

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

WORKER
CASE ID #[personal information]

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND

RESPONDENT

DECISION #164

Appellant	Worker, as represented by Maureen Peters, Worker Advisor
Employer	As represented by Margot Elgharib, Human Resources
Respondent	Brian L. Waddell, Q.C., Solicitor representing the Workers Compensation Board
Place and Date of Hearing	June 7, 2012 Inn on the Hill 150 Euston Street Charlottetown, Prince Edward Island
Date of Decision	October 31, 2012

1. This is an appeal by the Worker of Internal Reconsideration Decision IR #[personal information] dated August 10, 2011, upholding the decision of the Workers Compensation Board (the "Board") dated March 15, 2011, (and October 22, 2010) wherein it was determined that it was more probable than not that the symptoms experienced by the Worker in April 2010 could not be reasonably attributable to the Worker's left neck, shoulder and arm strain which occurred on January 4, 2010.

FACTS, EVIDENCE AND BACKGROUND

2. On January 4, 2010, the Worker, a [personal information], in the course of her employment was injured on the upper back /shoulders by falling ice from overhead telephone/electrical wires.
3. The Worker was seen by her family physician, Dr. George Carruthers, on January 4, 2010, following the accident.
4. Dr. Carruther's report dated January 4, 2010, states, "falling ice hit her on shoulders at work, pain bilateral shoulders, left arm feels heavy- pain with range of movement left arm & tender upper back and trapezius left side." The diagnosis was soft tissue injury.
5. The Worker was seen again by Dr. Carruthers on January 7, 2010, and in his report dated January 8, 2010, he states, "Continues soreness left neck/ shoulder/arm from injury."
6. On January 8, 2010, the Worker filed a claim (Worker's Report) with the Board in respect of the injuries she sustained in the accident.

7. By decision letter dated January 19, 2010, the Board accepted the Worker's claim, having earlier approved her for chiropractic treatment from Dr. David Whitty.

8. The Board's case worker stated in her decision letter:

It is noted you sustained soft tissue injuries to the left side of your neck, left shoulder and arm. The Disability Duration Guidelines accepted by the Board indicate the expected healing time for an injury of this type is six weeks. I note you are approved to attend chiropractic treatment until February 9, 2010, with a possibility of being extended to February 23, 2010. Therefore, your claim will close effective February 24, 2010.

9. The Worker was seen again by Dr. Carruthers on January 19, 2010, and in his report dated January 26, 2010, he states, "Pain left upper back and shoulders, see Dr. Whitty- unable to do ADL's (activities of daily living), normal job-modified work. His clinical notes state, "unable to do regular duties at food bank due to injury."

10. On March 24, 2010, Dr. Whitty filed a report with the Board, stating:

Actual Dates Seen: Jan.11 (initial), 13,18, 22, 27
Feb 01, 08, 16, 2010.

Client Report: While working as a [personal information] a chunk of ice fell off the overhanging telephone/electrical wires striking the Worker in the left shoulder, lower neck/upper back area. She responded very well to treatment. She was able to return to work without restrictions having made a full recovery.

Objective Findings: Limited shoulder flexion, abduction and adduction due to pain initially, and

limited gross and segmental cervical mobility. All movements were returned to normal full pain-free range during the course of therapy.

Treatment Goals: Restore normal pain-free mobility, treatment goal attained.

Outcome: Good.

11. The Worker was seen again by Dr. Carruthers on April 27, 2010, and in his clinical notes he states, "Complains of painful left shoulder. History of previous injury-ice fell off wires in January and hit her across back and shoulder-workers compensation. Dull pain ... pain along top of shoulder and feels tight in neck, no relieving factors, and worse with movement. Had several treatments with Chiropractor. Help some, but shoulder not back to previous state. Two car accidents in the past; has had arthroscopic surgery on left shoulder 2002-anti-inflammatories not helping ... wants to have Miller Dr. Stephen Miller, Orthopedic Surgeon) to recheck-will refer."
12. After the Worker's visit to Dr. Carruthers, the Worker phoned the Board's case worker.
13. The case worker's Event Log entry of April 27, 2010, states, "The Worker said she was to see Dr. Carruthers today and was given a prescription (Celebrex). I asked her what has been going on since the last report on file from Dr. Whitty indicates she made a full recovery. The Worker said she finds using the clothes line and doing yard work has been flaring up her left shoulder symptoms. I told her her claim is closed and I would have to review Dr. Carruthers' April 27, 2010, report if he submits it. I could not approve meds. on a closed claim."

14. On June 25, 2010, the case worker requested the Board's Medical Advisor, Dr. Steven O'Brien, to review the Worker's file and provide a medical opinion on whether the Worker's present symptoms could reasonably be related to the original workplace incident on January 4, 2010 or to her pre-existing left shoulder injury?

15. Dr. O'Brien's medical opinion dated July 5, 2010 states:

This visit on April 27, 2010 was approximately 6 weeks following her last chiropractic treatment of February 16, 2010 when Dr. Whitty declared the Worker had made a full recovery.

An Even Log entry of April 27, 2010 states, "I asked her what has been going on since the last report on file from Dr. Whitty indicates she has made a full recovery. The Worker said she finds using the clothes line and yard work has been flaring up her left shoulder symptoms."

Therefore, the Worker's present symptoms cannot be reasonably related to the workplace injury of January 4, 2010, which had made a full recovery according to the chiropractic reports, but rather would be due to her pre-existing left shoulder injury and "using the clothes line and yard work has been flaring up her left shoulder symptoms. "This would be the cause of her ongoing left shoulder symptoms, rather than the workplace injury of January 4, 2010.

16. The Worker was seen again by Dr. Carruthers on May 18, 2010, June 8, 2010, and July 15, 2010, for her ongoing symptoms.

17. On May 18, 2010, Dr. Carruthers prescribed Celebrex and referred the Worker to physiotherapy treatment and on July 15, 2010, he prescribed Voltaren medication.

18. By decision letter dated October 22, 2010, the Board notified the Worker that her claim would remain closed as of February 24, 2010, stating:

While, I acknowledge that a workplace incident did occur on January 4, 2010, and was accepted for left neck, shoulder and arm strain, a review of your file indicates that you were able to continue working and that your injury responded well to chiropractic treatment. Normal, pain free function was restored February 16, 2010. Also, no medical treatment was required for your left shoulder from January 19, 2010, to April 27, 2010. This further confirms that the soft tissue injuries sustained in the January 4, 2010, incident had healed. There is no medical evidence on file to suggest that it is more probable that your present symptoms are more reasonably related to your pre-existing non-compensable left shoulder injury (arthroscopic surgery in 2002) than to the workplace incident of January 4, 2010.

...

Having weighed the evidence on file, I have determined that it is more probable that the recent increase in symptoms is more reasonably related to the pre-existing non-compensable left shoulder injury and non-work related activities than the strain on January 4, 2010, from which, evidence suggests, you made a full recovery.

19. On November 3, 2010, the Worker was seen by Dr. Carruthers again and in his clinical notes he states, "Still having pain in left shoulder following accident in January-WCB denied- Wondering where to go."
20. On January 18, 2011, the Worker filed a Notice of Request for Internal Reconsideration with the Board requesting reconsideration of the Board's decision of October 22, 2010, stating, "I do not believe that my 2002 shoulder injury is a factor in the current state of my shoulder. I do believe that the injury of January 4, 2010, is the cause and I have medical documentation forthcoming that I feel will support this."
21. On January 21, 2011, the Board received a letter from Dr. Stephen H. Miller, Orthopedic Surgeon, addressed to the Worker, stating:

To Whom It May Concern:

The Worker had a left shoulder scope/debridement and acromioplasty on March 13, 2002 by myself. She had a complete recovery of this surgery with physiotherapy.

Her injury of approximately January 4, 2010 to this same shoulder, in no way has anything to do with her previous surgery of 8 years ago.

22. On February 2, 2011, the Board's Internal Reconsideration Officer (the "IRO") dismissed the Worker's reconsideration request of January 18, 2011, on the basis that Dr. Miller's letter was "new evidence" and that the reconsideration process required that new evidence be returned to the original decision maker (case worker) for consideration and response to the Worker.
23. On February 24, 2011, the case worker requested the Board's Medical Advisor, Dr. O'Brien, to review the Worker's file, for a second time in light of Dr. Miller's letter.
24. Dr. O'Brien's medical opinion in response dated March 1, 2011, states, "The mechanism of injury on January 4, 2010, has been acknowledged as being due to falling ice hitting her on the upper back and shoulder; right more so than left. The mechanism of this injury has not been related to her previous surgery of 8 years ago; therefore, Dr. Miller's letter of January 10, 2011, would not cause me to change my previous medical comment of July 5, 2010."
25. An inter office memorandum of the case worker dated March 7, 2011, states:

I contacted Dr. Miller's office to see when the Worker was seen by Dr. Miller after being referred by Dr. Carruthers on April 27, 2010. The receptionist said the Worker was only seen in July 2011 but this visit was related to a knee problem. There was no mention of her left shoulder being treated at this visit. The receptionist checked her chart

and indicated that Dr. Miller has not treated the Worker for a left shoulder injury since March 2002.

I asked the receptionist if Dr. Miller treated the Worker on January 10, 2011, when he wrote a letter on her behalf, stating her injury sustained on January 4, 2010, had nothing to do with her previous surgery 8 years ago. The receptionist said the Worker was not treated on January 10, 2011. The Worker stopped by the office to request a letter from Dr. Miller stating her previous injury had nothing to do with the injury on this claim.

26. By decision letter dated March 15, 2011, the Board notified the Worker that her claim would remain closed as of February 24, 2010, stating:

While, I acknowledge that a workplace incident did occur on January 4, 2010, and was accepted for left neck, shoulder and arm strain, a review of your file indicates that you were able to continue working and that your injury responded well to chiropractic treatment. As evidenced in a March 12, 2010, chiropractic report, normal, pain free function was restored by February 16, 2010. Also, no medical treatment was required for your left shoulder from January 19, 2010, to April 27, 2010. This further confirms that the soft tissue injuries sustained in the January 4, 2010, incident had healed. On April 27, 2010, you contacted me to let me know that your symptoms have returned following the use of your clothesline and doing yard work. Dr. Carruthers' clinical notes for April 27, 2010, indicate that you relate your symptoms to your work injury on January 4, 2010, and that you have not recovered from this work incident. As stated above the March 12, 2010, chiropractic report confirms that you did regain normal, pain free function by February 16, 2010.

Dr. Miller's letter indicates that you sustained an injury on January 4, 2010, to your left shoulder which was not related to your previous surgery performed by him on March 13, 2002. It is important to note that it has been confirmed by Dr. Miller's office that he has not examined the condition of your left shoulder since March 2002 and therefore is providing a purely subjective medical opinion that you have completely recovered following your March

13, 2002, surgery. Dr. Miller also states that you sustained an injury to your left shoulder on January 4, 2010, and this injury has nothing to do with your original surgery on March 13, 2002. This fact is not disputed.

Although Dr. Miller did perform your left shoulder scope, debridement and acromioplasty on March 13, 2002, and has provided an opinion, at your request, I have placed little weight and credence on his medical opinion as he did not examine you prior to providing his opinion, in fact, he has not seen you since March 2002. Once again, I note that Dr. Miller does not provide any objective medical evidence to support that you have fully recovered from your previous surgery nor does he provide any objective medical evidence to support your present symptoms being related to your more recent injury on January 4, 2010.

...

Having considered the new evidence on file, I have determined that it is more probable than not that the symptoms experienced by you in April 2010 cannot be reasonably attributable to your left neck, shoulder and arm strain which occurred on January 4, 2010. I have determined that the symptoms are more reasonably related to using your clothesline and doing yard work, which were undertaken prior to the return of your symptoms. Therefore, the new evidence does not change the decision to close your claim effective February 24, 2010. Your claim remains closed.

Factors in favor of my decision include but are not limited to:

- . You remained at work during your recovery from the injury on January 4, 2010.
- . Normal, pain free function was restored by February 16, 2010.
- . No medical treatment was required by you from January 19, 2010 to April 27, 2010.
- . You were undertaking tasks, some of which were strenuous, unrelated to your employment prior to the return of symptoms in April 2010.

I have also considered:

- . Dr. Carruthers opinion that your symptoms are related to the injury of January 4, 2010.
 - . Dr. Miller's opinion that your current symptoms are not related to surgery performed by him in 2002.
27. On June 15, 2011, the Worker filed a second Notice of Request for Internal Reconsideration with the Board requesting reconsideration of the Board's decision of March 15, 2011 stating:

In a memo dated July 5, 2010, the Board Medical Advisor, Dr. O'Brien, wrote that he felt that my shoulder symptoms at that time were due to my pre-existing left shoulder injury and that using the clothes line and doing yard work was causing these symptoms to flare.

It is clear from Dr. Miller's letter that my "pre-existing left shoulder injury" had completely resolved following surgery in 2002, and there is no medical information on my file to suggest otherwise.

Furthermore, when speaking with the case worker on April 27, 2010, I noted that activities such as doing yard work or hanging clothes did aggravate my shoulder symptoms; however, had it not been for the injury of January 4, 2010, I would not have experienced any problems with these or any other of my activities of daily living. Prior to the workplace injury that initiated this claim I did not have any left shoulder symptoms and did not experience pain when doing activities such as yard work or hanging clothes. Another example of a task which I am no longer able to perform as a result of my injury is the volunteer work that I used to do at the [personal information]. Following the accident I had to stop doing my regular [personal information] duties, and now volunteer in a [personal information] position.

In conclusion, I suffered an injury to my left shoulder on January 4, 2010. Prior to that, I did not have any symptoms in that shoulder. I did undergo a left shoulder surgery in 2002; however, the surgeon confirms that I had completely recovered from that procedure. I have not however completely recovered from the January 4, 2010

injury. I am still experiencing symptoms which are affecting my activities of daily living. These symptoms are consistent with the mechanism of injury and diagnosis associated with the workplace event of January 4, 2010, and cannot be attributed to any intervening events.

28. On August 10, 2011, the IRO denied the Worker's reconsideration request.

29. The IRO's decision (IRO # 11-38) states:

I have weighed the evidence on file and find:

- . The Worker was injured on January 4, 2010.
- . She attended chiropractic treatments from January 11-February 16, 2010, at which time Dr. Whitty stated she had made a full recovery.
- . There was no medical attention sought from February 16, 2010, until April 27, 2010.
- . On April 27, 2010, the Worker advised the case worker that after using her clothes line and doing some yard work her left shoulder symptoms flared up.
- . These activities are not work related.

The Worker had made a full recovery following chiropractic treatment for her January 4, 2010 workplace injury. It was not until the Worker was doing yard work and using her clothesline that her symptoms flared up. These events are not work related.

The decision of the case worker to close the Worker's claim effective February 24, 2010 was appropriate.

30. The worker subsequently filed a Notice of appeal with the Workers Compensation Appeal Tribunal (WCAT) appealing the IRO's decision of August 10, 2011 requesting that the Board's decision be set aside and that the Worker's claim for compensation be reopened effective February 24, 2010.

ISSUE

31. The issue is whether the Worker is entitled to compensation benefits beyond February 24, 2010?

DECISION

32. WCAT is bound by the Act and Board Policy.
33. The proper standard of review by WCAT is that of correctness, i.e. an incorrect decision by the Board may be corrected by WCAT.
34. Pursuant to Section 6 (1) of the Act and Paragraph 1 of Board Policy POL-71 the worker's injuries are compensable if her injury or condition arose out of and in the course of her employment.
35. While there is no dispute that the Worker was injured by an accident on January 4, 2010, arising out of and in the course of her employment, the issue is whether the Worker's ongoing symptoms and condition beyond February 24, 2010, were caused by the injuries she sustained on January 4, 2010.
36. When adjudicating a claim, the Board (and WCAT) must assess and weigh all of the relevant evidence to determine, on the balance of probabilities, whether a worker is entitled to compensation benefits.
37. Board Policy POL-68 (Weighing of Evidence) states:
 1. The decisions of the Workers Compensation Board are made in accordance with the real merits and justice of the case and the

Workers Compensation Board is not bound to follow strict legal precedent.

In determining the merits and justice of each case the Workers Compensation Board must give consideration to:

- all relevant information relating to the case in order to establish the facts and circumstances relating to the case;
- relevant provisions of the Workers Compensation Act and Regulation; and
- relevant Workers Compensation policies.

2. In making decisions related to compensation benefits, the Workers Compensation Board will examine the evidence to determine whether it is sufficiently complete 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.

The Workers Compensation Board will gather, review, and weigh all relevant evidence as part of the decision making process. However, the Workers Compensation Board will give greater weight to evidence that is factual and objective when making a decision.

3. The Workers Compensation Board will assess and weigh all relevant evidence and make decisions based on a balance of probabilities– a degree of proof which is more probable than not.
4. Where the evidence weighs in favor of the person claiming compensation, the claim shall be allowed and compensation benefits provided.
5. Where the evidence weighs against the person claiming compensation, the claim will not be allowed.
6. Where on any application for compensation the Workers Compensation Board concludes the evidence for or against the issue is approximately equal in weight, the issue will be resolved in favor of the person claiming

compensation as outlined in Workers Compensation Board policy, POL-62, "Benefit of Doubt".

38. In this case, the evidence in favour of the Board's decision, include:
- (a) the generally accepted Disability Duration Guidelines indicate the expecting healing time for this type of soft tissue injury is six weeks;
 - (b) Dr. Whitty's report indicates that after eight sessions of chiropractic treatment beginning January 11, 2010, and ending February 16, 2010, the Worker made a full recovery with normal full pain-free range and mobility;
 - (c) no medical treatment was apparently required by the Worker from January 19, 2010, to April 27, 2010, except the chiropractic treatments ending February 16, 2010; and
 - (d) Dr. O'Brien's medical opinion that the Worker's ongoing symptoms could not be reasonably related to her injury of January 4, 2010.
39. The evidence in favour of the Worker's claim, include:
- (a) Dr. Carruthers' medical opinion that the Worker's ongoing symptoms were related to her injury of January 4, 2010;
 - (b) Dr. Miller's opinion that the Worker had made a complete recovery from her pre-existing left shoulder injury;
 - (c) the Worker's assertion that she never fully recovered from her shoulder symptoms following her January 4, 2010, injury;
 - (d) the Worker was apparently no longer able to do volunteer work at the [personal information] following her January 4, 2010, injury and that activities of normal daily living aggravated her condition; and
 - (e) the Worker had apparently not received any treatment for her pre-existing left shoulder injury following her recovery in 2002 and the Worker's assertion that there was no intervening injury, recurrence or symptoms from the time of her recovery in 2002 until her injury on January 4, 2010.
40. It should be noted:
- (a) the Duration Disability Guidelines are only that - guidelines;

- (b) Dr. Whitty has not examined or treated the Worker since February 16, 2010;
- (c) Dr. O'Brien did not examine or treat the Worker;
- (d) although Dr. Miller, a specialist in orthopedic surgery, did not examine or treat the Worker since 2002, he unequivocally stated that the Worker had made a full recovery from her pre-existing injury; and
- (e) Dr. Carruthers was the Worker's family physician and examined and treated her on numerous occasions following her January 4, 2010 injury.

41. After reviewing all the evidence and considering the submissions of counsel for the Worker and the Board, this Tribunal finds, on the balance of probabilities, that the Worker's ongoing symptoms and condition beyond February 24, 2010, were directly and causally related to the Worker's injury on January 4, 2010, in the course of her employment.

42. Accordingly, this Tribunal allows the Worker's appeal and returns the matter to the Board for adjudication of appropriate benefits to the Worker.

43. The Panel wishes to thank Ms. Peters and Mr. Waddell for their excellent presentations at the Hearing.

Dated this 31st day of October 2012.

John L. Ramsay, Q.C., Vice-Chair
Workers Compensation Appeal Tribunal

Concurred:

Don Cudmore, Employer Representative

Nancy Fitzgerald, Worker Representative