



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

### **DECISION NO. 2010/09**

**BEFORE:**

R. McClellan : Vice-Chair  
E. Tracey : Member Representative of Employers  
M. Ferrari : Member Representative of Workers

**HEARING:**

October 19, 2009 at Toronto  
Oral  
No post-hearing activity

**DATE OF DECISION:**

December 31, 2009

**NEUTRAL CITATION:**

2009 ONWSIAT 3036

**DECISION(S) UNDER APPEAL:** WSIB ARO decision dated June 27, 2008

**APPEARANCES:**

**For the worker:**

Mr. Ron Collie, Service Employees International Union

**For the employer:**

Mr. Edward Hepburn, paralegal

## REASONS

### (i) The appeal

[1] The worker appeals the decision of the Appeals Resolution Officer, Mr. Shepherd, dated June 27, 2008. That decision concluded that the worker did not have initial entitlement for a left shoulder injury under the May 2006 accident claim.

[2] The issues before the Panel are:

- whether the worker has initial entitlement for a left shoulder injury under the May 2006 accident claim;
- whether the worker's impairment in the left shoulder is causally related to the compensable accident in May 27, 2006; and/or
- whether the left shoulder impairment resulted from an accident in the course of employment on July 4, 2006.

### (ii) Background

[3] The worker, now age 52, was employed as a Home Care Worker by a health care agency. On May 27, 2006, she sustained an injury to her right arm in the course of lifting and transferring a patient. Entitlement was awarded for the right shoulder injury. In June 2008, the worker was rated at 24% for permanent impairment in the right shoulder, diagnosed as rotator cuff tear/frozen right shoulder, which converted on a whole-person basis to an award of 14%.

[4] Following her right shoulder injury, the worker returned to work in June at modified work provided by the accident employer, consisting of "homes studies" and visits to clients requiring lighter physical demands.

[5] On July 4, 2006, she sustained a left shoulder injury when she fell on stairs in her home.

[6] Board Memo #1, dated July 6, 2006, recorded that the worker advised her Claims Adjudicator that on Tuesday night, (July 4, 2006) the worker had slipped and fallen on stairs at home, injuring her left shoulder, and had also aggravated her compensable right shoulder impairment. The employer advised that a result of the left shoulder injury the worker was no longer able to do any patient care work. Her home studies continued.

[7] In Board Memo #9, dated October 12, 2006, entitlement for the left shoulder was denied. The Memo recorded that the worker claimed to have left shoulder symptoms from the time of the workplace accident in May 2006 and that the fall at home had aggravated the pre-existing left shoulder injury, as well as the right shoulder condition. The adjudicator noted there was no indication of left shoulder symptoms in the medical reports prior to the accident of July 2006 and ruled that the accident was a home incident unrelated to her employment. Initial entitlement for the left shoulder was denied.

[8] Following a review of the medical file, Board Medical Consultant Dr. Deslauriers advised in Board Memo #12, that the worker had entitlement for neck, right shoulder and arm strain, based on the diagnosis of torn right supraspinatus tendon with underlying tendinitis. He

noted that the worker had no entitlement for the left shoulder. In Board Memo #17, dated January 2, 2007, Dr. Deslauriers confirmed entitlement for the neck, right shoulder and arm strain, and clarified that the underlying tendinosis was part of the claim and not a pre-existing condition.

[9] Entitlement for a left shoulder injury was denied by the ARO, who, while giving incorrect accident dates, rejected the worker's submissions that she had injured the left shoulder at the time of the January 2006 accident (sic) and exacerbated the left shoulder injury as a result of the fall at home in May 2006 (sic). (The correct dates are May 27, 2006 for the compensable accident, and July 4, 2006 for the left arm injury resulting from the home accident).

[10] The ARO also rejected the worker's submissions that she had been in the course of employment at the time of the July 6 injury in her home, because her modified duties at that time required her to prepare home-study reports at home. The ARO ruled that the accident in July 2006 had taken place at night, outside the worker's stated working hours of 7 AM to 5 PM.

[11] The worker's representative notified the Tribunal on November 7, 2008 that the worker had been granted entitlement to loss-of-earnings benefits from May 14, 2007 to February 29, 2008, under the May 2006 right shoulder accident claim, and there were no other issues pending before the Board.

[12] The Case Record contains samples of the worker's Scheduling Form, also referred to as the availability form, which is a document authorized under the collective agreement setting out the scheduling of all work assignments, arranged at six-month intervals.

[13] The Case Record also contains a letter to the worker's representative dated May 29, 2008, from Mr. John Slinger, Chief Operating Officer for the WSIB, dealing with this employer's "home study" program. In this letter, Mr. Slinger wrote as follows:

I share your concerns and agree with you that this employer's return to work program/practices are not appropriate. The WSIB generally does not support at home work as an effective way of facilitating return to work. Such practices should only be considered for very short periods of time and in no case where a worker is totally disabled.

I have asked that a complete review of all of this employer's claims be undertaken and to address the issues identified in each claim.

I have also asked our Service Delivery and Regulatory Services staff to meet with the employer to discuss our concerns with the program and review the appropriateness of their claim reporting and return to work practices.

**(iii) The medical evidence**

[14] None of the medical reports, beginning with the emergency hospital report dated May 29, 2006, and including reports from the treating physiotherapists and the treating family physician Dr. Muldowney make any reference to left shoulder symptoms prior to the home accident of July 4, 2006.

[15] The earliest reference to left shoulder injury is contained in the hospital emergency record dated July 5, 2006, which reported the worker had "slipped off step at home last night." Hospital x-ray showed no fracture or dislocation.

[16] The worker continued to receive physiotherapy for her right shoulder. On August 28, 2006, the treating physiotherapist wrote to the Board requesting clarification of the worker's current work restrictions relating to the right shoulder impairment resulting from the accident of May 27, 2006. As of the most recent Functional Abilities Form dated July 3, 2006, the worker was considered unsafe to supervise and manage any client who was at moderate risk or higher of falling. She made the following statement:

I will state clearly that although (the worker) sustained a precipitous injury to her left shoulder during this same time of attempting to rehabilitate her right shoulder, the left shoulder is not preventing her right shoulder from achieving any gains in functional goals. The status of her right shoulder on its own has been responsible for not being able to return to a normal duties.

[17] On September 14, 2006, the worker received an ultrasound for both shoulders. The left shoulder ultrasound identified chronic calcified tendinitis in the left supraspinatus tendon. It also identified two partial thickness tears in the right supraspinatus tendon.

[18] Ongoing left shoulder problems were identified in a report from the Kemptville Hospital emergency outpatient department, on June 21, 2007.

[19] An MRI of the cervical spine taken on July 30, 2009, showed no pathology at C2/3, C3/4 or C7/T1. There was a small central disc bulge at C4/5 not compressing the cord and a small central disc bulge not compressing the cord at C5/6. At C6/7 there was a very large paracentral left disc protrusion compressing and indenting the left aspect of the cord and displacing the left side and nerve roots.

[20] On August 27, 2009, physiatrist Dr. Alex McKee advised the treating physiotherapist that the worker continued to have significant symptoms on the right side of her neck into the right shoulder, with lesser ongoing left shoulder pain. It was reasonable to assume that the left compression at C6/7 accounted for the right-sided radiculopathy. It was unlikely that the worker would have a successful return to work in the foreseeable future as a result of her cervical disc symptoms.

**(iv) The worker's testimony**

[21] The worker testified that following the right shoulder injury of May 27, 2006, she was provided with modified work by the employer, consisting of "homestudy" at 31.5 hours per week and 15 hours of light-duty patient care. She described the homestudy program as requiring work at home and the "work" consisted of reading manuals and then writing a series of responses to questions about the content of the manuals for submission to the employer. The worker stated she was provided a total of eight manuals, one at a time, and each manual had a specified time for completion ranging between 12 and 22 hours. As soon as she had completed one manual, and submitted the questionnaire, she was provided with a successor manual.

[22] The worker testified that, with her supervisor's knowledge and approval, she was working flexible hours at her own pace, and was not confined to her previous shift availability schedule of 7 AM to 5 PM. The worker stated that because of her severe right shoulder injury, her sleep was disturbed, she was not able to sleep in bed but rather slept in a lazy boy chair, and her sleep was frequently interrupted by the pain. As a consequence, she stated, she frequently worked on the homestudy project at irregular hours: sometimes as early as 5 AM, and sometimes late into the night. She stated that her right upper extremity injury limited her ability to write for prolonged periods and she had to take frequent breaks from her homestudy work.

[23] The worker described the accident of July 4, 2006 (the correct date). She stated she was working on the homestudy project and at some time around 5 PM, she took a break to go to the washroom. She stated that as she was coming back to continue working, she slipped and fell on the stairs, sustaining the injury to her left shoulder. She stated that her left shoulder was very painful, and became progressively stiff until she had lost all mobility. The worker stated that she received physiotherapy treatment the next day, July 5, and then went to the hospital emergency the same day. The worker stated she did not report the accident as work related because she had no idea that she could have had entitlement to compensation until she was so advised by her union representative at a later date.

[24] The worker testified that when she described the accident as occurring "last night," she stated that she was referring to an accident around 5 PM and that was the way she spoke.

[25] The worker stated that the homestudy project began in mid-June 2006 and finished at the end of August 2006, and no further modified work was provided by the employer for the rest of the year. She returned to work in January 2007, and subsequently was provided with an LMR program by the Board under the May 2006 accident claim, which she is in the process of completing.

[26] The worker stated that she still has a loss-of-range of motion in her shoulders, as well as pain, and that she continues to take physiotherapy as needed.

**(v) Submissions of the worker's representative**

[27] Mr. Collie submitted that because the worker had been assigned the homestudy project by the employer between June 2006 and August 2006, her residence effectively became her workplace. He submitted that the worker was working flexible hours in her home with the knowledge and consent of her supervisors and that the timing of the accident was actually irrelevant, although there was no reason to doubt the worker's testimony that it happened some time around 5 PM on July 4, 2006. The worker had been consistent in her version that she had been working at the homestudy project, took a bathroom break which was entirely incidental to employment, and was on her way back to resume working on the homestudy project when the accident occurred. Mr. Collie submitted that the worker therefore was in the course of employment at the time the accident by chance event occurred, and that the statutory presumption clause at section 13(2) of the Act applied in this case. He submitted that the presumption had not been rebutted.

[28] Mr. Collie cited the provisions of Board's *Operational Policy Manual*, (OPM) Document Nos. 15-03-02 and 15-03-03, as well as Tribunal jurisprudence respecting activities incidental to employment which included bathroom breaks.

[29] Mr. Collie also submitted a letter from the SEIU representative Mr. David Cheslock dated October 8, 2009 (Exhibit #8). The letter stated that as a union representative with SEIU Local 1, he is aware that the employer in this case has a practice of requiring workers who were on modified duties to work outside their stated availability, and are routinely assigned modified work outside the hours stated on their availability forms.

[30] Mr. Collie drew the Panel's attention to the letter in the Case Record from Mr. John Slinger of May 29, 2008 (see above). Mr. Collie submitted that the employer in this case had been engaged in a deliberate attempt to avoid the responsibility for compensation claims through the use of the "home study" program, and that the program did not constitute a legitimate ESRTW exercise. He submitted that the employer's attempt to deny the worker's entitlement for the left shoulder injury which occurred in the home workplace should be considered within this context of compensation avoidance and the worker should not pay a price for the employer's wrongful actions.

**(vi) Submissions of the employer's representative**

[31] Mr. Hepburn submitted that the ARO's decision should be upheld. He submitted that there had been a number of contradictory versions with respect to the left shoulder injury. Initially, the worker had claimed that she had injured left shoulder at the time of the May 24, 2006 accident and then claimed that her left shoulder condition resulted from the nature of her job duties and then finally, that it was the result of a chance event on July 4, 2006. He argued that the time of the accident was an important consideration and that it would be unreasonable to assign the employer liability for injury by accident on a 24-hour basis. He submitted that the worker's availability schedule, which established her regular hours of work as 7 AM to 5 PM, continued to apply to her homestudy activity. He further argued that the worker's description of the accident as having taken place "last night" ruled out a 5 PM accident time and therefore the home accident had taken place outside her scheduled working hours and did not occur in the course of employment. There was therefore no entitlement for the left shoulder injury.

**(vii) Law and policy**

[32] On January 1, 1998, the *Workplace Safety and Insurance Act, 1997* ("WSIA") took effect and applies to this case.

[33] The relevant section relating to NEL awards states as follows:

**46(1)** If a worker's injury results in permanent impairment, the worker is entitled to compensation under this section for his or her non-economic loss.

**(2)** The amount of the compensation is calculated by multiplying the percentage of the worker's permanent impairment from the injury (as determined by the Board) and,

(a) \$51,535.37 plus \$1,145.63 for each year by which the worker's age at the time of the injury was less than 45; or

- (b) \$51,535.37 less \$1,145.63 for each year by which the worker's age at the time of the injury was greater than 45.

However, the maximum amount to be multiplied by the percentage of the worker's impairment is \$74,439.52 and the minimum amount is \$28,631.22.

- (3) If the amount of the compensation is greater than \$11,452.07, it is payable as a monthly payment for the life of the worker. If it is \$11,452.07 or less, it is payable as a lump sum.

[34] Loss of earnings benefits are provided in section 43.

**43(1)** A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,

- (a) the day on which the worker's loss of earnings ceases;
- (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
- (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
- (d) the day on which the worker is no longer impaired as a result of the injury.

[35] The definition of accident is set out as follows:

2. (1) in this Act,

“accident” includes,

- (a) a wilful and intentional act, not being the act of the worker,
- (b) a chance event occasioned by a physical or natural cause, and
- (c) disablement arising out of and in the course of employment; (“accident”)

[36] Section 13 reads as follows:

**13(1)** A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

(2) If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

(3) Except as provided in sections 18 to 20, the worker is not entitled to benefits under the insurance plan if the accident occurs while the worker is employed outside of Ontario.

(4) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

[37] Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. Pursuant to WSIA section 126, the Board has identified certain policies applicable to this appeal. We have considered these policies as

necessary in deciding this appeal. In particular, we have considered Board Policy packages: 1; 31; 300.

**(viii) The Panel's conclusions**

[38] The worker in this case is claiming entitlement for a left shoulder injury resulting from an accident by chance event arising out of and in the course of employment on July 4, 2006.

[39] The facts of the case are that the worker sustained a left shoulder rotator cuff injury in a slip and fall injury in her own home on July 4, 2006. At that time, she had been given a modified work assignment by the employer as a result of a significant right shoulder injuries sustained on May 27, 2006. Since the middle of June, the worker had been working 31.5 hours per week in her own home on the employer's "homestudy" project and approximately 12.4 hours per week at light client care duties outside the home. The homestudy job duties are described above.

[40] The question before the Panel is whether or not the worker was in the course of employment at the time of the left shoulder injury on July 4, 2006.

[41] The employer has argued that Board decision-makers were correct in assigning the time of the July for accident as outside the worker's scheduled hours of work from 7 AM to 5 PM; that the accident had taken place at "night" after her scheduled hours of work and therefore did not occur in the course of employment.

[42] However, the Panel does not accept this argument, for the following reasons.

[43] The adjudication of this case does require a finding with respect to the credibility of the worker. The worker testified in a straightforward manner without exaggeration and her testimony has not been contradicted by any other evidence. The Panel finds that there is no basis to challenge the worker's testimony as anything other than honest and sincere and accepts that she is a credible witness. We accept her testimony with respect to the nature of her activities at the time of the accident of July 4, 2006.

[44] The worker in this case was assigned by the employer, as part of her ESRTW program, to work in her own home, working 31.5 hours per week on the homestudy project, which involved reading manuals then completing and submitting a kind of test questionnaire on the content of each manual. Given the nature of the worker's compensable right shoulder impairment, which clearly required flexible hours and frequent breaks, it is unreasonable to insist that the worker's pre-accident shift schedule, which had been based on homecare visits to clients, should be applied to the worker's modified work in her own residence. We accept the worker's testimony that her supervisors were aware she was working flexible hours, which is entirely reasonable given the circumstances. We also accept the submission from Mr. Cheslock that it was this employer's routine practice to provide modified work outside the Schedule Form availability hours.

[45] The issue in this case involves the question when is a home-worker in the course of employment for the purpose of determining entitlement to compensation benefits. There is limited Tribunal jurisprudence on this issue, with appeals being adjudicated on a case by case basis. (See *Tribunal Decision Nos. 2352/05, 1056/08, 464/91.*)

[46] Mr. Hepburn has argued that it would be entirely unreasonable to impose a burden of 24-hour/day liability on employers for workplace accidents and injuries, and he is correct: it would be unreasonable. However, that is not being proposed. What is being proposed is that claims for compensation entitlement from home workers for accidents occurring in the home workplace be adjudicated on the basis of the nature of the activity at the time of the accident. Obviously, a home-worker who slips and falls in the kitchen while cooking supper, or who falls out of bed while sleeping, or who is injured while taking out garbage or while shovelling the snow, is outside the employment nexus. A home worker who falls off an office chair while performing a job-related activity, is within the employment nexus. A home worker engaged in a job-related activity, who takes a bathroom break and is injured in the course of the bathroom break, is engaged in an activity incidental to employment and is within the employment nexus.

[47] In the case before us, the worker has testified that on July 4, 2006, at around 5 PM more or less, the worker was working on her homestudy project, when she took a bathroom break. On her way back to resume her work, she slipped and fell on the stairs injuring her left shoulder. As stated above, the Panel finds the worker's testimony on this point to be credible. It accords with the emergency room report of July 5, 2006, that the worker slipped on a step at home. The worker was engaged in an activity incidental to employment at the time of the accident of July 4, 2006, and was within the course of employment. The statutory presumption under section 13 of the statute has not been rebutted. The Panel finds that the accident of July 4, 2006, arose out of and in the course of employment.

[48] The worker therefore has initial entitlement for a left shoulder injury arising out of and in the course of employment on July 4, 2006. The determination of compensation benefits flowing from this decision is remitted to the Board for determination.

**DISPOSITION**

[49]           The appeal is allowed.

[50]           The worker has initial entitlement for a left shoulder injury arising out of and in the course of employment on July 4, 2006. The determination of compensation benefits flowing from this decision is remitted to the Board for determination.

DATED: December 31, 2009

SIGNED: R. McClellan, E. Tracey, M. Ferrari