WORKERS' COMPENSATION BOARD
APPEAL TRIBUNAL

CASE I.D. [personal information]

BETWEEN: **[personal information]**

APPELLANT

AND:

WORKERS' COMPENSATION BOARD
OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION # 47

	Keith D. Mullins B. Comm, RRP **Employer Advisor for the Appellant**
John K. Mitchell	**Solicitor representing the** **Workers' Compensation Board**
Place and Date of Hearing	**October 26, 2005** **Charlottetown, Prince Edward Island**
Date of Decision	**June 14, 2006**

BACKGROUND

The worker had been trained as [personal information], where he worked at his trade, from [personal information] to [personal information]. He [personal information] 2000.

After [personal information] he did several jobs, including working as a full time [personal information], six (6) nights per week before he took a job as a [personal information] on [personal information], 2002.

By [personal information], his work duties were such that he was very busy at the [personal information] workplace. Those duties included not only [personal information] but also "the lifting of [personal information] twisting my elbows [personal information]."

> The worker states that some two months after he began this work, he 'never missed a day, an hour, nor didn't complain to anyone I worked with, that I was experiencing any discomfort, because there simply was not any pain... It is possible that the pain (symptoms) didn't appear instantaneously but became noticeable after performing the routine work over and over."

After he developed tingling in his hands and wrists, he sought and received medical attention from his family physician, Dr. Kelly, who diagnosed him as having carpal tunnel syndrome in both wrists. The worker also developed pain and discomfort in both elbows.

After the pain in his wrists and elbows became progressively worse, he stopped work on the advice of his doctor in [personal information] of 2002. Shortly thereafter he submitted his claim for compensation benefits.

Before he [personal information], he worked for approximately [personal information] years as a [personal information]. During which time his duties mainly involved walking. Immediately before his [personal information] he worked as a [personal information]. ([personal information]).

After numerous reviews by the Claims Entitlement Manager and the Internal Reconsideration Officer, and many medical interventions, consults and reports from Doctors Kelly, MacLean and Profit, the claim, ([personal information]) was approved for benefits as a consequence of the worker having been diagnosed as suffering a workplace injury - right lateral epicondylitis (tennis elbow.)

It is noted that on [personal information], 2002, the physician's Initial Report of Injury described the mechanism of injury as "Repetitive Strain"; and the diagnosis as " bi-lateral tennis elbow and carpel tunnel syndrome."

On the [personal information], 2002 Referral to Occupational Therapy, the Board referred to the diagnosis as Bilateral Tennis Elbow.

As early as [personal information], 2002 the worker's family physician reported that, "this gentleman is indeed a complicated case. He doesn't have any neck symptoms."

The Board, during the first year of the worker's involvement, denied the worker's claim for benefits for his elbows and wrist injuries on the basis that the worker could not/did not suffer any of these injuries at work - primarily because of the sudden onset of the symptoms only some two months after the worker started his [personal information] job and to some extent at least, because he had some other non-work related issues (which are clearly borne out by the record in this matter). In addition, the board determined that, as was apparent to it during its initial site visit in [personal information] of 2002, (during which the worker demonstrated/mimicked some of his body movements while at least [personal information]), the worker's large girth caused him [personal information] and/or the task at hand, causing him to assume an awkward position.

Notwithstanding that the Canadian Standard for Occupational Health and Safety (CSOHS)

identified the risk factors for [personal information] are:

> Awkward body positions and [personal information] movements are risk factors...for neck and shoulders and other upper body limbs,

the board's Entitlement Officer, supported by the board's Medical Director's opinion, determined that the injuries, CTS, and tennis elbow were not work related. In fact; the worker's large girth, the presentation of these symptoms only a few months after the commencement of the work, the worker's pre-work extensive gym activities, his groin injury/surgery, his weight problem were seen as significant non-work related factors to justify a denial of compensation for any of the injuries that the worker complained of.

The worker strongly denied that his girth had anything to do with his "awkward" posture. The Board however, maintained that, by his own admission, the worker had communicated to an Occupational Therapist that he had been experiencing:

> some or similar symptoms some one or two years prior to commencing his new job in [personal information] of 2002, and that his elbows were "definitely sore within three weeks of starting work or possibly even prior to this.

So offended by seeing this in print, in the OT report of [personal information], 2003 and learning of the considerable significance that the Board attached to this revelation (its medical director, confirming that the literature on the time frame for the development of CTS and/or tennis elbow is scarce, and noting that colleagues suggest that it takes more than a few months) the worker denied ever making that statement. He insisted that his family physician could/would verify that he never exhibited any of the symptoms of CTS or tennis elbow. Subsequently, the worker demanded and received a copy of the letter from the OT dated February 5, 2003, directed to the Board, "to whom it may concern", in reference to her initial [personal information], 2002 letter to the board , regarding her [personal information], 2002 assessment of the worker.

That letter states:

> At the initial physiotherapy assessment on [personal information], 2002, the worker reported that when he had periods off work and had subsequently resumed work activities he had noticed fatigue in his arms which he attributed to the adjustment of returning to his work duties. It was not until [personal information] 2002 that he had symptoms of painful forearms, decreased gripping ability, and "shocks" in the arms. He reiterates that the actual pain symptoms were not present until the [personal information] of 2002, with fatigue being the only factor involved prior to that time.
>
> On presentation at the clinic, the worker had restricted wrist and elbow range of motion, weakness in his grip strength, tenderness over the epicondyles, and positive stretch test of the wrist extensors. These findings are consistent with a repetitive strain injury, particularly tennis elbow and/or carpal tunnel.
> I trust that this clears up any misunderstandings with respect to the history of his current problem.

On May 22, 2003, a return visit was made to the worksite by the worker, a (different) OT, and the Board's Medical Director. The report from the Client Services Department to the file dated May 30, 2003 states: "On this second visit the worker was observed doing a variety [personal information] tasks."

The May 30, 2003 report from the Client Services Department to the File states:

> The worker indicated again that he noticed discomfort in his elbows very soon after beginning work. He was unable to indicate the exact day, but he feels they were definitely sore at least three weeks after starting and possibly even prior to this.

> His work duties were again reviewed with respect to [personal information]. He was also observed [personal information]. It was noted that [personal information].
>
> It was also noted that the angle of the right elbow is at approximately 145 degrees. The position of the left elbow is [personal information].
>
> During the assessment today **some awkward postures were noted as already indicated for the right elbow versus the left** and risk factors for carpel tunnel syndrome related to the wrist in a bilateral nature were not able to be appreciated again today at the workplace.

In [personal information] 2003, Dr. Kelly wrote to the Entitlement Officer, the undated letter received by the Board on August 7th, 2003 states:

> *There is a good trail of medical evidence in my reports to support his care and only one sentence in the physio's report to suggest pre existing problems.*

After complying with the worker's March 31st, 2003 written request to the Minister that: " there be a more thorough review of all documents supporting my claim," (in which he noted what he called an error or a possible a misrepresentation on behalf of the OT who did the initial assessment.) the claim was reviewed again, in its entirety. The Board's Medical Director referred to the worker's past history of "intermittent symptoms in his sore arm for two years prior to the initiation of this claim, there was an increase in these symptoms in the [personal information] 2002."

This report then in somewhat guarded fashion states:

> While literature supports an epidemiological association between the development of carpal tunnel syndrome and [personal information], it also supports nonoccupational risk factors for the development of a carpal tunnel syndrome, including obesity and congenitally small

carpal tunnel canals. It is noted in several references that the worker is obese.

I have also attended the worksite once again and have considered my personal observation of this worker's level of activity. I have also considered he was right handed.. There was a very limited amount of time to personally observe the worker perform [personal information] duties due to a reluctance on the worker's part to demonstrate for fear of creating pain in his elbows. What I did observe supports that the comments from the previous ergonomic assessment were both reasonable and accurate in the ergonomic assessment process. Therefore, **I still do not see the worksite as being casually associated with carpal tunnel syndrome**.(Emphasis added)

What was observed was the worker's personal work habit, again with the **very limited observation time. Because of the worker's abdominal obesity, he appears [personal information] to accommodate his girth and, therefore, his right elbow use is held in much more extension position than is the elbow [personal information] observed. This posture factor, in conjunction with [personal information] and movement, would give a reasonable causal association to a right tennis elbow.** The left elbow is held in a relatively neutral position and does not have the sustained risk exposure as far as posture, [personal information] and movement that the right one does. Therefore, I cannot accept the left elbow symptoms can be reasonably associated with the work injury which initiated this claim, although they certainly can be related to his pre-existing symptoms.(Emphasis added)

I should point out the Pre-adjudication Occupational Therapy Report was done specifically to look at the risk factors with respect to carpal tunnel. It did not analyse risk factors with respect to the elbow, as the carpal tunnel appeared to be the prominent diagnosis. Therefore, the occupational therapy report was indeed both appropriate and accurate as far as the working diagnosis at that time was concerned.

As far as the elbow goes, I am certainly at a loss to explain a bilateral plus presentation, except as would relate to pre-existing problems. I am at a loss to explain the persistence of the symptoms some [personal information] months after leaving work, since there was no ongoing exposure that would account for persistence of his symptoms. (Emphasis added)

These Medical Director's comments concerning the OT's initial assessment as being predominantly to look at risk factors regarding CPS are noted and appreciated.

On October 24, 2003, the Board notified the worker that his claim for his right elbow problems was going to be accepted.

In her written decision of December 4, 2003, the Entitlement Manager, in part, wrote to the worker.

> **Issue:**
>
> Your claim for bilateral carpal tunnel syndrome and epicondylitis was returned by the Internal Reconsideration Officer to the Workers' Compensation Board Client Services Division for purposes of readjudication of your claim.
>
> **The Decision:**
>
> Your claim for bilateral carpal tunnel syndrome continues to be denied. Your claim for left epicondylitis continues to be denied. **Your claim for right epicondylitis occurring in [personal**

information] 2002 has been approved.

And after reviewing the [personal information], 2003 OT Report, the Medical Director's Review, additional medical reports from Doctors MacLean, Profitt and Kelly and after reviewing the applicable board policies on "Repetitive Strain", "Weighing Evidence", and Sections 17, "Benefit of Doubt" and Section 6(4), "Presumptions", the Entitlement Manager held:

> **based upon new evidence/information on your file, your right epicondylitis did arise out of and in the course of your employment .**
>
> The Worker's Compensation Board Occupational Therapist was requested to revisit your worksite. [In her report], it was also noted that the angle of the right elbow is at approximately 145 degrees. Further, this report indicates, 'During the assessment today, some awkward postures were noted as already indicated for the right elbow versus the left and risk factors for carpal tunnel syndrome related to the wrists in a bilateral nature were not able to be appreciated again today at the work place.'
>
> Upon submission of further medical information from doctors Profitt, Kelly and G. MacLean, the Board Medical Advisor was requested to review new information to the file. This was also requested in conjunction with the Work Site Visit attended to by Dr. Carruthers and the OT.
>
> In addition to the OT's reference to 'Some awkward postures' noted in your right elbow, Dr. Carruthers also comments in this respect. In his report dated [personal information], 2003, Dr. Carruthers states, ... 'he appears [personal information] to accommodate his girth and, therefore, his right elbow use is held in much more extension position than in the elbow [personal information] observed. This posture factor, in conjunction with [personal information] and movement, would give a reasonable causal association to a right tennis elbow.' Also during the work site

visit of May 2003, Dr. Carruthers advised, 'The left elbow is held in relatively neutral position and does not have the sustained risk exposure as far as posture, [personal information] and movement that the right one does.'

The worker was approved for [personal information] days wage loss. On March 19, 2004, the employer appealed and requested an Internal reconsideration.

On March 22, 2004, the employer filed an opinion dated [personal information], 2004 from Dr. E. Deliu, an expert in Occupational Medicine, in support of its position that the worker did not/could not have suffered right lateral epicondylitis at his place of employment.

The record shows that both the worker and the employer requested reconsiderations subsequent to the December 4, 2003 decision of the Entitlement Officer in which the worker's claim was approved (in part) for compensation for right tennis elbow only.

Eventually Dr. Deliu's report, which post-dated December 2003 decision was considered by the IRO as "New Evidence"; and on March 31, 2004 the IRO returned the file to Client Services for further adjudication as:

> **The file record has provided conflicting opinions by two physicians, Drs. B. Carruthers and Dr. E Deliu, who both have expertise in Occupational Medicine and have reviewed the evidence in the file record.**

Dr. Deliu's illustration of the conflict is noted as follows:

> It is obvious that approval of this claim was **solely based on inaccurate improvisation of work performance** (posture), as [the worker] himself confirmed.....
>
> Therefore, such activities could have precipitated medical epicondylitis (golfer's elbow) of the right arm in right hand dominant workers, but certainly not lateral epicondylitis (tennis elbow) as in

> this case and...
>
> As such, the work activities involved [personal information] **are unlikely to cause lateral epicondylitis** in the worker's dominant arm.

On the other hand, Dr. Carruther's [personal information], 2003 report stated:

> ...There was **a very limited amount of time to personally observe** the worker perform some [personal information] duties...
>
> ...What was observed was the worker's personal work habit, again with the very limited observation time. Because of the worker's abdominal obesity, **he appears** [personal information] to accommodate his girth...This posture factor, in conjunction with [personal information] and movement, would **give a reasonable causal association to a right tennis elbow**. (lateral epicondylitis) and ...I should point out the Pre-adjudication Occupational Therapy Report was done specifically to look at the risk factors with respect to carpal tunnel. **It did not analyze risk factors with respect to the elbow and**,...
>
> ...As far as the elbow goes, I am certainly at a loss to explain a bilateral plus presentation, except as would relate to pre-existing problems... (Emphasis added)

In his note to the file on [personal information], 2004, Dr. Carruthers states, with respect Dr. Deliu's medical opinion:

> **I reviewed my previous memo and Dr. Deliu's report. There is no new objective medical information contained in Dr. Deliu's report. Dr. Deliu's is accurate in his scientific/medical presentation of the musculature and the mechanics of their usage. His analysis of the issue and opinion is respected.**

Having said that, Dr. Carruthers, in his [personal information], 2004 memo to the Entitlement Manager states:

> In reply to your April 5, 2004 memo, in general [personal information] are recognized to be in an occupation that have a higher rate of the occurrence of epicondylitis. This has been noted in my previous memos.
> Position is only one factor to consider. [Personal information] is certainly well established in the medical literature as a significant risk factor, as is [personal information]. [Personal information], likewise, influences the extent of fatigue.
>
> It is also well recognized in the literature that such disorders as tendonitis and epicondylitis **develop over long periods of time.**
> Please see my memo of [personal information], 2003.

After reviewing the entire file including the [personal information], 2004 medical opinion of Dr. Deliu, the Entitlement Officer, in her June 1, 2004 decision letter (in approving the worker's claim for right lateral epicondylitis (tennis elbow) states:

> Specifically, Dr. Deliu states in his report, 'The work activities involved [personal information] are unlikely to cause lateral epicondylitis in the worker's dominant arm.' Dr. Deliu also refers to his notable medical expertise in the area of Occupational Medicine, and more specifically, as it relates to his experiences [personal information]. Although Dr. Deliu's expertise and opinions are respected in this regard, it must be highlighted that your injury of right lateral epicondylitis did not occur [personal information]. Your injury of right lateral epicondylitis was specific [personal information]. The Workers' Compensation Board has completed two (2) Work Site Assessments which specifically detail your work related duties as they relate to your position, particular to [the employer's] [personal information]. In addition, and again

respecting Dr. Deliu's expertise in the area of Occupational Medicine, it must be emphasized that each application submitted to the Workers' Compensation Board for benefits is adjudicated and weighed on its own individual merits. Specifically, to compare or contrast the job duties and demands [personal information] worker, would not be deemed appropriate in this case. Your claim is in regards to a different work environment, which has been specifically assessed by the Workers' Compensation Board of Prince Edward Island on two(2) separate occasions.

Further, the initial Occupational Therapist's report completed on [personal information], 2003, does confirm the presence of 'some awkward postures noted through the elbows.' Again, in a second Occupational Therapy report dated [personal information], 2003, it is confirmed, 'The angle of the right elbow is at approximately 145 degrees.' In addition, the same report states, 'Some awkward postures were noted as already indicated for the right elbow...' Once again, I highlight that these findings were based on an actual workplace visit and assessment completed by the Occupational Therapist. Also in attendance at the second work site assessment was the Board Medical Director who also has a certification specific to Occupational Medicine....

According to the Board Medical Director's Report to File dated [personal information], 2003, your [personal information] was dependant upon your abdominal girth. Therefore, despite the [personal information] in question, [personal information]. This point is highlighted by the Board Medical Director's Report which states: 'Because of the worker's abdominal obesity, he appears [personal information] to accommodate his girth and, therefore, his

right elbow use is held in much more extension position than is the elbow [personal information] observed. This posture factor, in conjunction [personal information] and movement, would give a reasonable causal associating toa right tennis elbow.' I highlight the fact that Dr. Carruthers was present at your particular work site during the time at which the Occupational Therapist's assessment was completed.

The Internal Reconsideration Officer makes note in his report dated March 31, 2004 that there is a lack of 'accurate and explicit details and data about the worker's job and physical functional requirements associated with his primary and secondary work duties and tasks.' With respect to this issue, I would draw your attention again to the Occupational Therapist's workplace Assessment Reports completed on [personal information], 2003 and [personal information], 2003. The purpose of these assessments was to examine your work duties as they may relate to your specific diagnoses. In addition to the Occupational Therapist's Assessment Reports on file, there is a memorandum to file dated [personal information], 2002 also completed by the Occupational Therapist. This memorandum does provide a detailed description of your work related tasks and duties. Further, you have also provided a job description to your file.....

It is also of important interest to note that although you had been removed from your work environment for an extended period of time, your carpal tunnel syndrome symptoms continued. It would be expected that once your work related risk factors have been removed that your symptoms would improve or subside. However, this was not the case.

There being no change in the earlier decision, the employer promptly applied ten (10) days later with its letter from Dr. Deliu claiming that the Entitlement Officer upheld the tennis elbow claim for the following reasons:

> 1. Wrong comparison of [the worker's] job position performance to the job position performance [personal information] provided in my letter dated [personal information], 2004, as [the worker] was working in a different work environment.
> 2. The description of job performance based upon the improvisation of the same..... So she has wrongly interpreted the contents of my letter dated [personal information], 2004.

Dr. Deliu cites certain speculations on the part of the Entitlement Officer as to the reason for the worker's [personal information], - which was at odds with the worker's recollection of his posture on at least one of the two work-site visits.

Just as significant, was Dr. Deliu's goal "to show that lateral epicondylitis is not a common work related injury with workers performing the same activity but at a much higher intensity and repetitiveness."

In addition, Dr. Deliu pointed out the reference in the Entitlement Officer's decision to the worker's removal from the worksite for an extended period of time, ([personal

> information] months) noting that the CTS symptoms still continued. He quoted from her decision:

"It would be expected that they could improve or subside".

Dr. Deliu noted what he felt was an inconsistency with her finding that while there is no left tennis (work related) elbow, there is right (work related) tennis elbow [personal information] months after the work stoppage...

His letter concludes:

> In conclusion, due to: 1) Inappropriate interpretation of my letter from [personal information], 2004;
>
> 2) Inaccurate improvisation of job performance; 3) lack of pathophysiologic explanation of mechanism of injury and work related causation; 4) Unfair implementation of double standards; one for carpal tunnel syndrome and another for right lateral epicondylitis (please see above). Ms. Depiero's decision cannot be objectively supported. Therefore, I would suggest that the Workers' Compensation Board reconsider this decision, take into consideration the above listed facts, and reverse the same.

The board's response was that while the [personal information], 2004 letter was dated after the June 1, 2004 decision, it did not, according to board policy, constitute "new evidence" - accordingly the original decision was upheld . Board Policy POL04-52 states:

> **New evidence includes only information not already considered in the decision making process. Information submitted in a different format or by a different source, need not be considered unless the information contains evidence new to the case.**

A request for an Internal Reconsideration was received on October 28, 2004 by the Board from the Employer, relative to the July 30, 2000 decision of the Entitlement Officer. The issue being identified as follows:

(i) The **new evidence**, [personal information], 2004 report from Dr. Deliu indicates that it is almost impossible to pathophysiologically support lateral epicondylitis in such activities.

(ii) **Conflicting reports** Medical Director/OT versions as to why the worker was [personal information] to perform his duties, (large girth or worker [personal information] to work during the [first demonstration]

(iii) CTS not approved **symptoms did not subside after [personal information] months off work**, while
right tennis elbow symptoms did not improve or subside during the same time period, but claim approved for tennis elbow - **inconsistent rationale**.

A Paper File Review was conducted by the IRO on January 10, 2005. The same issue remained. (Approval of the worker's claim for tennis elbow).

As mentioned earlier, the IRO noted the conflicting information and conflicting medical opinions.

At the risk of boring the reader, part of the IRO's decision states:

1. The issue raised by the employer, is the acceptance of the claim for right lateral epicondylitis when there is conflicting information on file from the worker, Board Medical Director, OT and Dr. Deliu, an Independent Medical Examiner with expertise in occupational medicine.
2. The worker had only begun his employment on [personal

information], 2002 and began to notice symptoms in both elbows and wrists one month after beginning work as [personal information].

3. The information on file suggests this is a repetitive strain injury, however, there is supporting documentation stating worker was required to lift and move [personal information] weighing as much as 40 pounds which **could** contribute to his accepted injury.

4. I find the entitlement officer's decision to accept this claim for right lateral epicondylitis was based on information provided in the file. **The OT report did indicate risk factors were present for the right elbow** but not for the left. **The activities** described by the worker and documented on file **were consistent in providing these risk factors. (Emphasis added)**

The Notice/Grounds of Appeal

As the Notice of Appeal, Grounds of Appeal and Argument are all contained in the February 10, 2005 correspondence from the Employer Advisor, it is in the interest of retaining the full scope of the Grounds of Appeal and Argument that the whole submission be reproduced herein.

On behalf of the employer, I wish to appeal a decision dated January 12, 2005 rendered by the Internal Reconsideration Officer at the Workers Compensation Board of PEI, to deny the employer's reconsideration request. The reconsideration issue was a request that the decision rendered in writing by the Entitlement Officer on July 30, 2004 to accept right lateral epicondylitis be overturned and related costs for this claim be reversed from the employer's experience rating statement.

At this time I would like to draw your attention to the following information

which is contained in the file and which supports this request for an appeal:

At the employer's request, a review of the worker's file was conducted by Dr. E. Deliu, an Occupational Medicine specialist with over [personal information] years experience, who has evaluated a large number of repetitive strain injuries in workers employed [personal information]. In his report dated [personal information], 2004, he could not recall ever seeing lateral epicondylitis precipitated by work activities [personal information] because the flexor muscles involved [personal information] are attached to the medial, not the lateral, epicondyle. Therefore, such activities would precipitate medial epicondylitis in the dominant arm as opposed to lateral epicondylitis.

In a follow -up report dated [personal information], 2004, Dr. Deliu explained that his previous reference [personal information] was to show that lateral epicondylitis is not a common work related injury with workers performing the same activities as [personal information] at the worksite, even though they do it at much higher intensity and repetitiveness. He concluded it is almost impossible to pathophysiologically support the lateral epicondylitis in a worker's dominant arm as a result of work activities involved [personal information]. This expert medical opinion was summarily dismissed by the Internal Reconsideration Officer and was not given due consideration in the decision making process.

The worker also reported he may have injured himself in [personal information] 2002 while lifting [personal information] twisting his elbows [personal information]. Dr. Deliu reported that the muscles used to lift and [personal information] are also attached to the medial epicondyle, so this activity could not have precipitated lateral epicondylitis either.

The Board Medical Director, in a medical comment to the file dated [personal information], 2004, indicated Dr. Deliu was accurate in his scientific/medical presentation of the musculature and the mechanism of their usage. He went on to say this was not objective medical evidence but he respected Dr. Deliu's analysis of the issue and his opinion. The Board Medical Director, in a further medical comment to the file dated [personal information], 2004, indicated it is well recognized in medical literature that epicondylitis develops over long periods of time. It should be pointed out that the worker reported his symptoms began as early as a month after he started with his employer. The Board Medical Director also reported that the worker was working out in a gym prior to his employment so he was considered to be reasonably fit.

The Internal Reconsideration Officer appeared to place considerably more weight on evidence supplied by the treating physicians, specialists and the Occupational Therapist than on Dr. Deliu's expert medical opinion. With respect to the report of the Occupational Therapist and the Board Medical Director who accompanied her on a work-site visit on May 30, 2003, there was conflicting evidence provided by the worker himself which apparently was not given due consideration in the decision. The Board Medical Director's report stated "he appears [personal information] to accommodate his girth and therefore his right elbow use is held in much more extension than in the elbow [personal information] observed. This posture factor, in conjunction [personal information] and movement, would give a reasonable causal association to a right tennis elbow."

No credibility appears to have been given to the worker's counter claim that he [personal information]. In addition, he reported he wasn't wearing his safety equipment, was still recovering from his second carpal tunnel syndrome release surgery, [personal information]. Had he actually performed [personal

information] duties and was [personal information], it could be reasonably assumed he would have used less extension and therefore performed his duties in much the same manner as the [personal information] who were observed. The inaccurate improvision of the work performance should have been given more consideration in determining the actual mechanism of injury.

An x-ray of the cervical spine conducted on [personal information], 2002 revealed the vertebrae and disc spaces looked satisfactory. As reported by Dr. R. Hutchings, EMG studies conducted on [personal information], 2002 had findings which supported the clinical impression of bilateral carpal tunnel syndrome but there was no evidence of a lesion involving the motor or sensory fibers of theulnar (elbow) nerve.

The worker's claim for left lateral epicondylitis and bilateral carpal tunnel syndrome were denied because, in part, the symptoms continued after he had been removed from the work environment for an extended period of time, in excess of [personal information] months. The same work related causation was not extended for right lateral epicondylitis, so an unfair double standard has been implemented in the decision making process.

Given the above and in light of all the other medical and functional information on file, I hereby request the Workers Compensation Appeal Tribunal convene a hearing to consider this appeal of the Internal Reconsideration Officer's decision to deny the reconsideration request.

THE LEGISLATION:

Section 1(a) states:

> ***"accident" means a chance event occasioned by a physical or natural***

cause, and includes ***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

Section 6(1) states:

> ***Where, in any industry within the scope of this Part, <u>personal injury by accident</u> arising out of and in the course of employment is caused to a worker, the <u>Board shall pay compensation</u> as provided by this Part out of the Accident Fund.***

Section 6(4) states:

> ***Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment, and where the accident occurred in the course of employment, unless the contrary is when, it shall be presumed that it arose out of the employment.***

Section 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 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.***

Section 32(1) states:

> ***Subject to section 56, the Board has exclusive jurisdiction to examine into, hear, and determine, all matters and questions arising under this Act and as to any matter or thing in respect of which any power, authority, or discretion, is conferred upon the Board; and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court, and no proceedings by or before the Board shall be restrained by injunction.*** **(Emphasis added)**

Section 32(2) states:

> ***Without limiting the generality of subsection (1) the decisions and findings of the Board upon all questions of law and fact are final and conclusive, and in particular, the following shall be deemed to be questions of fact:***
>
> ***(a) whether any injury or death in respect of which compensation is claimed was caused by an accident within the meaning of this Part;***
>
> ***(b) the question whether any injury has arisen out of or in the course of an employment within the scope of this Part;***
>
> ***(c) the existence and degree of disability by reason of any injury;***
>
> ***(e) the existence and degree of an impairment and whether it is the result of an accident;***

Section 56 states:

> ***(2) The decisions of the Board shall always be given upon the real merits and justice of the case, and it is not bound to follow strict legal precedent.***
>
> ***(6) Following reconsideration, a person who has a direct interest in the matter may, in writing, appeal the decision to the Appeal Tribunal.***
>
> ***(20) The Appeal Tribunal has exclusive jurisdiction to hear and determine all matters and questions arising under this Part in respect of***
>
> ***(a) Appeals under subsection (6);***
> ***(b) Any matter referred to it by the Board.***
>
> ***(17) The Appeal Tribunal shall be bound by and shall fully implement the policies of the Board and the Appeal Tribunal, its chairperson and members are prohibited from enacting or attempting to enact or implement policies with respect to anything within the scope of this Part.***

BOARD POLICY: POL 04-30: Weighing of Evidence

Policy:

1. In determining entitlement, the Workers Compensation Board requires **evidence** that:
    - any injury has occurred;
    - the injury was caused by an accident arising out of and in the course of

employment;

- the diagnosed condition is compatible with the history provided; and
- medical treatment was sought or wages were lost as a result of the injury.

2. The Workers Compensation Board will examine the evidence to see whether it
is sufficiently complete and reliable to allow a decision to be made with confidence.

3. The standard of proof for decisions made under the Act is the balance of probabilities: a degree of proof which is more probable than not.

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

8. Medical evidence:
Medical evidence and medical opinion provided by a **treating** physician or chiropractor will be used in determining the validity of a claim:

Where there is **conflicting medical evidence** presented on a claim, the evidence must be analyzed objectively, keeping the following criteria:

- the expertise of the individual providing the opinion;
- the correctness of the facts

The Standard of Review: Questions of Fact

There is no disputing the fact that, at the crux of the case, the main issue of contention is whether the worker suffered a work-related injury-right tennis elbow.

This case involves the applicability of Section 32 (2)(a to f) of the Act. In particular this question involves a Question of Fact and the decision of the Board on a Question of Fact is final and conclusive and is not open to review in any Court.

Section 32 (2)(a-f) states:

> *Without limiting the generality of subsection (1) the decisions and findings of the Board upon all questions of law and fact are final and conclusive, and in particular, the following shall be deemed to be questions of fact: . . .*
>
> *(a) whether any injury or death in respect of which compensation is claimed was caused by an accident within the meaning of this Part;*
>
> *(b) the question whether any injury has arisen out of or in the course of an employment within the scope of this Part;*
> *(c) the existence and degree of disability by reason of any injury;*
> *(d) the permanence of disability by reason of any injury;*
> *(e) the existence and degree of an impairment and whether it is the result of an accident;*

(f) the amount of loss of earning capacity by reason of any injury; (Emphasis added)

This Appeal Tribunal has, on numerous occasions dealt with appeals from Workers Compensation Board decisions involving Questions of Fact. Drawing upon rulings from both the Supreme Court of Canada - ***Stein v. The Ship Kathy "K",*** (1976) 62 DLR 3rd 1 SCC, ***Johnston v. Murchison***, (1995), 127 Nfld & PEIR 1(PEISCAD) and ***Fraser v. WCB of PEI*** (AD) 0486 the Tribunal has adopted and continues to follow the guiding principles in these cases. These are:

In ***Johnston v. Murchison*** *(1995), 127 Nfld. & P.E.I.R. 1 (P.E.I. S.C., A.D.)* at pages 8 and 9, the parameters of review on an Appeal are stated as follows:

I. That an appellate court should not interfere with the conclusions of fact reached by a trial judge except in the event of a clear error on the face of the reasons or conclusions of judgement;

II. The privileged position of the trial judge to assess evidence extends to the evidence of expert witnesses as well as ordinary witnesses and the appellate court should not reconsider the evidence of expert witnesses when the conclusions reached by the trial judge could reasonably be supported by the evidence of the expert witnesses;

III. The appellate court does not have jurisdiction to interfere with the trial judge's assessment of the evidence as a whole unless, again, in conducting the assessment of the evidence on a whole, the trial judge made an error clear on the face of the record or conclusions of the judgment appealed from;

III. Findings of fact based on the credibility of witnesses error which affected his or her assessment of the facts;

IV. Where the credibility of witnesses is not an issue, the appellate court may review a trial judge's finding of fact to determine if the findings were based on a failure to consider relevant evidence or on a misapprehension of the evidence;

V. Findings of fact based on the credibility of witnesses are not to be disturbed unless it is shown the trial judge made some palpable and overriding error which affected his or her assessment of the facts;

VI. The trial judge's conclusion must be consistent with the evidence and that no evidence essential to the outcome of the case be overlooked or ignored;

VII. An appellate court should not interfere unless it is certain that its difference of opinion with the trial judge is as the result of an error. The appellate court must be able to clearly identify the error made by the trial judge or it should not interfere unless the trial judge's finding of fact is so unreasonable that nothing he or she could have gleaned from this privileged position could possible lead to the conclusion reached.

These parameters, in fact, were a summation of the guidelines and/or principles set out by the Supreme Court of Canada in ***Lapointe v. Hopital Le Gardeur*** *(1992) 1 S.C.R. 351 (S.C.C.)*

In the ***Johnston*** case, the P.E.I. Appeals Division of the Supreme Court applied the law as stated by the Supreme Court of Canada in ***Toneguzzo-Novell v. Burnaby Hospital***, *(1994) 1 S.C.R. 114 (S.C.C.)* at page 121:

> ***It is now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it . . .*** *(Emphasis added)*

Applying this standard of review then, this panel therefore should not and cannot

interfere with the decision of the Board on matters of fact unless there is evidence of palpable or overriding error on the part of the Board in its decision with respect to the issue(s) before it. In the absence of evidence that the Board made a manifest error, ignored conclusive or relevant evidence, mis-understood the evidence or has drawn erroneous conclusions from it, this panel can not either overturn the decision of the Board or substitute its view for that of the Board.

In earlier decisions of this Tribunal, it has consistently held that Parliament has reaffirmed the remedial intent of Section 17 of the Act when it once again in Section 56(2) directs the Board to render its decisions upon "real merits of the case", while "not bound by strict legal precedent".

In reaching his decision the IRO must, especially when the issue is one involving entitlement to compensation, keep in mind the simple question: Can the worker's case reasonably be brought within the scope of the legislation?

In the absence of an error going to the jurisdiction of the IRO, this panel has no authority to entertain the argument of the employer in this case on this Question of Fact.

Having carefully reviewed the written decision of the IRO in which she confirmed having considered the documents on the file, the Act and applicable Board Policy, there is no doubt that she canvassed all of the issues necessary to form the basis of her decision to the effect that the Entitlement Manager's decision to approve the worker's claim for benefits based on a work-related injury , right tennis elbow, was correct.

As the central issue in this case involved a question of fact, and; in the absence of convincing evidence that the IRO had made a manifest error, ignored conclusive or relevant evidence or has misunderstood the evidence or drawn erroneous conclusions from it, this Tribunal cannot and does not find there is any error going to jurisdiction, nor was her decision unreasonable nor patently unreasonable (wholly without merit).

In addition, from a review of the foregoing summary of the decision of the IRO, it is abundantly clear that she had ample evidence from which she could have reached the decision that she did.

Mr. Justice Mitchell, speaking for the Appeal's Division of the Supreme Court of this Province in ***MacLeod v. WCB*** 40 Nfld & PEI p. 138 PEICA at p. 143 held:

> ***Accordingly, the Workers' Compensation Act should be interpreted liberally so as to provide compensation for work-related injuries to as many as can reasonably be seen to fall within its purview. . . . A worker, such as the appellant, should therefore be given compensation benefits if his case can reasonably be brought within the scope of the legislation.***

The very instructive and helpful decision of the Appeals Court in this Province in 1994 in ***Fraser v. WCB of PEI*** A.D. 0486 states:

> ***The Appellant challenges the August 14, 1993 decision of the respondent denying him benefits under the Workers Compensation Act, RSPEI 1988, Cap. W-7 because it found that his capacity to earn had not been diminished by the injury he sustained.***
> ***The appeal against this ruling must be dismissed because s. 32(1) (d) of the Workers' Compensation Act deems such a finding a question of fact, and that being the case, no right of appeal exists. Section 32 (2) provides for appeals respecting questions of law and jurisdiction, but not fact. According to subsection 32 (1), findings of fact are final and conclusive. No question of law or jurisdiction arises with respect to the finding in this case because the respondent had evidence before it from which it could reasonably have reached the conclusion it did. The fact that this Court might disagree with the Board's decision or that it might have reached a different one is***

> ***really immaterial. The Legislature obviously wanted the Board to have the last word on such matters.***

Mr. Justice Mitchell in Blanchard v. WCB PEI (1995) 49 Nfld & PEIR 150 (P.E.I.SCAD) held:

> ***On any application for compensation an applicant is entitled to the benefit of the doubt, which means that is not necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but the Board is entitled to draw and shall draw from all the circumstances of the case, the evidence and medical opinions, all reasonable inferences in favour of the applicant...*****(emphasis added)**

The Section 6)2) presumption:

In Gallant v. WCB of PEI Docket # AD - 0864, the PEI Court of Appeal dealt with: the Presumption of Fact Section 6(2), Benefit of Doubt Section 17, Right of Appeal and the Standard of Review. In that case, the worker appealed the decision of the Board which held that the worker did not suffer from a work-related accident.

Chief Justice Mitchell, speaking for the Court of Appeal, held, citing Subsection 6(2) of the Old Act: (Now 6(4) of the New Act)

Section 6(2):

> Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment:

The questions of whether an accident arose out of, or occurred in, the course of employment is deemed by s.32 of the Act to be one of fact, and therefore within the

exclusive jurisdiction of the respondent to determine. Accordingly this court would have no authority to intervene unless the respondent lost jurisdiction by acting in a patently unreasonable, that is to say, in a clearly irrational manner.....(emphasis added)

A reading of the decision of the respondent indicates it was keenly aware the appellant did not have to conclusively establish his right to compensation. However, it is also clear that even after giving the appellant all of the benefit of the doubt to which he was entitled, the respondent concluded the weight of the evidence to the contrary was so strong it would not allow the respondent to find his condition arose out of or occurred in the course of his employment. That was a determination which the respondent had the exclusive jurisdiction to make. Its finding was a determination of a question of fact and that by virtue of s.32 of the Act is not appealable. As I said earlier, the respondent's decision was not patently unreasonable so as to deprive it of jurisdiction. Accordingly, this court has no authority to intervene or to second guess the decision of the respondent. Ground one of the appeal is therefore rejected. **(emphasis added)**

Accordingly, on the basis of the foregoing, the decision on the Question of Fact, in this case, by the IRO is upheld; or to put it another way, cannot be overturned by this Tribunal which feels bound to apply the law as set out in the above noted cases.

Standard of Review:Correctness

This Tribunal has, after a review of several cases from Supreme Courts in other jurisdictions, and after an analysis of the applicability of Section 32(1) of the Act, (which

contains the broad privitive clause)determined that in reviewing IRO Decisions, the Tribunal can and should review same on a Standard of Correctness.

In a recent Decision of the Appeal Tribunal, # 37, the Tribunal considered the extent of its powers pursuant to the current legislation, in reviewing IRO decisions.

In that case, the issue was whether or not the Appeal Tribunal is bound by the rather broad privitive clause.

In addressing this issue, this Tribunal stated on page 21 of that decision:

> If one reads Sections: 56.(20) in conjunction with Section 32 and poses the question: can the Appeal Tribunal examine into, hear, and determine, all matters and questions arising under this part [Appeals, pursuant to Section 56] in respect of which any power, authority, or discretion, is conferred upon the Board? the answer appears to be found in the wording of Section 56(20):
>
> > 56.(20) *The Appeal Tribunal has exclusive jurisdiction to hear and determine all matters and questions arising under this Part in respect of*
> >
> > *(a) appeals under subsection (6);*
>
> Sub-section (6) of Section 56 states:
>
> > 56.(6) *Following reconsideration, a person who has a direct interest in the matter may, in writing, appeal the decision to the Appeal Tribunal.*

At page 27 of that decision, this Tribunal adapted the reasoning from the Jesso vs. Nfld WCC:

> *In summary, the current scheme, established by the Act, makes it the role of the Review Division to ensure that the Commission properly applies the Act, regulations and policy. There is no privative clause operative respecting the Review Division's review of the decisions of the Commission, nor are there other indices that the standard of review should be other than correctness. Further, it would seem that if the*

> *standard of review of a review commissioner were patent unreasonableness that would create needless duplication of tasks as that is the standard applied by the courts. Common sense suggests that the whole raison d'être of the Review Division is to act as a watch dog over the Commission in respect of those matters listed in s.26(1). I conclude that the standard of review to be applied by the Review Division is*
>
> *correctness. In other words, a review commissioner is, for matters within his or her jurisdiction free to re-examine the evidence, interpret the Act, regulations and policy and, if he or she finds that the Commission has not correctly interpreted the Act, regulations or policy, substitute the decision which he or she considers to be proper or remit the matter to the Commission. This does not mean that a review commissioner can change policy which has been made by the Commission but only that it may interpret that policy differently than the Commission does, provided, of course, the interpretation of a review commissioner is not patently unreasonable.* [emphasis added]

At page 30 of Decision # 37, this Tribunal held:

From a review of the cases referred to and a review of Sections 32 and Section 56 of the Act we find:

(i) The Section 32 Privative Clause is subject to the powers of the Appeal Tribunal as set out in Section 56.

(ii) There is no statutory restriction (except for the time for the filing of certain appeals) on the right to appeal to the Appeal Tribunal.

(iii) The reference to the Appeal Tribunal having exclusive jurisdiction to hear all matters involving appeals by "any person who has a direct interest in the matter, who (in writing) appeals to the Appeal Tribunal pursuant to Section 56(6), is clear direction from Parliament that the power of the Appeal Tribunal is not subject to the Section 32 limitation."

(iv) On appeal to the Appeal Tribunal, the standard of review is correctness.

(v) There is no onus on an Appellant to strictly prove his case.

(vi) If the Appeal Tribunal determines that the decision of the IRO is incorrect/wrong, it has the authority to substitute its decision for that of the IRO and/or amend, vary or reverse the decision or send the matter back to the Board with

> directions to deal with same in accordance with the Act, Regulations and applicable Board Policy.
>
> Applying that test then, the employer must, in our opinion, adduce convincing evidence that the decision of the Board to accept this claim for benefits, and in particular, the decision of the IRO, which is the subject of this appeal was "wrong".

Mr. Justice Mitchell in Blanchard v. WCB PEI (1995) 49 Nfld & PEIR 150 (P.E.I.SCAD)
held:

> *On any application for compensation an applicant is entitled to the benefit of the doubt, which means that is not necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but the Board is entitled to draw and shall draw from all the circumstances of the case, the evidence and medical opinions, all reasonable inferences in favour of the applicant*...(emphasis added)

Mr. Justice Mitchell, speaking for the Appeal's Division of the Supreme Court of this Province in ***MacLeod v. WCB*** 40 Nfld & PEI p. 138 PEICA at p. 143 held:

> ***Accordingly, the Workers' Compensation Act should be interpreted liberally so as to provide compensation for work-related injuries to as many as can reasonably be seen to fall within its purview....A worker, such as the appellant, should there fore be given compensation benefits if his case can reasonably be brought within the scope of the legislation.***

Applying these rulings to the case, this Tribunal is of the view and it so holds in the absence of a requirement for the worker to conclusively prove his case; and where the Board is required to draw all reasonable influence to bring the worker's case within the scope of the legislation, there is a burden on the employer in this case to do more than raise doubts about the worker's entitlement to compensation.

Applying the benefit of doubts (Section 17) to this case, would lead one to believe that there was ample medical evidence before the IRO to resolve any doubt in favour of the worker.

Section 17 is one of the sections of the act that was referred to as relevant in the IRO decision although she did not go into detail in weighing the evidence. It is noted as well that the IRO referred to the Board Policy on both: weighing of the evidence and Carpel Tunnel Syndrome.

While there are some inconsistencies in the medical opinions, as referred to earlier and in the accounts as to how the injury occurred and in the OT reports; on the whole, there is no convincing evidence that the Decision of the IRO was incorrect or wrong.

From a full review of all of the facts, medical reports (including but not limited to the numerous physiotherapy reports, noting the conflicting medical reports, the expertise of the medical persons supplying the various reports; and, upon reviewing the caselaw earlier referred to, especially the **MacLeod Blanchard** and **Gallant** decisions; and, after considering the Board Policy (which pursuant to Section 56 (17) (22) and is binding upon this Tribunal, we are of the opinion and so hold that the decision of the IRO was not wrong or incorrect. It is noted [personal information]. [Personal information], this Tribunal will continue to apply same as it is of the view that doing so is within the direction set out in the **Macleod, Blanchard** and **Gallant** cases, in applying the spirit and intent of current legislation governing worker's compensation issues.

For this reason also, and applying the "correctness" test, this appeal is therefore dismissed.

Dated this 8th day of June, 2006

Allen J. MacPhee, Q.C.
Chair of the Appeal Tribunal

Neil MacFadyen
Tribunal Member

Scott Dawson
Tribunal Member

WORKERS' COMPENSATION BOARD
APPEAL TRIBUNAL

BETWEEN: **ATLANTIC WHOLESALERS LTD.**

APPELLANT

AND:

WORKERS' COMPENSATION BOARD OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION # 47

	Keith D. Mullins, B. Comm. RRP **Employer Advisor for the Appellant**
John K. Mitchell	**Solicitor representing the Worker's Compensation Board**
Place and Date of Hearing	**October 26, 2005**

Charlottetown, Prince Edward Island

Date of Decision **June 14, 2006**