WORKERS COMPENSATION
APPEAL TRIBUNAL

BETWEEN:

EMPLOYER

EMPLOYER/APPELLANT

WORKER
CASE ID # [personal information]

WORKER

AND:

WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND

RESPONDENT

DECISION #158

Appellant	Patricia McPhail, Employer Advisor Representing the Employer
Respondent	Brian L. Waddell, Q.C., Solicitor representing the Workers Compensation Board
Worker	Maureen Peters, Worker Advisor representing Worker
Place and Date of Hearing	December 6, 2011 Best Western Charlottetown Charlottetown, Prince Edward Island
Date of Decision	March 5, 2012

Facts/Background

1. This is an Appeal of the Decision of an Internal Reconsideration Officer ("IRO") of the Workers Compensation Board (the "Board") dated May 3, 2011, and a subsequent decision dated June 28, 2011, wherein the IRO issued a decision stating that the Worker's right wrist tendonitis arose out of and in the course of his employment, and thus denied the Appellant's (Employer's) Request for Internal Reconsideration, wherein the Board granted benefits to the Worker.

2. The Worker was employed with the Appellant as a full-time [personal information] since approximately 2000. On January 26, 2011, the Worker attended the Queen Elizabeth Hospital Emergency Department and was diagnosed with right lateral tendonitis. At that time the Worker advised the doctor that in approximately 1980 he had similar episodes when he had resided out West, and had been advised it was tendonitis. [Appellant's Appeal Record Tab 7 and 8]

3. The Worker filed a Worker's Report Form 6 dated January 28, 2011, which was received by Board on the same date. In that report the Worker indicated his condition had developed over a period of time, and indicated that the type of work that he did involved a [personal information]. [Appellant's Appeal Record Tab 9]

4. The Appellant filed a Manual Handling – Progressive Injury Questionnaire with the Board, said questionnaire dated January 31, 2011, and received by the Board on the same date. In the questionnaire, the Worker describes his symptoms as pain in his right arm and wrist, which last most of the day. [Appellant's Appeal Record Tab 10]

5. The Appellant filed an Employer's Report Form 7, dated February 4, 2011, which was received by the Board on the same date. In the Employer's Report, the Appellant indicated that it was unknown whether the injury occurred on the employer's premises, and that it possibly may be related to other employment. The Employer's report also indicated that the Worker had called prior to starting work to report that his arm was sore and there was no discussion to concerning anything being wrong with his arm prior to that date. [Appellant's Appeal Record Tab 11]

6. The Board accepted the Worker's claim of right wrist tendonitis. It was accepted effective January 27, 2011. [Appellant's Appeal Record Tab 14]

7. The Worker did attend physiotherapy treatments on January 31, 2011, and February 1 and 3, 2011. On discharge, the Physiotherapist's report indicated that the Worker's symptoms were beginning to settle, and advised that he was to attempt a trial return to work and perform modified duties when needed, and able. [Appellant's Appeal Record Tab 15]

8. The February 14, 2011 Pre-adjudication Worksite Analysis for Progressive Injury Claims Report was prepared for the Board by Occupational Therapist, Alida Love. In this report, the Occupational Therapist noted that, the tasks performed by the Worker in his employment were highly repetitive. The Occupational Therapist noted that:

> "The above job was analyzed with respect to these factors and it was noted that risk factors could be appreciated due to the highly repetitive nature of the duties and sustained power required of the right hand."
> [Appellant's Appeal Record Tab 13]

9. By letter dated February 18, 2011, the Board advised the Worker and the Appellant, that the Worker's claim for compensation benefits as a result of his injury, had been accepted effective January 27, 2011. The diagnosis was

accepted on the claim of right wrist tendonitis, and the Board advised the Worker that he was entitled to temporary wage loss benefits as well as medical aid benefits. [Appellant's Appeal Record Tab 14]

10. The Appellant filed a Request for Internal Reconsideration of the February 18, 2011, decision of the Board. In the request for Internal Reconsideration, the Appellant stated that no consideration had been given to the Worker's non-occupational risk factors, such as outside employment or work done from the Worker's home. In addition, the Appellant claimed that the Occupational Therapists report indicated the risk factors for the worker "could be" related to his medical condition, as opposed to a finding of "probable" association, was required by Policy POL-91 of the Board. [Appellant's Appeal Record Tab 5]

11. The Board's Internal Reconsideration Officer ("IRO") rendered a decision dated May 3, 2011. In that decision, the IRO denied the Employer's request for reconsideration. The IRO held that in weighing the evidence in the file, the Worker did sustain an injury arising out of and in the course of his employment. The IRO noted that the Occupational Therapist's Report had stated that risk factors for repetitive strain injuries to the wrist could be appreciated due to the highly repetitive nature of the Worker's duties in the sustained power grip required of the right hand. [Appellant's Appeal Record Tab 4]

12. The Appellant requested a reconsideration by the Board of the IRO decision by letter dated May 5, 2011. In the IRO's decision, the Appellant claimed that the IRO had referenced an older version of Policy POL-91 on repetitive strain injuries, when making her decision. The Appellant claimed that the IRO had referred to claims being considered when there was "reasonable" association between the medical condition and the exposure to the task risk factors; whereas

the current policy does not use the term reasonable, but rather uses the term "probable". [Appellant's Appeal Record Tab 3]

13. The IRO issued a follow-up decision dated June 28, 2011. In this decision, the IRO ruled that the evidence provided by the Health Care Providers, the risk factors identified by the Occupational Therapist, and the rationale provided in the earlier IRO May 3, 2011, letter supported the acceptance of the Worker's claim, in that it was more unlikely than not, that the Worker's injury resulted from the workplace, or to state it another way, that it was more probable than not that the Worker's injury resulted from the workplace. [Appellant's Appeal Record Tab 1]

14. The Appellant filed a Notice of Appeal to this Tribunal on the issue whether the Worker's right wrist tendonitis arose out of or in the course of this employment.

Issue:

Did the Worker's right wrist tendonitis arise out of and in the course of his employment?

Decision:

15. Section 6.1 of the *Workers Compensation Act* R.S.P.E.I. 1988, Cap. W-7.1 as amended ("The Act") states that a Worker's injury or condition is compensable if the injury or condition arose out of and in the course of the Worker's employment. Section 1(1)(a) of the Act, defines an accident as follows:

> "accident" means, subject to subsection (1.1) a chance event occasioned by a physical or natural cause, and includes
> (i) A willful 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 arising out of, and in the course of, employment, and
(iii) an occupational disease,
and as a result of which a worker is injured."

16. The Appellant argued that, before a Board decision can be made on whether an injury arose out of, and in the course of the Worker's employment, the Board must weigh all of the evidence. In particular, Policy POL-68 of the Board at Paragraph 2 states:

> "The Workers Compensation Board will examine the evidence to determine whether it is sufficient complete and reliable to allow a decision to be made. If the Workers Compensation Board determines more information is required to make a decision, the Workers Compensation Board will work with the worker, employer, and health care providers to obtain the necessary information."

17. In addition, the Appellant argued that, pursuant to the same policy, that the Board must weigh all relevant evidence. Paragraph 4 of the Policy states:

> "Decision makers must assess and weigh all relevant evidence. Conflicting evidence must be weighed to determine whether it weighs more toward one possibility than another. Where the evidence weighs more in one direction then that shall determine the issue."

18. Policy POL-91 Repetitive Strain Injury, states in Paragraph 2:

> "Thorough investigation to determine the causation and to establish a well-defined medical diagnosis is essential as it forms the basis of appropriate treatment. Claims will be considered when there is a **probable association** between the medical condition and exposure to the task risk factors. Investigations **may** include the following:

- a comprehensive medical assessment including: clinical history, physical examination with diagnostic testing (nerve conduction studies/x-rays);
- investigation of non-occupational risk factors;
- assessment of occupational risk factors by an Occupational Therapist including a worksite visit." (Emphasis added)

19. The Appellant argued that the Board failed to examine all of the medical records of the Worker, and also failed to consider whether there were any other non-occupational factors. While the Appellant did not dispute the diagnosis of right wrist tendonitis, the Appellant disputed the cause. In particular, the Appellant argued that the Occupational Therapist's report did not provide sufficient evidence to make a determination or ruling that the injury was caused by work at the Appellant's place of employment. In particular, the Appellant argued that the Occupational Therapist stated that risk factors "could be appreciated", and the Occupational Therapist did not opine that it was "probable" that the injury was work related. The Appellant argued that the wording in the Occupational Therapists Report, "could be" were more indicative of a "possibility" as opposed to a "probability" which requires a stronger evidentiary proof or burden".

20. With respect to potential non-occupational risk factors, the Appellant argued that those factors do not appear to have been thoroughly canvassed by the Board in any of its decisions. In particular, the Board failed to consider the 1980 injury, or the worker's medical history. The Appellant argued that, pursuant to the Weighing of Evidence Policy POL - 68, the Board should have considered all of the relevant evidence, as opposed to considering only the Occupational Therapist's Report.

21. The Board argued that there was satisfactory evidence that the injury arose out of, and in the course of, the Worker's employment. The Board argued that

paragraph 2 of Policy POL-91 is permissive, in that it provides the Board with discretion as to what the investigation might include. The Board argued that none of the factors listed in paragraph 2 of this policy are mandatory.

22. The Board further argued that the key factor in this case was the Occupational Therapist's Report, which considered variables in the Worker's employment and also noted the medical literature cited that known risk factors such as high repetition, high forces and extreme postures were to be considered as possible contributors to the development of repetitive strain injuries to the right wrist. As such, the Worker's job was analyzed with respect to those factors, and it was noted that the risk factors could be appreciated due to the highly repetitive nature of the duties, and the sustained power grip required on the right hand. On the basis of the foregoing, the Board argued that it had sufficient evidence to conclude the Worker's work duties were highly repetitive in nature. In addition the Board had medical evidence of the diagnosis of the Worker's right wrist tendonitis, and that the Worker was unable, in the opinion of his physician, to return to full duties.

23. The Appellant argued that the emergency room physician did not render any opinion on causation of the injury, which weakened the Board's medical evidence but the Board argued that it was appropriate that the emergency room physician did not provide such an opinion.

24. The Board further argued that on the basis of probability, the Board had a clear diagnosis of right wrist tendonitis and an opinion from an Occupational Therapist that there were risk factors associated with the Worker's employment which could contribute to a repetitive strain injury including right wrist tendonitis. As such, there was sufficient connection or causation between the diagnosis of right wrist tendonitis and the occupational risk factors identified by the Occupational Therapist.

25. As the Board argued it had no evidence of an alternative cause, whether from other employment, recreation, accident at home, or otherwise, it, therefore, was able to decide on the balance of probabilities that there was a sufficient connection between the Worker's employment and his injury.

26. With respect to the Appellant's argument that the Occupational Therapist's report, wherein it indicated that risk factors "could be appreciated" is not equivalent to making a finding of causal connection of probable association, this Tribunal rules the Occupational Therapist's report was quite clear that the tasks performed by the Worker, while employed by the Appellant, were highly repetitive throughout the day, and that there was a sustained power grip required of the right hand. Based on the glossary of terms attached to the Occupational Therapist's report, the actions of the Worker, while working for the Appellant, involved high repetition, high force exposure of eight hours a day, five days a week, and some vibration. The Occupational Therapist's Report is an objective report of the testing involved in the Worker's tasks while employed by the Appellant, in determining whether there were risk factors found in the tasks. Therefore, based on her report, it is quite clear that the Occupational Therapist considered that highly repetitive risk factors were present.

27. In addition, this Tribunal rules that it was not necessarily fatal to the Respondent's and Worker's position that the emergency room physician failed to draw inferences concerning a probable association between the Worker's injury and his workplace tasks.

28. With respect to the claim that the Board did not investigate or thoroughly consider non-occupational risk factors of the Worker, Policy POL-91 does not require that all these risk factors are to be considered by the Board. Rather these factors **may** be considered, and it is not mandatory that the Board investigate all the factors listed in this policy.

29. Policy POL – 68 states that decisions of the Board are to be made on the balance of probabilities. In the event that the evidence for and against entitlement is approximately equal in weight, then the benefit of the doubt is then granted to the Worker.

30. In this case, this Tribunal rules that, on the balance of probability, the evidence which was presented to the Board, consisting mainly of the Worker's evidence, the medical diagnosis of the attending doctors concerning right lateral tendonitis, and the medical assessment of the Occupational Therapists, are of such a weight that the Board was correct in ruling in the Worker's favour. The only evidence which may be considered contrary to that ruling would be the fact that the Worker did admit to having a similar injury in approximately 1980. However, upon weighing all of the evidence before the Board, which includes the most recent medical evidence, the evidence shows that it is more probable than not that the injury of the Worker arose out of and in the course of his employment with the Employer. Even if the Board could conclude that the evidence for and against the entitlement is approximately equal in weight, then both Section 17 of the Act and Policy POL-68 of the Board states that the issue is to be decided in the favour of the Worker. In this case, this Tribunal rules that the Board was correct in its decision in that it was more probable than not that the injury of the Worker arose out of and during the course of his employment with the Employer.

31. Therefore, the Appellant's Appeal is denied.

32. This Tribunal wishes to thank counsel for the Appellant and the Respondents for their well presented arguments.

Dated this 5th day of March, 2012.

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

Concurred:

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Gordon Huestis, Worker Representative

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Scott Dawson, Employer Representative