



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3126/18

BEFORE: C. Huras: Vice-Chair

HEARING: October 24, 2018 at Kitchener
Oral

DATE OF DECISION: November 19, 2018

NEUTRAL CITATION: 2018 ONWSIAT 3598

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated July 19, 2017

APPEARANCES:

For the worker: O. Iacopini, Paralegal

For the employer: R.A. Fink, Lawyer

Interpreter: Not applicable

REASONS

(i) Introduction

[1] The worker appeals a decision of the Appeals Resolution Officer (ARO), which concluded that suitable duties at no wage loss were offered on September 18, 2015; entitlement to loss of earnings (LOE) benefits beyond September 16, 2015 were not in order; the organic neck and left shoulder injuries fully recovered as of November 16, 2016 and denied entitlement for chronic pain disability (CPD).

[2] At the onset of the Tribunal hearing, the worker's representative withdrew the issues of suitability of the modified duties offered by the accident employer, entitlement to LOE benefits from September 16, 2015, and entitlement for CPD. Any attempt to renew the appeal of these issues will be subject to the time limit provisions set out at section 125(2) of the *Workplace Safety and Insurance Act, 1997* (the WSIA).

[3] At the Tribunal hearing, both representatives submitted evidence outside of the Tribunal's three-week rule, which is provided in the Tribunal's *Practice Direction: Disclosure, Witnesses and the Three-Week Rule*. As there were no objections by the representatives to having this information accepted into the Case Record, and as I found the evidence to be relevant to the issue in this appeal, they were accepted into the Case Record and marked as Exhibit #10 and Exhibit #11.

(ii) Issue

[4] The issue under appeal is as follows:

- Ongoing entitlement for neck and left shoulder from November 16, 2016, including the recognition of a permanent impairment (PI) and a non-economic loss (NEL) award for the left shoulder.

(iii) Background

[5] The following are the basic facts.

[6] The now 42-year-old worker started as a machine operator with the accident employer in March 1999. The worker had two prior Workplace Safety and Insurance Board (WSIB) (the Board) claims for the left shoulder; a claim in 1998 for left shoulder strain, and a claim in 2005 for a left shoulder blade injury. The worker also reported left shoulder pain in June 2010 prior to a surgery, and was diagnosed with a left shoulder strain in June 2011.

[7] On July 2, 2014, the worker reported an onset of neck, left shoulder and left arm pain while packing envelopes. Initial entitlement was accepted for a gradual onset disablement for left shoulder tendonitis, and left arm, elbow and upper back strain.

[8] In a decision dated June 30, 2016, the ARO determined that the repetitive neck strain did not fully resolve by November 17, 2014 and full LOE benefits were granted from October 15, 2014 until the worker returned to the modified duties provided by the employer subsequent to a Return to Work Specialist (RTWS) meeting on October 14, 2014. In addition, the ARO concluded that the worker had a flare-up of left cervical sprain and left shoulder tendonitis as of June 24, 2015 and authorized full LOE benefits from June 24, 2015 to

September 19, 2015, less any time worked. The worker's entitlement to LOE benefits beyond September 19, 2015 was remitted back to the operating area for determination.

[9] In a decision dated September 19, 2016, the Case Manager (CM) determined that the worker was not entitled to LOE benefits beyond September 16, 2015 on the basis that suitable duties were available at no wage loss.

[10] On August 25, 2016, the worker attended the Board's Shoulder and Elbow Specialty Clinic where a multidisciplinary pain program was recommended. The worker was assessed at the WSIB Function and Pain Specialty Program (FPP) on September 22, 2016 where a 6-week treatment program was recommended. The worker attended the FPP from October 5, 2016 to November 21, 2016. The Discharge Report of November 21, 2016 noted that the worker declined to attend her scheduled formal functional testing and indicated that a Functional Abilities Evaluation (FAE) could be completed by the FPP or at a location closer to the worker's new address if further details of her functional restrictions were required. The worker's functional restrictions at the time of discharge from the FPP were overhead reaching on an occasional basis and forward reaching on a rare basis.

[11] In a decision dated January 13, 2017, the CM determined that the worker had reached maximum medical recovery (MMR) for the organic neck and left shoulder injuries by November 16, 2016 with no PI.

[12] In a decision dated February 21, 2017, the CM denied entitlement to CPD.

[13] The worker objected to the CM's decisions of September 19, 2016, January 13, 2017, and February 21, 2017, which were upheld by the ARO in a decision dated July 19, 2017.

[14] As stated earlier in this decision, the worker withdrew her objection to the suitability of the modified duties offered by the accident employer, entitlement to LOE benefits from September 16, 2015, and entitlement for CPD. Accordingly, the sole issue before the Tribunal is ongoing entitlement for the neck and left shoulder from November 16, 2016, including the recognition of a PI and entitlement to a NEL award for the left shoulder.

(iv) Law and policy

[15] Since the worker was injured in 2014, the WSIA is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[16] Section 46 of the WSIA provides that if a worker's injury results in permanent impairment, the worker is entitled to compensation for non-economic loss.

[17] "Impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

[18] "Permanent impairment" means impairment that continues to exist after the worker reaches maximum medical recovery.

[19] Legislation and Board policy provide that the degree of a worker's permanent impairment is determined in accordance with the prescribed rating schedule or criteria, any medical assessments, and having regard to the health information on file. The prescribed rating schedule for most impairments is the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised) (the AMA Guides).

[20] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280*.

[21] The standard of proof in workers' compensation proceedings is the balance of probabilities. Pursuant to subsection 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

[22] Pursuant to section 126 of the WSIA, the Board stated that Policy Packages #10, #212, #224, #232, and #300, Revision #9, would apply to the subject matter of this appeal. I have considered these policies as necessary in deciding the issue in this appeal.

(v) Testimony

[23] The worker testified that she had no prior injuries, prior motor vehicle accidents, or WSIB claims for the neck or left shoulder. During questioning by the employer's representative, the worker did not recall a prior left shoulder claim from December 1998; she recalled reporting pain in the dorsal area of her mid back from a cold draft at work in February 2003; she recalled reporting pain in her shoulder and under her ribcage in July 2010, which she attributed to her appendix surgery; and stated that she probably had left shoulder pain in June 2011, which she stated happens when lifting at work. She stated that her left shoulder pain is now more intense and that the pain is worse. She stated that she could have had problems in her left shoulder in 2010 and 2011 that came and went, however she stated that from 2014 to date her left shoulder pain did not go away. She stated that she can lift her left arm over her shoulder but that it is not good all the time. She stated that she has left shoulder pain with resistance and sometimes feels pinching in her left shoulder when driving. The worker stated that she believes that her neck and shoulder pain is 100% mechanical.

[24] The worker testified that she gets headaches which she attributes to her neck. She stated that when her neck hurts her voice gets hoarse.

[25] The worker testified that she did not participate in therapy exercises at Altum Health (WSIB Function and Pain Specialty Program) in October/November 2016 because she was told by the massage therapist not to do any physiotherapy after her massage treatment. The worker agreed with the statement in the Altum Health report of November 21, 2016, that her ability to complete her exercises prior to massage was dependent on her dogs, whose behaviour made it difficult for her to arrive earlier at the clinic. She stated that she performed these exercises at home.

[26] The worker was asked if she left the clinic earlier than the expected one-and-a-half hours because of reported symptoms. She testified that she never left early. She stated that she kept telling them that she was getting pinching in her left shoulder, and another time she told them her chest was bothering her. The worker reiterated later in her testimony that she did not leave the clinic early. She stated that they told her to be there for an hour. She stated that she only attended the other part of her treatment, a cognitive behavioral group session, once or twice, as she did not know why she had to attend this type of treatment as it had nothing to do with discussing her pain.

[27] The worker agreed with the statement in the Altum Health report of November 21, 2016 that she was consistently self-limited due to pain and tightness in her chest.

[28] The worker agreed with the comment in the Altum Health report of November 21, 2016 that she had frequent absences during her final two weeks of the program and did not attend six out of the final seven scheduled exercise sessions and stated that this was maybe correct as she was moving.

[29] The worker stated that she did not decline the functional testing that was offered by Altum Health towards the end of her program but stated that there was a misunderstanding. She stated that she had an understanding that the functional testing would be done at the beginning of the week as she was moving on November 24, 2016, however Altum Health scheduled it for the end of the week.

[30] The worker testified that since the injury in 2014 she has been on the same types of medication, specifically Tylenol I, Advil and Ibuprofen. She stated that she rarely has days that she does not take any medication. She stated that she typically takes one to three pills every day, taking approximately 72 pills every one-and-a-half months.

[31] The worker testified that since November 2016 she has continued to receive medical treatment. She stated that she attended physiotherapy in January 2018, going once per month, for six months; had three cortisone shots in her left shoulder; went for freezing injections in June 2018; and continues to perform home exercises. She stated that she has an MRI booked for December 2018.

[32] The worker was asked whether she had a specific diagnosis for her left shoulder and neck condition. The worker stated that her family physician did not know the specific diagnosis and that is why she is sending her to specialists. The worker was asked by her representative if she had tendonitis and a labral tear in her left shoulder. The worker testified that she did.

[33] The worker indicated that she returned to work on July 9, 2018 with the accident employer, working in Quality Control.

(vi) Analysis

[34] The worker's representative submitted that the medical evidence supports that the worker did not fully recover from the work-related injuries that she sustained on July 2, 2014. He stated the worker is seeking ongoing entitlement for the left shoulder and neck from November 16, 2016, including the recognition of a PI and entitlement to a NEL award for the left shoulder. The worker's representative stated the worker is not seeking entitlement to the recognition of a PI or entitlement to a NEL award for the neck. The worker's representative submitted a written copy of his closing arguments, and requested that his previous submission dated October 2, 2018 be considered in this appeal.

[35] The employer's representative stated that the two main issues to consider in this appeal are whether there is a significant organic disability and if so, whether the work injury resulted in a permanent aggravation of this organic condition. The employer's representative submitted that the worker does not have a PI as a result of her work accident. Rather, he argued that the balance of evidence indicates that the worker's organic condition is the same as her pre-existing condition. In addition, he argued that the worker's testimony, and her lack of co-operation in psychological treatment and resulting lack of recovery from this psychological condition, is indicative of CPD.

[36] The appeal is allowed in part for the reasons set out below.

(a) Ongoing entitlement for the neck and left shoulder from November 16, 2016

[37] In this case, the worker is seeking ongoing entitlement for the neck and left shoulder. Accordingly, the main issue to determine in this appeal is whether the worker recovered from her work-related repetitive neck strain/cervical sprain and/or her left shoulder tendonitis as of November 16, 2016.

[38] I will first consider whether the worker has ongoing entitlement for the neck from November 16, 2016.

1. Ongoing entitlement for the neck from November 16, 2016

[39] *Board Operational Policy Manual (OPM) Document No. 11-01-05, "Determining Permanent Impairment"* states, in part that:

A work-related impairment is considered permanent when it continues to exist after maximum medical recovery (MMR) has been reached.

A recovery from the work-related injury/disease is considered to have been made if there is no evidence of an ongoing work-related impairment at the time MMR is reached.

[40] Entitlement in this claim was initially accepted by the Board for left shoulder tendonitis, and left arm, elbow and upper back strain. In June 2016, the ARO concluded that the worker's repetitive neck strain did not fully resolve by November 17, 2014, and that the worker had a flare-up of cervical sprain and left shoulder tendonitis in June 2015. In a decision dated January 19, 2017, the ARO upheld the CM's determination that the worker had reached MMR for her organic neck and left shoulder injuries by November 16, 2016, and that she did not have a PI.

[41] I find that based on the evidence before me there is no ongoing entitlement for the neck beyond November 16, 2016 for the following reasons.

[42] First, there is no evidence of significance before me to indicate that the worker had an ongoing repetitive neck strain/or cervical sprain injury beyond November 16, 2016. In reaching this conclusion, I have placed considerable weight on the Initial Treatment Progress Report of November 1, 2016 from the WSIB's Function and Pain Specialty Program (FPP), the medical reporting subsequent to November 2016, and the worker's testimony.

[43] The FPP report of November 1, 2016 provided the following diagnoses:

DSM-IV DIAGNOSIS

During the Comprehensive Assessment, the following was determined:

Axis I: Clinical Disorders

- Pain Disorder with both Psychological Factors and a General Medical Condition (Chronic).
- Rule Out Adjustment Disorder with Depressed Mood.

Axis II: Personality Disorders

- "Dyslexia" per self-report.

Axis III: Medical Conditions (as per medical file and comprehensive assessment)

- Chronic left shoulder tendinitis.

Axis IV: Psychosocial Stressors

- Stress related to injury and limitations

[44] There is no indication in this report that the worker had an ongoing organic injury to her neck. I have placed considerable weight on this report as the diagnoses were provided after conducting a comprehensive assessment of the worker from the start of treatment on October 5, 2016, by a treatment team which consisted of an occupational therapist, a registered kinesiologist, a cognitive behavioural therapist, a physician and a clinical pharmacist.

[45] In addition, I note that there is a lack of medical reporting in the claim file from approximately November 2016 until May 2017. However, I find that the preponderance of medical reporting subsequent to May 2017 does not support an ongoing repetitive neck strain/or cervical sprain injury.

[46] In May 2017 the worker had an MRI of her left shoulder. In September 2017, the worker had an ultrasound of her left shoulder. There is no evidence before me to indicate that there were any investigations for the neck during this period.

[47] On November 13, 2017, the worker was seen by Dr. V. Venkateswaran, orthopaedic surgeon, for an assessment of her left shoulder. There was no mention in this report of any ongoing repetitive neck strain/or cervical sprain injury. Rather, the diagnosis was “left shoulder long head biceps tendonitis, Nonspecific Shoulder Pain NYD.”

[48] On January 17, 2018, the worker attended a physiotherapy and sports injury clinic for a “L shoulder assessment.” Although the worker reported that she had “started to get neck pain” after trying light duties in 2014, there was no mention of an ongoing neck injury under the heading “problems.”

[49] On June 7, 2018, the worker was seen by Dr. Tavazzani, orthopaedic surgeon, for an assessment of her left shoulder. Although Dr. Tavazzani indicated in his report of June 7, 2018 that the worker had “cervicogenic shoulder pain,” there was no specific mention of an ongoing repetitive neck strain/cervical sprain injury, only that the worker had “multifactorial shoulder pain.”

[50] I also acknowledge the worker’s testimony that there is no specific diagnosis for her ongoing neck condition.

[51] I find on a balance of probabilities that the lack of medical reporting of a neck condition subsequent to November 2016, and the absence of a specific diagnosis, suggests that the worker’s ongoing neck condition is not causally linked to the repetitive neck strain/cervical sprain injury on July 2, 2014, or to the flare-up of a cervical sprain in June 2015, which were the diagnoses that were accepted within the scope of entitlement in this claim.

[52] Finally, I have not been directed by the worker’s representative to an opinion from any of the treating physicians explaining a causal link between the worker’s current neck complaints and her work-related injury.

[53] For the reasons stated above, I find that the worker reached MMR for her work-related repetitive neck strain/cervical strain as of November 16, 2016, with no evidence of an ongoing work-related impairment. Accordingly, there is no ongoing entitlement for the neck.

2. Ongoing entitlement for the left shoulder from November 16, 2016

[54] I find on a balance of probabilities that the worker has ongoing entitlement for the left shoulder from November 16, 2016, for the following reasons.

[55] First, I find that the preponderance of evidence before me indicates that the worker had an ongoing work-related impairment to her left shoulder beyond November 16, 2016, the date the Board determined that the worker had reached MMR. In reaching this conclusion, I note that the Progress Report of November 1, 2016 from the WSIB's FPP confirmed a number of diagnoses which included "Chronic left shoulder tendinitis." I also note that the Discharge Report from the FPP dated November 21, 2016, indicated that:

[The worker] has made minimal functional improvements in the 6 weeks of therapy. Given that the nature of her pain has been longstanding (since 2014), at the time of discharge, the prognosis for functional improvement (including return to her pre-injury job) is **guarded**. [emphasis added]

[56] The Discharge Report from the FPP dated November 21, 2016, also noted that the worker was fit for "Sedentary" work with functional precautions of "overhead reaching on an occasional basis, and forward reaching on a rare basis," which would indicate that the worker continued to have functional limitations for her left shoulder as a result of her work-related injury after November 21, 2016.

[57] Second, while I acknowledge that the worker may not have fully engaged in treatment at the FPP, which was documented in the various FPP reports, and confirmed in the worker's testimony, there is no medical evidence of significance before me to indicate that, irrespective of her level of participation, she was expected to make a full recovery following her six-week program at the FPP. This is consistent with the Initial Progress Report from the FPP dated October 5, 2016, which indicated that the even "With implementation of the proposed treatment plan, the prognosis for full functional improvement (including return to vocational activity) is guarded."

[58] Furthermore, while I acknowledge the employer representative's argument that the worker's left shoulder condition in November 2016 was the same as her pre-existing left shoulder condition, there is no medical evidence before me to establish that the worker had a left shoulder injury and/or left shoulder tendonitis from June 2011 up until her work-related injury on July 23, 2014, which required medical attention, or prevented her from performing her regular duties. This is consistent with the Employer's Report of Injury/Disease (Form 7) dated August 12, 2014, which indicated that the employer was not aware of any prior similar or related problem injury or condition in the worker's left shoulder. It is also consistent with the clinical notes from Dr. S. Hayward, family physician, which indicated that the worker was seen on June 16, 2011 and then not seen again for any condition until August 6, 2014, following her work-related injury.

[59] Moreover, I note that there are a number of medical reports which diagnosed other conditions that have not been accepted within the scope of entitlement in this claim, such as the FPP reports which diagnosed a pain condition; and the MRI of the left shoulder on May 19, 2017 which was "suggestive of a posterior labral tear." I also note that there are other medical reports, such as the report of August 25, 2016 from Dr. M. McKee, orthopaedic surgeon, where there was no specific diagnosis for the worker's complaints; and Dr. Venkateswaran's report of November 13, 2017, which diagnosed "Nonspecific Shoulder Pain NYD" in addition to left

shoulder long head biceps tendonitis. However, I find that the preponderance of evidence before me indicates that, irrespective of these other conditions and diagnoses, the work-related left shoulder impairment of tendonitis continued to exist after the worker reached MMR on November 16, 2016. In reaching this conclusion, I have placed significant weight on the following medical reports:

- The MRI report of May 19, 2017 which stated that “Focal hyperintensity in the anterior insertion of the infraspinatus tendon consistent with tendonitis or chronic tendinosis.”
- Dr. Venkateswaran’s report of November 13, 2017 which provided a diagnosis of “Left shoulder long head of biceps tendonitis.”

[60] For the reasons stated above, I find on a balance of probabilities that the worker did not recover from her work-related left shoulder tendonitis as of November 16, 2016. I find that the worker has ongoing entitlement for the left shoulder from November 16, 2016, including the recognition of a PI and entitlement to a NEL award for left shoulder tendonitis.

DISPOSITION

[61] The appeal is allowed in part as follows:

1. There is no ongoing entitlement for the neck.
2. The worker has ongoing entitlement for the left shoulder from November 16, 2016, including the recognition of a PI and entitlement to a NEL award for left shoulder tendonitis.

DATED: November 19, 2018

SIGNED: C. Huras