C A N A D A CASE ID #[personal information]

PROVINCE OF PRINCE EDWARD ISLAND

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

EMPLOYER

APPELLANT

AND:

WORKERS COMPENSATION BOARD
OF PRINCE EDWARD ISLAND

RESPONDENT

AND:

WORKER

RESPONDENT

DECISION #9

Date of Hearing: August 15th , 2000

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This is the decision of the Workers Compensation Appeal Tribunal (the “Tribunal”) on an appeal by (the “Employer”) on the decision of the Internal Reconsideration Officer of the Workers Compensation Board of Prince Edward Island (the “Board”) dated November 29, 1999, which decision reversed an earlier decision to deny the Respondent [Worker] compensation.

BACKGROUND

[Ter Worker] suffers from Carpel Tunnel Syndrome and as a result, had surgery to alleviate her condition. [personal information] Typically, [the Worker] worked from 12:30 – 8:30 pm. [personal information]

In November 1995, [the Worker] attended the Charlottetown Physiotherapy for an "unknown injury" which included symptoms of tingling in her right hand. [The Worker] also reported a work-related incident, which resulted in an injury in December 1995, whereby she was [personal information]. Over the years the numbness and pain in her wrists got progressively worse.

In December of 1998, [the Worker] was examined by Dr. Gregg MacLean for numbness. He stated "despite her normal examination" he thought the diagnosis was carpal tunnel and was arranging nerve conduction studies. On March 3, 1999, Dr. Jacoby conducted surgery to release the carpal tunnel syndrome in [the Worker's] right hand and then performed a similar procedure on her left hand on March 31, 1999.

[The Worker] had applied for workers compensation as a result of her condition, submitting that it arose out of the course of her employment. On March 17, 1999, [the Worker's] case manager, Albert Mosher denied her claim for workers compensation. He wrote to [the Worker], setting out the Workers Compensation Board Policy on repetitive strain injuries, and advised that her file

had been reviewed by an Occupational Therapist as well as the Board Medical Consultant, and the element of “repetition” was missing for her job duties and therefore her claim did not qualify for compensation.

[The Worker] requested an Internal Reconsideration Hearing, which was held on November 1, 1999 with Brian Kelly attending with her, and [personal information]. Also in attendance were [personal information]. The Hearing was held before Eileen MacEachern-Pierce, Internal Reconsideration Officer. At the hearing, Brian Kelly on behalf of [the Worker], submitted that even though the suggested “repetition” was missing from her job description, [the Worker] suffered significant trauma to her wrists over the years as a result of having to [personal information], and that, combined with the day to day tasks involving moving and pushing, etc. led to the development of carpal tunnel syndrome.

The Board decision delivered as IR-48, dated November 29, 1999, reversed the earlier decision finding that [the Worker’s] carpal tunnel syndrome arose out of and in the course of her employment.

The Employer filed a Notice of Appeal dated December 22, 1999. The hearing was held on August 15th, 1999. In attendance before the Tribunal was John Mitchell representing the Board and Linda Gaudet representing the

Employer. Brian Kelly as [the Worker's] representative had been served, but neither Kelly nor [the Worker] were in attendance

APPEAL

The Appellant raises four grounds of appeal in its Notice of Appeal:

1. The Internal Reconsideration Officer erred in failing to adhere to the Respondent Workers Compensation Board's policy respecting Repetitive Motion Injuries, specifically that to be compensable, a claim must relate to work "which involves a combination of repetition, force and posture which can cause a repetitive motion injury".

2. The Internal Reconsideration Officer erred in her application of the Workers Compensation Board of Alberta's Medical Advisory Guideline on Carpal Tunnel Syndrome to the injury of the Respondent [Worker] in that:

    a) the Work Relationship Criteria contained in the said Medical Advisory Guidelines are at odds with the criteria for Repetitive Motion Injuries set out in the Respondent Board's policy;

    b) the evidence before the Internal Reconsideration Officer did not support the finding noted at paragraph 8 of that decision that the Respondent [Worker's] carpal tunnel injury resulted from

"…direct trauma and prolonged pressure over the wrist or base of palm".

3. The Internal Reconsideration Officer erred in ignoring the expert opinion of Dr. Rosemary Marchant, Specialist in Occupational Medicine, that the injury suffered by the Respondent [the Worker] was not one arising out of or in the course of employment, which expert opinion was consistent with the opinion of the Respondent Board's own Medical Advisor, Dr. Richard Wedge.

4. The Internal Reconsideration Officer erred in applying the presumption contained in Section 17 of the *Workers Compensation Act*, R.S.P.E.I. 1988, Cap. W-7.1 in favour of the Respondent [The Worker] in that the evidence supporting the claim as a work-related injury was not approximately equal in weight to the evidence indicating that one or more non-occupational causes resulted in the injury to the Respondent [The Worker .

The Board maintains that the Internal Reconsideration Officer had before her evidence from which she could reasonably have reached the conclusions that she did and, as such, her decision should stand, and the appeal be dismissed.

ROLE OF THE TRIBUNAL

Section 6 of the *Workers Compensation Act* sets out the entitlement of an injured worker to compensation:

> *"(1) Where, in any industry within the scope of this Part, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation by this Part out of the Accident Fund."*

The Board's decision based on IR-48, is that [The Worker's] injury meets this test and that compensation should be granted. The parties presented argument as to why this decision should or should not be upheld.

The Tribunal is limited in its review with the role of the Tribunal being set out under section 56 of the *Workers Compensation Act*. The Tribunal, upon hearing an appeal "*may confirm, vary or reverse the decision appealed from*". The Tribunal does not hear any new evidence or it must send the matter back before the Board, and is to solely review the decision of the Board. The standard of review the tribunal must apply in reviewing the Board's decision is correctness as it applies to the law. However, the test becomes one of being "clearly wrong" when questions of fact are concerned, as set out in the *Shewan* v. *Abbotsford District No. 34* (1986) 70 B.C.L.R. (4th) B.C.C.A:

> *"…the function of the appellate court is to review the record of the proceedings below and to ascertain whether there has been an error in principle. It can make any order that could have been made by the Tribunal from which the appeal is taken, or set aside the decision below, and direct a new*

> *hearing. It should not interfere with the findings of fact made below unless it be established that there was some palpable and overriding error which affected the Tribunals' assessments of the facts…In short, the rule is that an appellate court will not interfere with the findings of the Tribunal unless they appear to be clearly wrong."*

Section 32(2) deals with Board's jurisdiction and what is legislatively deemed to be questions of fact. The list includes the question of "*whether any injury has arisen out of or in the course of an employment within the scope of this Part*". Therefore, the Board's decision in IR-48, clearly involves a finding of fact and as such, the above noted test must be applied. In other words, it is not whether the Tribunal would have reached the same or different decision based on the evidence before the Board, but was the decision as reached by the Board so unreasonable that is was "clearly wrong", or that there was no evidence to support the Board's conclusion.

The Appellant raises a number of issues at this Appeal level.

FAILURE TO FOLLOW POLICY

The Board has implemented a broad range of policies to assist in its day to day operations including a policy to deal with Repetitive Motion Injuries and the workers claim "*will be considered by the Workers Compensation Board when they meet all of the following criteria:*

1. *There must be a well-defined task involved in the worker's job which involves a combination of repetition, force and posture which can cause a repetitive motion injury.*
2. *The worker must have a well-defined medical condition involving the musculoskeletal system.*
3. *There must be a direct and specific association between the task and the musculaoskeleltal condition."*

Consistent throughout the events, is that [The Worker] is missing the requirement for "repetition" in her job description. In dealing with this issue the Board noted in materials supplied by the Employer (*Workers Compensation Board - Alberta Medical Advisory Guidelines*) that there is authority in existence which suggests direct trauma and prolonged pressure over the wrist or base of the palm can lead to Carpal Tunnel Syndrome.

The Board also accepted the evidence as presented by [The Worker] as to her injury and its causation. This finding of credibility is a finding of fact, which will not be easily interfered with, as the Tribunal does not have the benefit of hearing evidence directly from [The Worker] .

The Employer further submitted that the Appeal Tribunal must give the Board's Policy on repetitive strain injury effect pursuant to s. 56(17). However, upon review, the Appeal Tribunal disagrees with this strict interpretation, as the

Board decision "*shall always be given upon the real merits and justice of the case, and it is not bound to follow strict legal precedent*". As well, s. 17 states, "*Notwithstanding anything in this Act, on any application for compensation the decision shall be made in accordance with the real merits and justice of the case*".

FAILURE TO CONSIDER EVIDENCE

A review of the Board's decision indicates clearly that she read through [The Worker's] file and "considered all the contents therein." Although the reasons could have been more comprehensive, the Tribunal finds the reasons were not inadequate or unreasonable. It is evident that the Officer did properly put her mind to the issues and on the basis of all the information as presented at the hearing and available in [The Worker's] file, made the decision to reverse the earlier ruling.

SECTION 17 APPLICATION

The Appellant submits that the Officer completely misread the words and the intent of section 17. Section 17 of the *Workers Compensation Act,* provides:

> *"Notwithstanding anything in this Act, on any application for compensation the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant.*

This section has been known historically as the “benefit of the doubt” section. In fact, the marginal note in the Act refers to it as just that. However, this is somewhat deceiving, as there must be evidence “approximately equal in weight” before the section can be exercised in favour of the claimant. Upon our review, we find that the Board did not misunderstand the section. It is evident by her decision that the Board felt that based on [The Worker’s] evidence, her family physician’s evidence and the Alberta’s Workers Compensation Guidelines that there was evidence “approximately equal in weight” and as such found in favour of [The Worker]. The Board found [The Worker] to be credible and accepted her evidence outright. As well, there was authority provided that direct trauma and prolonged pressure over the wrist or base of the palm can lead to Carpal Tunnel Syndrome. [The Worker’s] family physician also found that the forceful holds [The Worker] does at work could have been the cause of the carpal tunnel syndrome. As well, even though Dr. Wedge and Dr. Marchand did not find the causation to be work related, they were unable to identify any other causes. The Employer suggests that [The Worker’s] guitar playing was the cause, but the Board dismissed this, and accepted [The Worker’s] evidence.

CONCLUSION

As a result of the foregoing, the Tribunal is not prepared to reverse the Board's decision. The Appeal is denied.

Dated this 6th day of March, 2001

_____
PAMELA J. WILLIAMS
Vice-Chairperson
Appeal Tribunal

I CONCUR:

_____
Nancy Fitzgerald (Employee Representative)

I DISSENT without reasons.

_____
Allison Drake (Employer Representative)