

WORKERS COMPENSATION
APPEAL TRIBUNAL

BETWEEN:

WORKER
CASE ID # [personal information]

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND

RESPONDENT

DECISION #149

Appellant	Maureen Peters, Worker Advisor, representing the Worker
Respondent	Brian L. Waddell, Q.C., Solicitor representing the Workers Compensation Board
Place and Date of Hearing	December 7, 2010 Inn on the Hill Charlottetown, Prince Edward Island
Date of Decision	February 22, 2011

Facts/Background

1. This is an appeal from a decision of the Internal Reconsideration Officer (“IRO”) of the Workers Compensation Board (“Board”), said decision dated December 15, 2009, (IR-09-110) where the IRO held that the Appellant’s injury and condition did not arise out of or in the course of her employment. [Appellant’s Appeal Record – Tab 1]
2. The Appellant was employed with [personal information] as a [personal information] on July 8, 2009. On that date, the Appellant, as noted on her Worker’s Report, Form 6, as filed on July 23, 2009, stated that she was retrieving a [personal information] from the top shelf at her place of employment when she turned the wrong way and injured the upper left part of her back. [Appellant’s Appeal Record – Tab 9]
3. The Appellant attended the Kings County Memorial Hospital Emergency Department on July 9, 2009, where she was examined by Dr. A. MacLeod. The Emergency Department chart indicated that she had a sore left shoulder. [Appellant’s Appeal Record – Tab 3]
4. The Appellant visited the Emergency Department again on July 13, 2009, and was again examined by Dr. A. MacLeod. In that report, it was indicated that the date and time of the accident was July 5, 2009, at 11:15 am. [Appellant’s Appeal Record – Tab 4]
5. A third visit to the Emergency Department by the Appellant on July 16, 2009, indicated that the accident occurred on July 9, 2009, at 9:30 in the morning. [Appellant’s Appeal Record – Tab 6]

6. The Physician's Report prepared by Dr. A. MacLeod dated July 16, 2009, and provided to the Board, provided a diagnosis of thoracic strain/spasms and indicated that the Appellant was not capable of working at that time in any capacity. [Appellant's Appeal Record – Tab 7]
7. The Emergency Department Chart, from a fourth visit to the Kings County Memorial Hospital Emergency Department by the Appellant on July 20, 2009, indicated the accident occurred on July 8, 2009, at 9:00 a.m., and Dr. A. MacLeod placed the Appellant off work until July 31, 2009, with a diagnosis of back pain. [Appellant's Appeal Record – Tab 8]
8. The employer for the Appellant filed an Employer's Report of Accident (Form 7) on July 27, 2009, wherein it was indicated that the Appellant's accident had occurred on July 10, 2009 at 2:00 p.m. [Appellant's Appeal Record – Tab 10]
9. The Appellant was examined by her family physician, Dr. B. Holland on July 29, 2009, and he provided a Physician's Report to the Board dated the same date. In that report, Dr. B. Holland diagnosed the Appellant with upper back strain and referred the Appellant to physiotherapy. Dr. B. Holland also indicated that the Appellant could not return to full duties at that time, and that she should remain off work until August 5, 2009. Dr. B. Holland indicated that the injury date was July 9, 2009. [Appellant's Appeal Record – Tab 12]
10. The Appellant attended physiotherapy commencing on July 30, 2009, and terminating on August 26, 2009, with a total of 10 treatments. The last physiotherapy report filed with the Board dated August 26, 2009, indicated that the Appellant had attempted to return to work in mid-August but she only stayed a few hours as she complained of increased burning over the left shoulder girdle area and was put off work again until September 6, 2009. The report also indicated that the Appellant started to feel improvement with treatment, and thus the physiotherapist requested an extension of the current

- treatment. The Board advised Power Physiotherapy Clinic by letter dated August 27, 2009, that the Appellant's claim had been denied, and therefore effective August 27, 2009, no further treatments would be covered. [Respondent's Appeal Record – Tab 37]
11. The Appellant attended at the Kings County Memorial Hospital Emergency Department on August 4, 2009, and the Emergency Department Chart indicated that the date and time of the accident was July 8, 2009, at 9:00 a.m. She was examined by Dr. C. Bruce who diagnosed back pain and placed the Appellant off work until August 18, 2009. [Appellant's Appeal Record – Tab 14]
 12. The Appellant met with a Board Entitlement Officer on August 6, 2009, to discuss her claim. At that point in time the Appellant indicated that she was injured on July 8, 2009, but when asked to state what happened to cause the injury, she stated she did not know. However, she did go on to state that she had been doing a lot of different things that day, and when she went to get a box off a shelf she felt a pull in her left upper back area under her shoulder blade. The Appellant indicated that she had never had upper back problems, although the initial report from Dr. A. MacLeod [see Appellant's Appeal Record – Tab 3] stated that she had a sore left shoulder for the previous three weeks. The Appellant stated that she had no idea why the doctor wrote that incorrect information on the report. [Appellant's Appeal Record – Tab 15]
 13. The Appellant returned to the Kings County Memorial Hospital Emergency Department on August 16, 2009. The Appellant was examined by the Emergency Department physician, Dr. R. Drury, who indicated that the Appellant reported having chronic back ache in the left sub-scapular area since June despite rest, physiotherapy and medication. Dr. Drury recommended the Appellant should stay off work for an additional three weeks. [Appellant's Appeal Record – Tab 17]

14. By letter dated August 27, 2009, the Board's Entitlement Officer denied the Appellant's claim. The Entitlement Officer ruled that there were discrepancies related to the mechanism of the injury and incident date in her file. In addition, there was no indication of a specific work related incident until a Medical Report of August 16, 2009 (although it should be noted that the Appellant filed a Form 6 on July 23, 2009, approximately 2 weeks after the alleged work related incident). Therefore, the Entitlement Officer ruled that, based on the medical evidence before the Board which indicated that the Appellant's symptoms were present prior to the alleged incident, the obvious discrepancy of the mechanism of the injury and upon weighing all of the evidence, there was no direct evidence to support a causal relationship that the Appellant's symptoms arose out of and in the course of her employment. [Appellant's Appeal Record – Tab 19]
15. The Appellant filed a Notice of Request for Internal Reconsideration dated November 2, 2009. [Appellant's Appeal Record – Tab 23]
16. By decision of the IRO dated December 15, 2009, the IRO upheld the decision of the Entitlement Officer and denied the Appellant's claim. The IRO ruled that upon a review of the file she noted there were conflicting reports of the mechanism of injury. In addition, the IRO ruled that the evidence on file noted that the Appellant was having symptoms dating back to June 2009. The IRO ruled that to accept the Appellant's claim and to attribute the Appellant's left shoulder symptoms to have been caused by a workplace activity, more evidence would be required than mere speculation which the IRO stated was the case here. The IRO ruled there was insufficient evidence to establish that the Appellant sustained a personal injury arising out of and in the course of her employment. [Appellant's Appeal Record – Tab 1]
17. The Appellant filed a Notice of Appeal with this Tribunal dated January 14, 2010. [Appellant's Appeal Record – Tab 2]

Issue

Whether the Appellant's injury arose out of or in the course of her employment?

Analysis/Decision

18. Section 6 of the *Workers Compensation Act* R.S.P.E.I. 1988 Cap. W – 7.1 (the “Act”) states that the Board shall pay compensation under the Act where personal injury by accident arising out of and in the course of employment is caused to a worker.

19. Section 1(1)(a) of the Act defines “accident” as follows:

“(a) “accident” means, subject to subsection (1.1) a chance event occasioned by a physical or natural cause, and includes
(i) a wilful and intentional act that is not the act of the worker,
(ii) any
(A) event arising out of, and in the course of, employment,
or
(B) thing that is done and the doing of which arises out of, and in the course of, employment, and
(iii) an occupational disease,
and as a result of which a worker is injured.”

20. The Appellant argued that the evidence before the Board and this Tribunal clearly established, on the balance of probabilities, that the Appellant's injury arose out of and in the course of her employment. There is no question that the medical reports (save and except initial report from the Kings County Memorial Hospital) stated that it was a Workers Compensation claim. However, the various medical reports provided by the doctors and the hospitals are inconsistent as to the dates and time the accident occurred. The only consistent factor is that the Appellant had a back injury and that it was a Workers Compensation claim.

21. The Respondent argued that there was a lack of objective medical evidence, and thus there was no causal connection between the sore shoulder for which the Appellant was seeking treatment and her employment. The Respondent also noted the uncertainty and ambiguity as to the type of injury. The Respondent argued that the Appellant, in her initial meeting with the Entitlement Officer, stated that she did not know how the injury occurred, but it must be noted that in the same meeting the Appellant did acknowledge that she was lifting a box off the shelf when she felt a pull in her left upper back area under her shoulder blade. The Respondent also noted that there was indication in one medical report that the back injury had occurred prior to July 8, 2009, the alleged date of injury.
22. Therefore, the Respondent argued that based on the totality of the evidence before the Board and Tribunal, there was an insufficient causal connection between the evidence and the injury, and to rule that the injury arose out of and in the course of employment would be mere speculation.
23. The Appellant argued that, based on Terrance Ison's, *Workers Compensation in Canada*, speculative evidence may be sufficient in certain circumstances. Ison discussed speculative evidence or inference as follows:

“It is often said that the evidence or an inference from the evidence that is relied upon in support of a proposed conclusion is “speculative”, but that term has no uniform meaning or significance. Evidence or an inference that is weak or speculative will be enough to warrant and to require the conclusion that it supports if there is no alternative hypothesis that is supported by evidence of greater weight, or by a stronger inference from the evidence.” [p. 209]
24. The Appellant argued that there does not need to have been a specific incident before a claim for compensation can be accepted by the Board, and that the evidence before the Tribunal supports the position that the Appellant's

- symptoms were as a result of her work duties which included activities such as lifting, bending and twisting.
25. The Appellant also argued that, in the alternative, the IRO failed to consider the application of Section 17 of the Act and Board Policy POL 04-16 Benefit of Doubt. In both of those provisions, the Board is to give the worker the benefit of the doubt where the evidence for and against entitlement is approximately equal in weight.
 26. In reviewing all of the evidence before this Tribunal, the Tribunal notes the inconsistent reports filed by the various medical doctors concerning the date and time of the injury. In addition, there is some evidence that the Appellant may have had the pain prior to July 8, 2009. [Appellant's Appeal Record – Tab 3 and Tab 17] The Tribunal acknowledges that there may be errors made by some of the medical professionals when completing medical reports. However, there were too many inconsistencies in the medical reports, to be attributed solely to errors in reporting by the medical staff. Therefore, in viewing the totality of the evidence before this Tribunal, this Tribunal cannot rule on the balance of probabilities that the Appellant's injury arose out of and during the course of employment of the Appellant.
 27. This Tribunal also rules that Section 17 of the Act which permits the Board to rule in favour of the worker where there is equal evidence for and against the worker's claim, does not provide any assistance to the Appellant in this case. As stated above there are significant discrepancies in the evidence, and thus it would be difficult to argue that the evidence for and against the Appellant's claim is equal in weight. Therefore, the benefit of the doubt as set forth in Section 17 of the Act can not be accorded to the Appellant in this matter.

28. Based on the foregoing, the Appellant's appeal is denied.

Dated this 22nd day of February, 2011

Wendy E. Reid, Q.C.
Chair of the Workers Compensation Appeal Tribunal

Concurred:

Gary Paynter, Worker Representative

Don Cudmore, Employer Representative