



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 2432/08

**BEFORE:** J. G. Bigras : Vice-Chair

**HEARING:** December 17, 2009, at Ottawa  
Oral

**DATE OF DECISION:** December 30, 2009

**NEUTRAL CITATION:** 2009 ONWSIAT 3026

**DECISION(S) UNDER APPEAL:** WSIB Appeals Resolution Officer (ARO) M. Dumais dated June 15, 2006.

**APPEARANCES:**

**For the worker:** P. King, Paralegal

**For the employer:** S. Huxley, Lawyer

**Interpreter:** N/A

## REASONS

### (i) Introduction to the appeal proceedings

[1] The worker appeals a decision of the ARO, which concluded that she was not entitled to workplace insurance benefits for a right shoulder strain which, she claims, resulted from her employment on April 20, 2005. The ARO rendered a decision based upon the written record without an oral hearing.

[2] An extension of the time limit to pursue this appeal was granted to the worker in *Decision No. 2432/08E* (December 19, 2008).

### (ii) Issues

[3] The issue under appeal is initial entitlement to benefits.

[4] The appeal is allowed for the reasons set out below.

### (iii) Background

[5] The now 51-year-old worker started as a bus operator with the accident employer in February 1984. A report of accident dated May 5, 2005, stated that she had suffered an injury during the course of her employment on April 20, 2005.

[6] The worker stated that she first experienced pain in her right shoulder when she reached for the transfer box on April 20, 2005. She also claims that she had to jump twice and tap a mirror situated about 7.5 feet above the floor, on the right side of the bus in order to adjust it at the start of her shift.

[7] The employer claimed that the stretching for the mirror change was not necessary, given that the worker had a rod or stick which could be used for that purpose.

[8] The Board also found that reaching for the transfer box which was only two to three feet from the driver's seat, was not an activity likely to have resulted in the injury. It was also found that the driver was not likely to have to adjust the right-hand mirror by jumping and reaching above her head with her right hand. Therefore, entitlement was denied.

### (iv) Law and policy

[9] Since the worker was injured in April 2005, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[10] Specifically, sections 2(1)(c) and 13 of the 1997 Act govern the worker's entitlement in this case.

[11] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #8, would apply to the subject matter of this appeal:

- 1, 107, 300.

[12] I have considered these policies as necessary in deciding the issues in this appeal, in particular:

- *Operational Policy Manual* (“OPM”) Document #15-02-01 [“Definition of an Accident”].

(v) **The evidence**

[13] Immediately before the start of her shift as a bus operator on April 21, 2005, the worker called her supervisor and asked to be replaced due to a sore right shoulder. The worker was seen the next day by family physician Dr. E. Biggs. A tendonitis was diagnosed and a layoff from work of three to seven days was recommended. Rest and an application of ice were prescribed.

[14] The worker returned to work on May 11, 2005.

[15] The worker gave evidence that she has been a bus operator with the accident employer for 26 years. At the time of the injury at issue, the worker was operating a “low-floor bus” which accommodates wheelchairs. At the start of every shift, the worker would adjust the four mirrors which serve to keep watch the entire bus and the road. She would adjust the left hand outside mirror by reaching it from her seated position. The right outside mirror could be adjusted by standing on the entrance steps. The middle mirror was adjusted by the driver standing next to her seat.

[16] However, a fourth mirror, situated inside the vehicle, on the extreme right, allowing the driver to see the wheelchair area, stood 7.5 feet above the floor. The worker who is 5 feet, 3 inches tall, stated that, normally, a rod of stick designed to open the overhead vents was used to adjust this mirror. However, no such instrument was available on April 20, 2005, when the worker took over the bus. She stated that she had to jump up and tap the mirror with her right hand. The operation had to be repeated to complete the adjustment. About 30 minutes later, as the worker reached for the transfer box situated at shoulder level in her sitting position, two feet to her right, she experienced a sharp pain in the right shoulder. The worker stated that as she believed she had sustained only a pulled muscle, she did not report the injury the day it occurred and finished her shift, operating the vehicle with her left arm only and reaching across her body with her left hand to empty the fare box and issue transfers. The pain had not subsided when she reported to work the next day and, realizing the danger of driving while in pain and with the use of one arm only, the worker called her supervisor and asked to be replaced.

[17] The worker stated that, given that the pain was first experienced as she was reaching for the transfer box, she reported an injury resulting from that movement. However, she later realized that the mirror incident was more likely to have caused the injury and reported it for the first time to a Claims Adjudicator, on September 8, 2005.

[18] An x-ray examination on September 30, 2005, showed a painful impingement syndrome of the right shoulder and painful arthritis of the right AC joint. There was no evidence of a tear or osteophyte formation.

(vi) **Analysis**

[19] There is no dispute that the worker experienced right shoulder pain which caused her layoff from work on April 21, 2005. Family physician Dr. Biggs diagnosed a shoulder strain and recommended rest and ice. The worker was off work from April 21, 2005, to May 11, 2005.

[20] The worker claims that the injury resulted from her employment. The employer argues that the condition did not result from her employment.

[21] The condition at issue in this case, a shoulder injury, arose in the course of the worker's employment. However, given that no chance event is known to have occurred, the issue falls under the third branch of the definition of "accident," under section 2(1)(c) which states that an accident may be a "disablement arising out of and in the course of employment."

[22] However, given that there is no known "chance event" causing the injury, the presumption provided in section 13(2) of the Act, does not apply. Section 13(2) provides, in part, that when it is shown that an injury arose during the course of employment, it can be presumed that it arose out of the employment. In disablement cases, it must not only be shown that an injury arose during the course of employment, but also that it arose from employment.

[23] Board's *Operational Policy Manual*, Document No. 15-02-01 states that the definition of "disablement" may include "a condition that emerges over time," or "an unexpected result of a work activity."

[24] In this case, I find that the worker's right shoulder injury was an unexpected result of her work activity. I accept the worker's evidence that she did jump and tap the mirror twice, on April 20, 2005, and that this activity likely resulted in the onset of pain that she experienced about 30 minutes later. The worker's explanation that, given that the pain was first experienced as she reached for the transfer box, she originally believed that the injury was caused by that movement. However, after analyzing the Claims Adjudicator's decision of May 17, 2005, and the events of the day of the injury, she realized that the injury was more likely caused by the jumping up and extending her right arm overhead to "tap" the mirror on the right side. The worker agreed with the employer that a rod is usually available to adjust the mirror, but that none was provided on that particular bus on that particular date.

[25] I understand the employer's concern and difficulties accepting the worker's recollection of events, given that "her story changed" from April 21, 2005, to September 8, 2005. However, we cannot expect injured workers to always be able to pinpoint the course of their medical problems and it is a common occurrence in that regard that original notions are later shown to be inaccurate. I am persuaded that this is such a case.

[26] On this evidence, I therefore conclude that the worker's injury on April 20, 2005, arose out of the worker's employment. Given that the accident also arose during the course of employment, the worker suffered an accident by disablement on April 20, 2005. She is entitled to benefits for the disability resulting from this injury. I leave the determination of benefits to the Board.

**DISPOSITION**

[27]           The appeal is allowed.

[28]           The worker is entitled to benefits for the disability resulting from her accident at work on April 20, 2005.

[29]           The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication, subject to the usual rights of appeal.

DATED: December 30, 2009

SIGNED: J. G. Bigras

