits.

### **THE DECISION**

[37] The worker is not entitled to benefits for a right ankle injury that occurred while she was at work on October 12, 2000.

[38] The worker's appeal is denied.

DATED: May 6, 2004

SIGNED: T. Carroll