2018 ONWSIAT 825
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 666/18

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DECISION NO. 666/18

R.P. Horne V-Chair

Heard: February 27, 2018
Judgment: March 9, 2018
Docket: 666/18

Counsel: D. Rakovich, for Worker
C. Stewart, for Employer

Subject: Employment; Occupational Health and Safety; Public
Headnote
Labour and employment law

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) S. Yjo, dated March 26, 2015, revised May 6, 2015 and to the ARO decision of P. Luck dated May 18, 2017

***R.P. Horne V-Chair*:**

(i) Introduction

1 The worker objects to the, ARO Decision of S. Yjo dated March 26, 2015 which denied entitlement to left median neuropathy (left wrist). The employer objects to the payment of full loss of earnings (LOE) benefits on December 6, 2012, December 7, 2012 and December 10, 2012 which the ARO allowed in the same decision.

2 In addition, the worker objects to a subsequent ARO decision by P. Luck dated May 18, 2017 which denied entitlement to bilateral De Quervain's tenosynovitis as a secondary condition.

3 Both ARO decisions were rendered based upon the written record without an oral hearing.

4 The worker in his appeal before the Tribunal selected the written hearing format and the participating employer agreed.

(ii) Issues

5 The issues under appeal are as follows:

1. The worker requests secondary entitlement for left median neuropathy (ARO Decision March 26, 2015);

2. The worker requests secondary entitlement for bilateral De Quervain's Tenosynovitis (ARO Decision May 18, 2017);

3. The employer objects to the payment of LOE benefits for December 6 2012, December 7, 2012 and December 10, 2012 (ARO Decision March 26, 2015).

(iii) Background

6 The following are the basic facts.

7 The now 59 year old worker has an allowed claim of right sided carpal tunnel syndrome (CTS) with an accident date of September 4, 2012. She was employed since 1990 as a flight operations coordinator for a large airline. Her job involved coordinating various crews and activities to ensure the safe and efficient operation of airplane arrivals and departures. The job involved the use of computer screens and communication with multiple parties by using up to three hand held radios. All of the radios involved using push button controls typically involving the thumb. In August 2012 the worker advised her employer she had developed right sided pain in her wrist and palm areas. The employer placed her on modified work removing the hand held radios. EMG testing in October confirmed the presence of right sided CTS. The Workplace Safety and Insurance Board (the Board) allowed entitlement for right sided CTS and arranged for the worker to be seen at one of their specialty clinics. The worker was seen multiple times at the WSIB Hand Wrist Specialty clinic starting on December 5, 2012. The last report on file from the clinic is dated September 24, 2015.

8 In the specialty clinic report of December 5, 2012 the treating specialist Dr. Z. Margaliot, General Surgeon noted a recent onset of left sided symptoms. He suspected bilateral CTS or possible median nerve compression. The wrists were injected at that time in the hopes that they would settle. The injections did not have lasting results and Dr. Margaliot recommended a surgical solution. He recommended right sided surgery first as it was the most symptomatic followed by left sided surgery. The Board following review allowed surgery for the right side, but in a decision dated April 3, 2013 denied left sided median neuropathy noting the onset had occurred while on modified work and in the absence of significant repetitive activity.

9 The worker underwent right sided surgery on June 3, 2013 consisting of a carpal tunnel release along with nerve decompression at the proximal forearm. In August 2013 after returning to modified work following the right sided surgery which involved holding a clipboard with the left hand the worker developed bilateral De Quervain's tenosynovitis. On review the Board denied entitlement to the bilateral De Quervain's tenosynovitis.

10 Following the December 5, 2012 injections the worker was off work for part of December 6, all of December 7 and all of December 10, 2012. She indicated she was unable to work during this period due to the injections. The employer maintained they had suitable work for her during this time and disputed that she had medical authorization to be off. The Board denied entitlement to the lost time. As indicated above the worker appealed the decision not to pay the lost time in December 2012 and the decision to deny the left sided symptoms. In a decision dated March 26, 2015 ARO Yjo allowed the lost time citing the evidence that she had experienced complications from the injections. The same decision confirmed the decision to deny the left sided symptoms. A subsequent ARO Decision by P. Luck dated May 18, 2017 also denied entitlement to De Quervain's tenosynovitis.

(iv) Law and policy

11 Since the worker was injured in 2012, the *Workplace Safety and Insurance Act, 1997* (the WSIA) is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

12 An "accident" is defined in section 2(1) to include:

> (a) a wilful and intentional act, not being the act of the worker,
>
> (b) a chance event occasioned by a physical or natural cause, and
>
> (c) disablement arising out of and in the course of employment;

13 General entitlement to benefits is governed by section 13:

> **13(1)** A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.
>
> **(2)** If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

14 The statutory presumption set out in section 13(2) does not apply to an injury by disablement. See, for example, *Decisions No. 268* and *42/89*.

15 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*.

16 Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, #31, #12, Revision #9, would apply to the subject matter of this appeal:

- *Operational Policy Manual* (OPM) Document No 15-05-01, "Resulting from the Work-Related Disability"
- OPM Document No. 15-05-02 "Accidents Resulting From Treatment"
- OPM Document No. 15-05-03 "Non Work Related Accidents"
- OPM Document No. 11-01-01 "Adjudicative Process"

17 I have considered these policies as necessary in deciding the issues in this appeal, in particular OPM Document No. 15-05-01, "Resulting from the Work-Related Disability." That policy indicates that:

> Workers sustaining secondary conditions that are causally linked to the work-related injury will derive benefits to compensate for the further aggravation of the work-related impairment or for new injuries.
>
> . . .
>
> Entitlement for any secondary condition is accepted when it is established that a causal link exists between it and the work-related injury.

(v) Submissions

18 Both the worker's representative Mr. Rakovich, Paralegal and the employer's representative Ms. Stewart, Lawyer have made written submissions on multiple occasions to the Case Manager, the ARO and now to the Tribunal. Mr. Rakovich's Tribunal submission is dated September 18, 2017 with a reply submission dated September 22, 2017. Ms. Stewart made submissions to the Tribunal dated September 15, 2017 and September 27, 2017.

19 The respective positions are summarized below:

20 Mr. Rakovich the worker's representative relies on the reporting from the Board's specialty clinic and notes that their reports support a work related causation. He discounts the opinion provided by the Board's medical consultant on the basis they were responding to narrow questions by Board staff and did not have proper regard for the expertise of Dr. Margaliot at the specialty clinic. With respect to the payment of time off work in December 2012 Mr. Rakovich supports the ARO decision of March 26, 2015.

21 Ms. Stewart takes the position the employer had modified work suitable for the worker in December 2012 and there is a lack of clinical evidence supporting that the worker could not work during the period in dispute. With respect

to entitlement to the left median nerve compression Ms. Stewart points out the lack of repetitive use of the left arm while on modified duties and the worker's own comments that she was not using the left hand very much in her modified duties. Specific to the diagnosis of De Quervain's tenosynovitis Ms. Stewart emphasized the delay in onset occurring one year after the development of the right sided CTS problem. She points out the lack of a supporting medical opinion establishing a work related causation and finally disputes the theory that the condition arose through the use of a clipboard. The evidence establishes in her mind that the worker held the clipboard only in her left hand and as a result a bilateral diagnosis could not be related to the modified work performed.

(vi) Analysis

(a) Lost time December 6, 2012, December 7, 2012 and December 10, 2012

22 I will first address the issue of the payment of LOE benefits from December 6, 7 and 10, 2012. The ARO in her March 26, 2015 decision allowed the payment of LOE benefits for the dates indicated. She explained her findings.

> ...having regard for the temporal relationship between the injections, the worker's report of severe pain, the physiotherapist's corroboration of the worker's statement, and his clinical experience that these symptoms were typical, I am persuaded the balance of evidence supports the worker, more likely than not, developed a reaction to the injections such that she was unable to return to work. Noting the injections were to both wrists. I find it reasonable that it was unlikely that she was able to do any work for the three days she lost time from work.

I am in agreement with the reasoning above. The worker attended the Board's Specialty Clinic on December 5, 2012. The report confirms both wrists were injected. The worker advised that the next day she could not open her hands. She indicated she re-contacted the clinic and was told to take it easy. The physiotherapist confirms the above conversation when he contacted the Board and left a voice message, which is documented in Memorandum #20 dated March 26, 2013. While the modified work provided was sedentary in nature it did involve the use of both hands. I am, as was the ARO, satisfied that given her reaction to the injections which was described as typical she would not have been able to perform the modified duties available. Dr. Margaliot in a subsequent report dated February 6, 2013 also collaborates that the worker had a flare of symptoms with significant pain for several days after the December 5, 2012 injection. The employer's representative points to Memorandum #5 where the worker advised she did not return to work after the Specialty Clinic appointment as no one told her she had to. It is unclear from this statement if she is referring to returning to the rest of her shift after the appointment or for the next three days. The Case Record confirms the worker attended a meeting at the employer's premises on December 6, 2012. There is little detail concerning this meeting. It is not known if the worker was asked or told to return to modified work after this meeting and her response, if any.

23 On balance, given the worker's reported symptoms and the confirmation by the physiotherapist that they were typical I am satisfied she would not have been able to perform the modified duties available. Thus the payment of LOE benefits for December 6, 7, and 10, 2012 is confirmed.

(b) Entitlement to left sided median neuropathy

24 I will next address the issue of left sided neuropathy. For the reasons outlined below, I find it more likely than not the modified duties and favouring of the right extremity made a significant contribution to the development of left sided median neuropathy.

25 I find the left sided symptoms came on in November 2012. Both the worker's original Worker's Report of Accident dated August 17, 2012 and the Employer's Report of Accident dated September 10, 2012 list only right sided symptoms. The September 24, 2012 ergonomic report of the worker's work station included an interview with the worker. No left sided symptoms were mentioned. The worker in conversation with the Case Manager on January 13, 2013 confirmed the left sided symptoms came on in late November. In conversation with the Case Manager on April 8, 2013 the worker confirmed she had to push down on a portion of a touch screen to activate the radio. She would use her thumb to push. She mostly used her right hand but would use her left hand when the right was bothering her. In her affidavit dated

September 18, 2017 and attached to the worker's representative's submission of the same date the worker maintains she over used the left hand during her return to work in the fall of 2012.

26 OPM Document No. 15-05-01, "Resulting from the Work-Related Disability" indicates that a secondary condition can be accepted where it is established that a causal link exists between it and the work-related injury. The first medical reference to left sided symptoms comes from Dr. Margaliot's December 5, 2012 report. Dr. Margaliot notes "on the left side, the patient has a more recent onset of symptoms including pain and intermittent paresthesias, as she has been favouring her right hand." In a subsequent report on December 19, 2013 Dr. Margaliot expanded on the causation of the left side.

> Given that the symptoms on the right and left side are identical and arose in similar fashion, I would recommend that WSIB reconsider the patient's claim for the left side to allow her to undergo expedited surgery.

27 The ARO in her March 26, 2015 decision denied entitlement to the left sided median neuropathy on the basis that the modified work provided to the worker from September to December 2012 did not involve repetitive forceful activities involving the left wrist. The ARO goes on to speculate that an alternate cause of the condition could be hypertension or a consequence of menopause. I find no evidence to support the other suggested causes made any contribution to the left sided median neuropathy.

28 The only medical comment on causation of the left sided median nerve compression is from Dr. Margaliot. Dr. Kruger a Board Medical Consultant (MC) was asked to comment on whether the worker had permanent restrictions resulting from the right sided surgery but does not comment on the causation of the left sided symptoms. Dr. Kruger did contact Dr. Margaliot directly and the case was discussed. Dr. Margaliot indicated in his opinion some people are more prone to the development of CTS and in his view the worker was one of these people. If the worker is more prone to the development of CTS on the right it follows she would be equally at risk for developing CTS and or median nerve compression on the left. No other medical evidence has been presented to me to refute Dr. Margaliot's clinical opinion. The argument against entitlement is that the job duties were not repetitive in nature and would not cause a repetitive strain type injury. I have reviewed the Physical Demands Analysis (PDA) of the worker's job duties. It is accepted that the modified job provided to the worker involved the removal of hand held radios and she was placed at a workstation where the radio was activated by touching a computer screen button. The evidence established that at least one workstation the video screen was defective and the operator required more pressure and duration to activate the "talk function." In addition, the job appears fast paced and required forward reaching to access the computer screen and then applying thumb pressure to the appropriate spot on the screen. I accept the worker's signed affidavit of September 18, 2017 which confirmed she favoured her right wrist when it bothered her and used the left side more. While I acknowledge this is in contrast with what the worker advised in Memorandum #22 it is consistent with Dr. Margaliot's December 5, 2012 report. I have also had regard to the fact that Dr. Margaliot was the accessing doctor at the Hand and Wrist Specialty Clinic. Due to this position it is inferred he would have some degree of expertise concerning injuries to the hand and wrist. I note Dr. Kruger in his MC review specifically deferred to Dr. Margaliot's opinion concerning the permanency of the right sided CTS due to his expertise in the area of CTS. I have given significant weight to the opinion of Dr. Margaliot and accept his theory of causation in the absence of any other contrary medical opinion. While I accept the modified work was not particularly repetitive and no longer involved repetitively pushing on radio buttons I accept, given the worker's predisposition and the absence of other contributing factors that it is more likely than not the modified work of repetitively pressing on the screen was sufficiently repetitive and forceful to have been a significant contributing factor to the development of left median neuropathy.

(c) Entitlement to De Quervain's tenosynovitis

29 Finally, concerning the issue of entitlement to bilateral De Quervain's tenosynovitis I find for the reasons below there is no clear causal connection between the work activities and the diagnosis. Entitlement to De Quervain's tenosynovitis is denied.

30 The first reference to the worker developing De Quervain's tenosynovitis is in Dr. Margaliot's report of August 21, 2013. This was about 11 weeks from the worker's right sided surgery on June 3, 2013. Dr. Margaliot advised that "while undergoing therapy" the worker developed bilateral wrist pain. Later in the same report he diagnosed very symptomatic De Quervain's tenosynovitis which developed "while undergoing treatment for her median compressions neuropathy." The doctor does not at that time connect the appearance of bilateral De Quervain's tenosynovitis to any activity at work, nor does the doctor go into any specifics as to the mechanism or type of treatment that would have brought on the De Quervain's tenosynovitis condition. In the next report dated September 25, 2013 Dr. Margaliot makes the following comment:

> The patient recently developed bilateral de Quervain's tenosynovitis. She was injected with corticosteroid and obtained initial relief. She now has mild recurrence of de Quervain's. The patient relates that at her present job auditing she has to continuously grip and hold a clipboard in her hand. This causes her recurrent radial wrist pain

31 From the above it is unclear if Dr. Margaliot is relating the De Quervain's tenosynovitis to the auditing job or if this is what the patient is relating the diagnosis to. Further, I note the October 16, 2013 report by Mr. Richard Tuefel, Occupational Therapist who was treating the worker in association with Dr. Margaliot. He notes when seen on September 25, 2013 the worker indicated the left wrist was fine but she had "ongoing bilateral radial sided wrist pain, right more so than the left." The worker was instructed how to modify the clipboard to facilitate a more ergonomic grip. When seen by Dr. Margaliot again on December 19, 2013 the doctor clarifies his causation theory. He now makes a clear connection between the modified duty of holding the clipboard and the development of De Quervain's tenosynovitis

> More recently, the patient returned to work on modified duties. At her last appointment here, she was diagnosed with left de Quervain's tenosynovitis, which is a result of her modified duties that require sustained holding of a clipboard in her left hand while performing inspections.

32 Dr. Margaliot now restricts his comments concerning De Quervain's tenosynovitis to the left side only. However, reports both before and after the December 19, 2013 report refer to the bilateral nature of the condition. Ms. Stewart in her submissions of April 19, 2017 and January 15, 2017 questions how both sides could be involved when the offending job duty or suspected mechanism of injury involved only the left hand. In her submission the worker was required to hold the clipboard in her left hand and not her right hand. Further she questions why if holding the clipboard was the offending action why it would be that the right side was more symptomatic than the left.

33 ARO P. Luck in her decision dated May 18, 2017 denied entitlement to De Quervain's tenosynovitis after reviewing the modified work performed and having regard for the MC opinion on file dated May 27, 2015. The ARO concluded the work did not involve grip, grasp, clench, pinch or wringing anything in a repetitive manner. She also discounted the treatment for nerve compression as a contributing factor.

34 The MC opinion referenced above was provided by Dr. John Castiglione. Dr. Castiglione's credentials are not provided. Dr. Castiglione noted there is controversy in the medical literature concerning the cause of De Quervain's tenosynovitis. He suggested if there was a work related cause it would need to be established that the work involved rapid repetitive use of the wrist with activities involving pinching, grasping and pulling. In particular, the thumb would need to be held in abduction and extension to result in risk for the development of De Quervain's tenosynovitis. Dr. Castiglione did not believe the holding of a clipboard would result in the requisite postures.

35 The Tribunal's Medical Liaison Office (MLO) provided an excerpt from the book "*Turek's Orthopaedics Principles and Their Application*" edited by S.L. Weinstein and J.A. Buckwalter and published by Lippincott Williams & Wilkens. Specifically an excerpt from Chapter 11, "The Wrist and Hand" was provided which included a section on De Quervain's tenosynovitis. Vice-Chairs are not bound by information provided by the MLO. They are intended to provide generic medical information to aid in decision making. It is open to the parties to rely on or refute the information in their submissions. Neither party referenced the article. I have reviewed the article. It notes De Quervain's tenosynovitis

generally occurs "following certain repetitive wrists movements that cause friction within the first dorsal compartment." The article goes on to note that the condition causes pain at the base of the thumb "exacerbated by ulnar deviation of the wrist strong grasp or thumb pinch."

36 Mr. Rakovich the worker's representative also provided some web based documents that discuss De Quervain's tenosynovitis. The material provided from the Mayo Clinic confirms the exact cause of De Quervain's tenosynovitis is not known but repetitive activity involving the wrist can make the condition worse. Reporting submitted from the Canadian Centre for Occupational Health and Safety notes repetitive or excessive movements such as hand twisting and forceful gripping will affect tendon lubrication and lead to the condition. Finally the excerpt provided from the database Emedicine Health lists some activities that might cause De Quervain's tenosynovitis. They included hammering, skiing, knitting and lifting heavy objects.

37 The worker in her affidavit of September 18, 2017 described her job duties when she returned to work following her June 3, 2013 right sided surgery.

> This time the Modified work was an 8 hr shift which required me to write down details while holding a clipboard... [she then lists the items recorded]... This work would be performed standing at specific gates holding a clipboard in my left hand and writing down details with a pen in my right hand. During an 8 hour shift I would stand with the clipboard in my hand at least 6-7 hours of the 8 hour shift.

38 The above description of the modified work conforms with the employer's description of the activities and I consider them to be an accurate reflection of the work the worker was performing post surgery.

39 On review, I accept that repetitive forceful use of the wrist would be required in a work setting to establish entitlement to De Quervain's tenosynovitis. Further, I find the modified work described as auditing which involved holding a clipboard in the left hand is neither repetitive nor forceful. It has not been shown that sustained gripping would cause the condition. The information outlined in "*Turek's Orthopaedics Principles and Their Application*" would suggest such an activity would exacerbate De Quervain's tenosynovitis but does not establish it would be the cause. I am in agreement with Ms. Stewart that the bilateral nature of the condition is not compatible with work activity that involved only the left hand. Given the right hand was involved in only writing during the modified work it cannot be established that the work is a significant contributing factor to the right sided development of De Quervain's tenosynovitis. The fact that, at least initially, the symptoms were worse on the right side when the claimed offending activity was on the left side cannot be adequately explained. I find the condition is bilateral in nature and arose after about a month after the worker returned to the auditing position and two months after her right sided surgery.

40 I acknowledge the opinion of Dr. Margaliot that the De Quervain's tenosynovitis condition arose from the worker's modified work activities. I do not in this instance accept the opinion. The claimed mechanism of injury of holding a clipboard in the left hand is not supported in the medical literature reviewed as being compatible with the development of De Quervain's tenosynovitis. Dr. Margaliot's opinion is also rebutted by that of Dr. Castiglione. The presence of a bilateral condition also mitigates against the condition arising from primarily left handed activity. No evidence of significance has been presented to establish the condition arose through treatment activities. On a balance of probabilities I am unable to conclude the holding of a clipboard for prolonged periods made a significant contribution to the development of De Quervain's tenosynovitis in this instance. Entitlement to De Quervain's tenosynovitis is denied.

DISPOSITION

41 The appeal is allowed in part as follows:

1. LOE previously paid for December 6, 2012, December 7, 2012 and December 10, 2012 is confirmed.

2. Entitlement is granted for left sided median nerve neuropathy.

3. Entitlement for bilateral De Quervain's tenosynovitis is denied.

42 The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication, subject to the usual rights of appeal.

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