2018 ONWSIAT 3451
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 705/18

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DECISION NO. 705/18

C.N. Tanzola V-Chair, M. Christie Member, A. Signoroni Member

Heard: March 8, 2018; October 10, 2018
Judgment: November 5, 2018
Docket: 705/18

Counsel: S. Oliverio, for Worker
E. O'Dwyer, for Employer

DECISIONS UNDER APPEAL: WSIB Appeals Resolution Officer ("ARO") decisions dated July 22, 2015 and July 29, 2016

***C.N. Tanzola V-Chair, M. Christie Member, A. Signoroni Member*:**

(i) Introduction and issues

1 The worker appeals two ARO decisions in two different claims. The first ARO decision is dated July 22, 2015 and relates to the denial of initial entitlement for a November 22, 2013 workplace incident ("Claim 1"). The second ARO decision is dated July 29, 2016 and relates to the denial of initial entitlement for an alleged December 10, 2014 workplace incident ("Claim 2").

2 As noted in the Tribunal's Hearing Ready Letter and as agreed to by the parties, the issues over which the Panel has jurisdiction are as follows:

> 1. Initial entitlement for the left shoulder and neck injury as having arisen out of and in the course of employment on November 22, 2013 in Claim 1; and
>
> 2. Initial entitlement for a thoracic spine injury as having arising out of and in the course of employment on December 10, 2014 in Claim 2.

(ii) Preliminary issue: estoppel of Claim 2

3 At the start of the March 8, 2018 hearing date, the accident employer's representative, Mr. O'Dwyer, submitted that the worker ought to be estopped from proceeding with her appeal as it relates to Claim 2 because of a May 9, 2016 arbitration decision (the "Arbitration Decision") as decided by an arbitrator (the "Arbitrator"). Upon consideration of the evidence and the submissions from both parties, the Panel determined that the doctrine of issue estoppel does apply. The Panel advised the parties of its decision prior to adjourning for the day. The Panel's detailed reasons are set out below.

(a) Background

4 As of December 10, 2014, the now 52-year-old worker was employed with the accident employer as an aircraft mechanic. As will be set out in more detail in the subsequent section of this decision, the worker has a permanent impairment as a result of a compensable workplace injury sustained in 1988.

5 The relevant Board history and background as it relates to Claim 2 may be summarized as follows:

- On December 10, 2014, the worker alleged that while at work, her supervisor came up from behind her and punched her in the back. The worker characterized the incident as an assault.

- On March 23, 2015, the Board granted the worker health care benefits for a thoracic spine contusion but denied Loss of Earnings ("LOE") benefits. Both the worker and the accident employer objected.

- On December 29, 2015, the Board denied the worker ongoing benefits. The worker objected.

- On July 29, 2016, the ARO decided that there was no personal work related injury and reversed the decision to grant initial entitlement.

6 As is apparent from the Case Record and the summary of evidence set out in the Arbitration Decision, the accident employer concluded that the worker's complaint regarding the alleged December 10, 2014 assault had been filed in bad faith and as such, the worker's employment was terminated. The worker's union grieved the worker's discharge and on May 9, 2016, after five days of hearing, the Arbitrator dismissed the grievance. The worker, the supervisor and others provided evidence during the labour arbitration.

7 The Arbitration Decision reads, in part, as follows:

The incident that triggered the events giving rise to the discharge occurred the morning of December 10th. The Grievor was standing by her workstation computer. There is no dispute that a supervisor ... walked by and touched the Grievor's back. The critical dispute in this case is about the nature or force of that touch. [The supervisor] described it as a "tap", intended only as a friendly gesture. The Grievor has always alleged that she was punched or assaulted. Therefore, her descriptions of what happened and her reactions must be analyzed carefully.

. . .

The Decision

. . .

...[T]he evidence leads to the conclusion that while a great deal of what the Grievor testified about can be accepted, she has deliberately and improperly exaggerated, magnified and misrepresented the incident of December 10th in order to further her own personal agenda.

. . .

...The strong weight of evidence supports the notion that [the supervisor] touched the Grievor as a friendly gesture and that the Grievor realized this almost immediately.

. . .

...Given the Grievor's medical situation, there is no reason to doubt her assertion that any contact to her back on that morning would have caused her pain. The Grievor has chronic pain from a previous injury. The medical procedure earlier that week left her back even more sore than usual. Therefore, even a slight touch would have triggered more pain than an ordinary person would have experienced.

. . .

...The Grievor strongly suggested to Human Resources that the "assault" resulted in her referral to the hospital on December 10th, a second MRI and hospitalization in the days that followed. First, there was no medical evidence to support that causal connection. Further, the Grievor's own testimony clarified that the medical procedures following December 10th were triggered by concerns about the possibility of an abscess on her spine and/or from

> damage caused by the medical intervention earlier that week. There is no evidence to support the implication that [the supervisor] did anything that had any negative effect on the Grievor's existing medical condition....

(b) Submissions

8 Mr. O'Dwyer submitted that the nature of the December 10, 2014 incident at issue in Claim 2 was a key issue at the arbitration. Specifically, the Arbitrator found that 1) the worker's supervisor had touched her in a friendly manner and did not punch or assault her, as claimed; and 2) the worker deliberately magnified and misrepresented the incident to further her own personal agenda. Mr. O'Dwyer submitted that the issue to be decided in this appeal as it relates to Claim 2 is whether there was a workplace accident causing injury, which was the same issue decided by the Arbitrator. As such, the worker ought to be estopped from proceeding with her appeal in Claim 2 to the Tribunal. In support of his argument, Mr. O'Dwyer relied upon *Decision Nos. 2657/15* and *1523/02I3.*

9 In the alternative, Mr. O'Dwyer requested that if the Panel found that the worker was not estopped from proceeding with her appeal in Claim 2, the Panel should give the Arbitrator's factual findings substantial weight. For this request, Mr. O'Dwyer relied upon *Decision Nos. 1145/00* and *606/95R*.

10 In reply, the worker's representative, Mr. Oliverio, submitted that although the Arbitrator decided the worker was not assaulted on December 10, 2014, the Arbitrator still found that the worker's supervisor touched the worker's back. Mr. Oliverio submitted that the Arbitrator did not determine whether the worker's spine was fragile enough and sufficiently compromised as a result of her pre-existing compensable condition such that the touch could have caused an injuring process. Mr. Oliverio submitted that according to the Arbitration Decision, no medical evidence (as is available in the Case Record) was filed. The Panel understands this argument to suggest that the Arbitrator did not have sufficient evidence to make a finding on medical compatibility.

11 Mr. Oliverio submitted that *Decision No. 2657/15* was distinguishable from this appeal because it dealt with a claim for mental stress and not an organic injury.

12 Thus, according to Mr. Oliverio, the worker ought to not be estopped from proceeding with her appeal in Claim 2 to the Tribunal.

(c) The law

13 In *Penner v. Niagara*[1] , the Supreme Court of Canada explained the doctrine of issue estoppel as follows:

> [28] Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.
>
> [29] The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.

14 The Supreme Court has made clear that the doctrine applies to the proceedings of administrative tribunals. In *Penner*, Justices Cromwell and Karakatsanis stated the following:

> [31] Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."

15 Their comments on this point echoed the following comments of Justice Binnie in *Danyluk v. Ainsworth Technologies*[2] where Justice Binnie stated:

> [21] These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

16 The test to determine whether the doctrine of issue estoppel applies is set out in *Danyluk* as follows:

> The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

(d) Analysis

17 The Panel finds that issue estoppel applies to preclude the worker's appeal in Claim 2 from advancing. Further, the Panel finds that there is no basis on which to exercise discretion not to apply the doctrine of issue estoppel. In addition, the Panel finds that *Decision No. 2657/15*, as relied upon by Mr. O'Dwyer, correctly sets out the law and required analysis regarding issue estoppel in the context of appeals to the Tribunal.

18 Starting first with the second and third criteria of the doctrine of issue estoppel (that the judicial decision relied on to create the estoppel was final and that the parties to the judicial decision or their privies were the same), the Panel finds that they have been satisfied. In this case, the prior proceeding was an arbitration, which was decided by the Arbitrator. Specifically, a grievance was filed by the worker's union and on behalf of the worker against the accident employer pursuant to a collective bargaining agreement. The Arbitrator considered the evidence and rendered a written decision. Section 48 of the *Labour Relations Act*, requires that every collective bargaining agreement provide for "final and binding settlement by

arbitration." That is what occurred in this case. Neither the accident employer nor the worker advised that an application for judicial review had been filed in relation to the Arbitration Decision or that any like application has been successful. The Panel finds that the Arbitration Decision was a final decision.

19 The Panel further finds that the arbitration involved the same parties as the worker's appeal before this Panel. The parties in this appeal are the worker and the accident employer. The parties to the arbitration were the accident employer and the worker's union. As noted in *Decision No. 2657/15*, it is trite law that the worker is a party to the arbitration or that she is a privy. *Decision No. 2657/15* referenced *Decision No. 1000/01I* in support of this finding, which the Panel adopts. The interests of the worker and the union were the same and thus, the worker was privy to a legal proceeding brought by the union on her behalf.

20 Turning now to the first criterion (whether the same question was decided in the prior proceeding), the analysis must turn on whether the question being decided in this appeal is fundamental to the prior proceeding as it extends to material facts, conclusions of law or mixed fact and law. Specifically, as noted in *Penner*:

> [24] Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

21 In Claim 2, the issue before the ARO was whether the worker ought to be granted initial entitlement for injuries alleged to have resulted from a December 10, 2014 workplace incident. Pursuant to the appropriate law and policy, the ARO considered whether the claim had the required five points: an employer, a worker, personal work-related injury, proof of accident, and compatibility of diagnosis to accident history. The ARO decided there was no personal work related injury because the worker's ongoing medical problems were directly related to incidents that occurred before December 10, 2014 and further, that the worker did not seek medical treatment for a thoracic spine contusion immediately following the incident. It could also be said that based on this reasoning, the ARO did not consider there to be compatibility between the December 10, 2014 incident and any subsequent diagnosis.

22 With respect to the question being decided by the Arbitrator, the Panel acknowledges that, from a general perspective and at a high-level, the Arbitrator was tasked with determining whether the worker's discharge was appropriate. In turn, this required consideration of the employer's position that the worker's complaint against the supervisor was made in "bad faith" and severed the "bond of trust" required in an employment relationship. In rendering her decision, it was necessary for the Arbitrator to first carefully consider the evidence with respect to whether the worker was tapped or punched (and assaulted) on December 10, 2014. Once she made this determination, only then could she proceed to make a determination on whether the worker misrepresented the incident and thus was appropriately dismissed.

23 With respect to the first part of the required analysis (whether the worker was tapped or punched), the Arbitrator considered the evidence of the worker, the supervisor, as well as what appears to be extensive documentary evidence including personal text messages between the worker and the supervisor and worker and her spouse immediately after the incident. The Arbitrator then determined that on December 10, 2014, the worker was touched and was not punched. Finding that the worker was merely touched, the Arbitrator addressed the worker's position that she immediately experienced an onset of or increased pain to her back. The Arbitrator found that while the worker may have experienced pain as a result of the touch, the pain was not as a result of any new injury. The fact the worker reported pain did not provide support to her version of the nature or impact of the incident.

24 Considering the above, the Panel finds that in deciding whether the worker had exaggerated her allegation of the nature and extent of what took place on December 10, 2014, the Arbitrator necessarily first considered whether the worker sustained a work-related injury by way of what was ultimately determined to be a touch. This question was not collateral or incidental or one that which could only be inferred by argument from the Arbitration Decision. Rather, the answer to whether the worker sustained a touch or punch and thus a work-related injury was fundamental to the Arbitrator's ultimate determination of whether the worker's discharge was proper.

25 Therefore, the Panel finds that the question decided by the Arbitrator was the same as that advanced by the worker before the ARO in 2016 and now before this Panel: did the worker sustain a workplace accident or injury and/ or did a touch to the worker's back significantly contribute to her injury? The Arbitrator's finding that the worker was not punched but rather touched and that her subsequent medical issues were related to a pre-existing condition effectively mirrors the ARO's conclusion. Further, the Panel finds that it is not relevant

that the result of the Arbitration Decision led to a dismissal of the grievance, no reinstatement or monetary damages and that if the worker was granted initial entitlement for a workplace injury occurring on December 10, 2014, she would be entitled to benefits. Specifically, as noted in *Decision No. 2657/15*:

> In our view, the fact that the potential remedies available to the worker at the grievance arbitration and in the workers' compensation claim are different is not a basis for not applying the doctrine of estoppel. If the remedies being sought in the various proceedings have to overlap in order for the doctrine to apply, this would essentially render the doctrine nugatory and would defeat the purposes which gave rise to the doctrine in the first place. Thus, if the doctrine does not apply unless the remedies being claimed in each forum are the same, then this would allow the worker to pursue a claim, based on the same allegation of facts, before the grievance Arbitrator, before this Tribunal, and potentially before a variety of other administrative tribunals as well, such as the Human Rights Tribunal of Ontario, for example. In our opinion, the question to be asked is whether the same fundamental issues of fact are being alleged in more than one forum, and the answer to that question is "yes."

26 The Panel acknowledges Mr. Oliverio's submission that *Decision No. 2657/15* ought to be distinguished from the facts of this issue at appeal because it dealt with a non-organic issue and further, that the Arbitrator did not consider whether a touch could have started or contributed to an injuring process. Although the Panel agrees that there could be important differences between cases that address organic and non-organic issues, the Panel finds, as above, that *Decision No. 2657/15* is relevant in that it set out a discussion of the relevant case law and the Tribunal's general approach with respect to issue estoppel. Further, the Panel finds that the facts and required analysis relating to the issue of estoppel in this appeal and in *Decision No. 2657/15* are notably similar. Specifically, in *Decision No. 2657/15*, the worker alleged that she had been bullied, discriminated and harassed and thus, sought entitlement to benefits for mental stress. The worker also filed similar grievances, which were put before an arbitrator. Thus, the issue to be determined by the Panel in *Decision No. 2657/15* and by the arbitrator in that case was the same: whether the worker had been harassed, bullied or discriminated against by her employer. However, the arbitrator was not tasked with determining whether the worker had been subjected to a traumatic event at work regardless of whether the behaviour was not officially considered harassment, bullying or discriminating (as reasoned by the ARO). Rather, like in this case, the arbitrator's decision that the worker was not harassed or bullied was a vital aspect to the ultimate arbitration decision. That the answer to the question could have resulted in initial entitlement (as in this case) or other damages (like reinstatement and a monetary award as in this case) is not

part of the analysis with respect to whether the same issue has been decided, giving rise to an issue estoppel.

27 In addition, although the Panel agrees that the Arbitrator in this case did not have the benefit of the same medical evidence as is available in the Case Record, the Arbitrator was provided with the worker's own testimony with respect to her pre-existing condition and what her doctors told her following the December 10, 2014 incident. The Arbitrator was satisfied that the evidence supported a finding that not only did the assault not occur in the way described by the worker but also that the worker had not been injured. Any pain she experienced was not caused by the incident. The Panel finds that the Arbitrator considered whether the December 10, 2014 incident significantly contributed to the worker's condition. Given that the purpose of issue estoppel is to prevent relitigation of an issue, the fact the worker and/or her representative may have preferred that more evidence or information have been available to the Arbitrator during that proceeding does not change the fact and the Panel's decision that the Arbitrator answered the same question required by this Panel with respect to initial entitlement for Claim 2.

28 Therefore, for the above noted reasons, the Panel finds that the doctrine of issue estoppel applies. However, the courts have made clear that in these circumstances, an adjudicator has discretion not to apply the doctrine. In *Danyluk*, the Court indicated that the doctrine of issue estoppel promotes the orderly administration of justice, but cannot do so at the expense of real injustice to the particular case. In *Penner*, the Court noted that the question of whether to exercise discretion not to apply the doctrine of issue estoppel requires the examination of two factors, namely, whether there was unfairness in the prior proceeding, and whether it would be unfair to use the result of the first proceeding in a subsequent one.

29 The application of the discretionary factors causes the Panel to conclude that this is an appropriate case to apply the doctrine of issue estoppel. There is no allegation that the proceedings before the Arbitrator were unfair. The union represented the worker in a proceeding that lasted five days. Multiple witnesses gave evidence and the 47-page Arbitration Decision set out lengthy evidentiary considerations and analysis. As noted earlier, no application for judicial review was brought with respect to the Arbitration Decision.

30 The Panel also finds there is no obvious or manifest unfairness that arises from using the results of the arbitration proceedings to preclude the worker from proceeding with Claim 1 as (?) it is based on the same allegations of fact which the Arbitrator considered. The worker's representative has not identified

any unfairness or injustice that warrants the exercise of discretion not to apply the doctrine of issue estoppel in this case.

31 Accordingly, the Panel concludes that the worker is precluded from advancing her appeal for initial entitlement as it relates to Claim 2 on the basis of which it has been advanced in the ARO decision which was appealed to this Tribunal. The worker is not precluded from advancing her appeal for initial entitlement as it relates to Claim 1.

(iii) Background: entitlement under Claim 1

32 Following the Panel's decision regarding Claim 2, there remains one issue to be determined: whether the worker ought to be granted initial entitlement for the left shoulder and neck injury as having arisen out of and in the course of employment on November 22, 2013 in Claim 1.

33 As referenced above, on October 24, 1988, a compensable claim was established for bilateral Thoracic Outlet Syndrome ("TOS") and referred neck pain due to the repetitive use of a riveting gun while employed with the accident employer (the "1988 Claim"). As a result, the worker was granted a 17.5% Permanent Disability ("PD") award (5% for the neck, 5% for the right TOS, 5% for the left TOS and a multiple of 2.5%). The worker had various surgeries and treatments, and in July 2005, was diagnosed with a recurrence of left cervical/ thoracic facet joint strain. On September 13, 1996, the worker underwent a percutaneous facet denervation at C5 to T2. On September 15, 2005, the worker had a second percutaneous facet denervation from C4 to T2. On December 3, 2014, the worker had a C7 epidural injection.

34 With respect to Claim 1, the worker alleged that on November 22, 2013, a supervisor grabbed her left arm very hard, injuring her left shoulder and neck. On December 5, 2013, the worker sought medical attention and on December 18, 2013, was diagnosed with a left shoulder and neck strain.

35 There is some dispute with respect to the nature of the supervisor's interaction with the worker. The worker alleged that she was physically assaulted. Specifically and according to her both her January 15, 2014 and January 25, 2014 Form 6s, the worker's supervisor grabbed and pulled down on the worker's left arm and shouted in her ear. As noted in a February 20, 2014 Board memo, the supervisor stated she lightly touched the worker's arm and apologized later. The details of this incident and the Panel's related findings are set out below.

36 On March 21, 2014 (and revised on March 27, 2014), the Board denied initial entitlement for Claim 1, finding that the worker's left shoulder and neck injuries were not as a result of the November 22, 2013 incident. The worker appealed.

37 On July 22, 2015, the ARO, S. Bennett, decided that while "an 'incident' occurred at work on November 22, 2013, there was no proof ... an actual injury had occurred as a result of this incident." It was decided that the worker's complaints of neck and shoulder pain were not the result of a work-related injury while in the course of employment. The worker's appeal was denied. The worker now appeals to the Tribunal.

(iv) Law and policy

38 As the worker alleged she was injured in 2013, 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.

39 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;

40 Pursuant to section 126 of the WSIA, the Tribunal is required to apply any applicable Board policy when making decisions. The Board has identified certain policies applicable to this appeal and the Panel has considered them as necessary.

41 *Operational Policy Manual* ("OPM") Document No. 15-02-01, "Definition of Accident," describes a chance event as "an identifiable unintended event which causes an injury," an injury itself is not a chance event. The policy defines a disablement as "a condition that emerges gradually over time" or "an unexpected result of working duties."

42 OPM Document No. 11-01-01, "Adjudicative Process," states that an allowable claim must have five points: an employer, a worker, personal work-related injury, proof of accident, and compatibility of diagnosis to accident history. OPM Document No. 11-01-01 provides the following guidelines for determining proof of accident:

Proof of Accident

Decision-makers may consider the following when examining proof of accident,

- Does an accident or disablement situation exist?
- Are there any witnesses?
- Are there discrepancies in the date of accident and the date the worker stopped working?
- Was there any delay in the onset of symptoms or in seeking health care attention?

43 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*.

(v) Submissions

44 Mr. Oliverio submitted that on November 22, 2013, the worker experienced an incident of assault, which ought to be accepted as a chance event. Mr. Oliverio submitted that the worker's evidence established that on November 22, 2013, the worker's supervisor forcefully grabbed and pulled her left upper arm, leaving red marks and causing swelling. It was not merely a "touch." Following, the worker sought immediate attention from the accident employer's occupational nurse and reported the incident to her union and the accident employer. There was no significant delay in seeking medical treatment such that it should be fatal to her claim. In support of his position on delay, Mr. Oliverio relied upon *Decision Nos. 1143/07, 1196/07* and *2262/06*.

45 Further, Mr. Oliverio submitted that the November 22, 2013 incident significantly contributed to the worker's subsequently diagnosed C3-4 disc herniation and C4 nerve root compression. Specifically, Mr. Oliverio submitted that in the April 19, 2012 x-ray preceding the November 22, 2013 incident, there was no indication of a herniation or root compression. In support of this argument, Mr. Oliverio relied upon a 1955 article published by the Clinical Orthopaedics and Related Research journal. Mr. Oliverio also submitted that while there is no diagnosis for her shoulders, pain seems to be radiating from her neck to her shoulder and as such, the worker continues to seek entitlement for her upper shoulder region.

46 Mr. Oliverio submitted that there was no other event or anything else that could have caused the worker's injuries.

47 Mr. Oliverio agreed that while the Panel does not have jurisdiction to consider whether the November 22, 2013 incident significantly contributed to a permanent aggravation or recurrence of the worker's compensable pre-existing cervical neck condition in the 1988 Claim, any medical evidence following the November 22, 2013 incident speaks to the significance of the worker's resulting injury. Following November 22, 2013, the worker's medical care and treatment increased and as such, the November 22, 2013 event was not "innocuous" as suggested by the ARO.

48 Mr. O'Dwyer submitted that the worker's appeal in Claim 1 fails on the fact there is no proof of accident or medical compatibility. The evidence establishes that the worker was touched and not grabbed by her supervisor. As such, there was no "jerk" such that a whiplash-type injury would have been caused. That the worker did not immediately seek medical attention from a clinic, her own physician or emergency goes to the severity of the worker's injury and proof of accident and also breaks "the chain of causation."

49 Mr. O'Dwyer submitted that the contemporaneous evidence in the Case Record that suggested the worker was in chronic pain prior to November 22, 2013 ought to be preferred over the worker's testimony given during the hearing. The November 22, 2013 did not significantly contribute to her ongoing medical issues.

50 Mr. O'Dwyer emphasized that it was the accident employer's position that the Panel does not have jurisdiction to consider whether the November 22, 2013 incident aggravated the worker's pre-existing compensable condition.

(vi) Analysis and conclusions

51 For the reasons that follow, the worker's appeal with respect to initial entitlement for the left shoulder and neck injury on November 22, 2013 in Claim 1 is denied.

52 The Panel accepts that the alleged November 22, 2013 incident would be considered a chance event in that, if accepted, it would have occurred as a result of "an identifiable unintended event which causes an injury." The Panel also accepts that it does not have jurisdiction to decide whether the alleged November 22, 2013 incident aggravated the worker's injury arising from her 1988 Claim, or any other condition. Specifically, although it appears that on July 12, 2017 the worker advised the Board that it was her position that the November 22, 2013 incident aggravated

her condition in the 1988 Claim, the Board, in a July 13, 2017 decision, decided that the worker's "current neck problems, proposed neck surgery, and physiotherapy treatment" could not be attributed to the 1988 Claim. This is not a final decision of the Board appealable to the Tribunal within the meaning of subsection 123(1)(a) of the WSIA. Further, there is no decision from the Board's Operation Level or its Appeals Services Division with respect to the issue of aggravation framed in any other way. As such, the Panel finds that it does not have jurisdiction over the issue of whether the alleged November 22, 2013 incident aggravated the worker's pre-existing compensable condition in the 1988 Claim.

53 As above, an allowable claim must have five points: an employer, a worker, personal work-related injury, proof of accident, and compatibility of diagnosis to accident history. The Panel finds that in this appeal, there was no personal work-related injury and further, that there was no compatibility of diagnosis to the accident history.

54 First, the Panel finds that the nature of the November 22, 2013 incident did not involve a forceful "pull" or "yank" as described by the worker. Rather, the Panel accepts that the worker's supervisor touched or grabbed her. Evidence with respect to the nature of the incident may be summarized as follows:

- During the hearing, the worker testified that earlier in her shift, her supervisor had discussed where particular paperwork had been moved to. Later in the shift, around 9:00am or 10:00am, the worker was looking for the paperwork and her supervisor overheard her asking where the paperwork was. The worker's supervisor went up to the worker, motioned to her as if she was going to whisper something in her ear, grabbed her left arm around the bicep area and "yanked" on it. The worker testified that she felt like a "guitar string [had been] strung" and experienced immediate pain in her neck. The worker also testified that she thought her supervisor had broken her skin with her nails, despite the fact she was wearing coveralls.

- The worker testified that there was no immediate pain in her left arm. The pain was all in her neck and then began to "shoot down" the back of her left arm. The worker also experienced symptoms of dizziness (the room would spin when she was lying down and did not feel balanced when she stepped).

- On January 22, 2014, the worker explained to the Board Case Manager that on November 22, 2013, the worker's supervisor "grabbed [her] left arm very hard...." Her arm "stung" from the supervisor's nails.

• On February 12, 2014, the worker explained to the Board Case Manager that a representative from the accident employer's human resource department advised her that the worker's supervisor admitted to "pulling [her] arm."

• On February 24, 2014, a human resource manager from the accident employer spoke to the Board Case Manager and advised that although the worker reported that her supervisor "grabbed her left arm," the supervisor advised that she did not grab the arm but rather, touched it.

• On February 24, 2014, the accident employer's occupational nurse advised the Board Case Manager that the worker reported to her that she was "Grabbed" by someone at work on the upper left arm.

• On February 25, 2014, the worker's supervisor spoke to the Board Case manager and stated that she "touched" the worker's shoulder. She did not pull, push or squeeze the worker's arm. After being advised that the worker was reporting that she hurt the worker, the supervisor spoke to the worker. The worker explained that she did not like to be touched. As such, the supervisor apologized to the worker.

• According to a June 23, 2014 report from Dr. P. Yau, family physician, on December 5, 2013, the worker reported that her supervisor "grabbed her left arm and pulled it downwards causing pains in her left shoulder and on the left side of her neck."

• According to a June 24, 2015 report by Dr. C. Santaguida, neurosurgeon, the worker reported that in 2013, someone "jerked" her left arm.

55 During the hearing, the worker and Mr. Oliverio relied on the apparent visualization of red marks on the worker's left arm to demonstrate that the supervisor used force when she made contact with the worker on November 22, 2013. Evidence with respect to the markings on the worker's skin may be summarized as follows:

• During the hearing and in responding to questions posed by Mr. Oliverio, the worker testified that following the November 22, 2013 incident, her arm was red and swollen. Although she thought the supervisor's nails had pierced her skin, they ultimately did not. The worker testified that but for her coveralls, the supervisor's nails would likely have broken her skin.

• However, in response to Mr. O'Dwyer's cross questions, the worker insisted that she had bruising, broken skin, redness and nail marks.

• In evidence were three coloured photographs of the worker's left arm. The worker agreed in testimony that the first photo, taken around 8:00pm on November 22, 2013 did not really show any redness or swelling. She stated, however, that the redness and swelling had dissipated by the time the photograph was taken (approximately 10 hours after the incident). The photograph did not show any discolouration to suggest there was bruising at any time. There was no broken skin shown in the photograph.

• On January 22, 2014, the worker advised the Board Case Manager that she showed her left arm to a manager and another supervisor. On February 12, 2014, the worker advised the Board Case Manager that when she showed her left arm to the manager and another supervisor, her arm "clearly showed [her supervisor's] hand print..."

• As noted in a February 20, 2014 Board memo, the accident employer's occupational nurse examined the worker almost immediately after the November 22, 2013 incident. She did not observe bruising, broken skin or redness. The supervisor, to whom the worker showed her left arm, advised the Board Case Manager that he did not notice anything on the worker's arm. It does not appear the Board Case Manager was successful in speaking to the manager.

• On February 24, 2014, the accident employer's occupational nurse advised the Board Case Manager that when she examined the worker on November 22, 2013, there was nothing visible on the arm - no bruising, no broken skin and no redness. The nurse gave the worker an ice pack to make her feel better but did not see anything. The nurse advised the Board Case Manager that the worker asked her if she should take a picture of the area and the nurse advised that she could if she wanted.

• During the hearing, the worker testified that the accident employer's occupational nurse provided her with an ice pack to take down the swelling and that the nurse advised her to take photos.

56 The Panel has carefully considered all evidence with respect to the force the supervisor used when she made contact with the worker's left upper arm, as well as whether the supervisor's contact with the worker's left upper arm left any marks. The Panel finds that on a balance of probabilities, the supervisor's contact with the worker's left upper arm was between a touch and a grab and that it was not a pull or a yank. The Panel prefers the worker's initial reporting to the Board Case Manager on January 22, 2014 wherein she reported that her supervisor grabbed her arm, as well as the evidence that the accident employer's occupational nurse

provided to the Board on February 24, 2014. This evidence is contemporaneous and at that time, consistent. The Panel finds that had a push or a yank occurred, the worker would have immediately reported that consistent detail to all individuals she complained to. The nature of the worker's subsequent reporting and evidence is not consistent with her initial reporting and as such, the Panel prefers the initial, contemporaneous evidence the worker provided to the occupational nurse and Board.

57 In addition, the Panel finds that on the balance of probabilities, the supervisor's contact with the worker's left upper arm did not leave any kind of mark nor did the worker sustain any bruising, redness or swelling. The Panel prefers the evidence of the occupational nurse who examined the worker contemporaneously and the evidence of the second supervisor who advised the Board that even immediately after the incident, there did not appear to be any markings, redness, swelling or bruising on the worker's left arm. Further, the photographs in evidence show that within 10 hours of the incident, the worker's arm appeared to be without visual defect. That said, the Panel is mindful that a mark on the skin is not necessarily indicative of the force behind a touch, grab, pull or any other kind of contact and its finding in this regard would not have impacted its finding that the supervisor did not pull or yank the worker's left arm.

58 Second, the Panel finds that the November 22, 2013 touch on the arm was not a personal work-related injury.

59 With respect to whether the worker sustained a personal work-related injury, Mr. Oliverio submitted that immediately following the November 22, 2013 incident, the worker's medical care and treatment increased. The worker also testified that prior to the November 22, 2013 incident, she was essentially asymptomatic with respect to her pre-existing condition in the 1988 Claim. In fact, the worker testified that following her September 15, 2005 surgery as it related to her 1988 Claim, she was "fine." The surgery worked and she did not feel any pain. She also did not take any medication, including the Tylenol No. 3's that she had available.

60 However, in his cross questions, Mr. O'Dwyer explored the worker's numerous references to "chronic pain" in the Case Record. For example, in her January 15, 2014 Form 6, the worker wrote that "[she] live[d] in chronic pain normally, and ... sought medical attention from the beginning because of additional severe pain." Further, on January 22, 2014, the worker advised the Board Case Manager that she did not seek immediate medical attention outside of her visit to the accident employer's occupational nurse because "she live[d] in chronic

pain and wanted to wait to see her own medical practitioner." In response to these references, the worker testified that what she meant was that without her denervation surgeries, she would live in chronic pain. The worker testified that the effects of the denervation surgery last for approximately seven years. The worker also testified that she did not require Tylenol No. 3's prior to November 22, 2013 because she was "accustomed to living in pain and [the] surgeries have made it so [she] does not need to take them."

61 The Panel finds that on a balance of probabilities, it is more likely than not that the worker was beginning to experience an increase in symptoms either before November 22, 2013 or around the time of the November 22, 2013 incident.

62 In support of this finding, the Panel notes that the worker testified that the effects of her denervation surgery generally lasted for seven years. Further, a July 12, 2005 report from Dr. G. Vanderlinden, neurosurgeon, stated:

> ...There is tenderness on palpating the left paraspinal muscles in the cervical and upper thoracic area ....
>
> I don't think that there is a recurrence of her left thoracic outlet syndrome but there is a recurrence of the left cervical/thoracic facet joint strain. This had responded well to the facet denervation in 1996 and it is quite common for the articular nerves to regrow and the pain recur in five or six years. In view of this, I have recommended that we repeat the facet denervation on the left from about C4 to T2 and try to get it done in mid-September...

63 Further, the Panel notes that although the worker sought medical care from the accident employer's occupational nurse on November 22, 2013, she did not seek follow-up care or further treatment until she went to a walk-in clinic approximately five days later. She testified that she was unable to get an appointment with Dr. Yau until December 5, 2013. Although the Panel finds that this delay is not substantial, nor is it fatal to her claim, the Panel finds it does support a finding that the worker's subsequent symptoms were not substantially different from what she was already experiencing prior to November 22, 2013 and/or it was possible the worker recognized that the symptoms were related to her previous condition for which she was due for another denervation procedure. The worker did not seek emergency treatment. She took the Tylenol No. 3's that she had available and waited to see her family physician.

64 In light of the Panel's finding that the worker's supervisor touched or grabbed the worker's left upper arm but did not pull or yank it and that the worker's increase of medical care and treatment following November 22, 2013 was related to her pre-

existing conditions and not as a result of a new injury, the Panel further finds that the worker did not sustain a personal work-related injury on November 22, 2013.

65 Third and finally, the Panel finds that the worker's subsequently diagnosed C3-4 disc herniation and C4 nerve root compression is not compatible with the events of November 22, 2013.

66 It is clear from various diagnostic imaging and medical reports that the worker has a back condition and that the back condition is progressing. Specifically:

- An April 19, 2012 x-ray report noted the worker has generalized degenerative discogenic disease from C3 to T1, moderately severe at C3-4 and C5-6 and mild at C4-5, C6-7 and C7-T1. There was also narrowing of intervertebral foramina bilaterally at C3-4, C5-6 and C6-7.

- An April 20, 2014 MRI report noted degenerative changes most pronounced at C4-5 with mild cord compression.

- An April 25, 2014 report from Dr. G. Moddel, neurologist noted the April 20, 2014 MRI showed some narrowing at C3-4 but that there was no evidence of spinal cord pathology.

- Following a December 3, 2014 injection the worker experienced an increase of symptoms. A December 12, 2014 MRI report noted spinal stenosis at C3-4, mild multilevel degenerate changes and a normal spinal cord.

- A June 24, 2015 report from Dr. Santaguida noted "on imaging, [the worker] has a right paracentral disc herniation at three-four, which is leading to some compression of the right C4 nerve root.

67 Mr. Oliverio submitted that the November 22, 2013 incident significantly contributed to the worker's herniation and cord compression. In support of his position, he relied upon a 1955 article published by the Clinical Orthopaedics and Related Research journal which stated:

> The whip-lash type of injury, as described by Davis, is responsible for the greatest percentage of cervical nerve root irritations. This type of injury is caused by a sudden forceful movement of the neck in any direction with a sudden recoil in the opposite direction. Such injuries cause typical sprains of varying degrees with subluxation of the articular processes and stretching, tearing or avulsion of, and varying amounts of hemorrhage into, the ligamentous and capsular structures. Automobile accidents are responsible for the greatest number of such injuries. However, falls, blows on the head or

chin, a sudden forceful pull on the arms, and many other apparently trivial injuries may cause a whip-lash, or sudden "popping" of the neck.

68 The Panel finds that in light of its findings that the worker's arm was touched or grabbed and not pulled or yanked and that there was no evidence of significance specific to this worker's case to support that the worker recoiled with any part of her body at the time of the incident, as well as the fact that the article was published in 1955 and there is no information on how Davis described "the whip-lash type injury," the Panel finds that the article ought to be given little weight in determining compatibility in this particular case.

69 The Panel notes that on June 23, 2014, Dr. Yau opined that on November 22, 2013, the worker "suffered a twisting trauma to her neck and left shoulder. This had the effect of aggravating the facet injury under [the 1988 Claim] ... The substantial increase in pains happened after the incident on 22 November 2013, confirming a cause and effect relationship between the injury and her current disability." That said, the Panel gives Dr. Yau's opinion little weight as it relates to there being a new personal work-related injury or compatibility. Not only is Dr. Yau's opinion seemingly based on his understanding that the worker's left arm was twisted, it appears to also be based on an increase of pain. The Panel has previously found that the worker's left arm was touched or grabbed and not pulled, yanked or twisted. The "twisting" mechanism is also inconsistent with the worker's own contemporaneous reporting of the claimed accident history. Further, the presence of pain does not, in and of itself, establish compatibility between an event and a medical diagnosis.

70 Other medical reports, such as an April 14, 2014 report from Dr. K. Rod, pain management, and Dr. Santiaguida's June 24, 2015 report, do not provide a medical opinion on compatibility between the worker's various diagnoses and the November 22, 2013 incident.

71 Finding that there are no medical opinions of significance in the Case Record, the Panel has considered the Tribunal's Medical Discussion Paper, "Neck and Arm Pain and Related Symptoms: Cervical Disc Disease" by Dr. J.F.R. Fleming, neurosurgeon, and Dr. J. Finkelstein, orthopaedic surgeon, which was available in the Case Record. A Panel is not bound by any information or opinion expressed in a discussion paper, but may consider and rely on the general medical information provided by the paper. Every Tribunal decision must be based upon the facts of the particular appeal. It is always open to the parties to rely upon a discussion paper, or to distinguish or challenge it with other evidence. The Medical Discussion Paper states, in part:

> Whiplash associated disorders occur following rear impact motor vehicle accidents (MVA). These occur from sudden flexion/extension movements of the head following impact leading to soft tissue inflammation of the cervical spine ...
>
> . . .
>
> Soft tissue injuries can result from any sudden unexpected movement of the head which can wrench or strain structures such as muscles or ligaments in the cervical spinal column, and these injuries will normally heal within a few weeks. It is very rare for such an injury to cause rupture or herniation of any intervertebral disc, with compression of a nerve root causing nerve root pain.

72 Further, although Mr. Oliverio argued that the worker's April 19, 2012 x-ray did not indicate a pre-existing herniation or compression and thus, it was caused by the November 22, 2013 incident, I find that the x-ray did suggest there were degenerative changes which could have naturally progressed.

73 Finally, the Panel notes that the worker likely holds an honest belief that she was injured while at work on November 22, 2013 and that the incident significantly contributed to her claimed neck or shoulder conditions. However, this honestly held belief is not enough to overcome a lack of supporting evidence. In considering the medical evidence in the Case Record, as well as the Medical Discussion Paper's commentary regarding the rarity of any unexpected head movement (of which there is no evidence of in this appeal) causing a rupture or herniation of a disc with nerve root compression, the Panel finds there is no medical compatibility between the November 22, 2013 incident and the worker's subsequently diagnosed disc herniation and nerve compression.

74 Therefore, the Panel finds that the November 22, 2013 incident is not a workplace accident pursuant to the applicable legislation and policy. There was no personal work-related injury and the November 22, 2013 incident did not significantly contribute to the worker's claimed neck or shoulder conditions. The worker's appeal for initial entitlement to her neck and shoulders in Claim 1 is denied.

DISPOSITION

75 The appeal is denied.

76 For Claim 1, the worker's appeal for initial entitlement for a left shoulder and neck injury as having arising out of and in the course of employment on November 22, 2013 is denied.

77 For Claim 2, the doctrine of estoppel applies so as to preclude the worker from advancing her appeal for initial entitlement for a thoracic spine injury as having arisen out of and in the course of employment on December 10, 2014.

Footnotes

1 [2013] 2 S.C.R. 125.

2 [2001] 2 S.C.R. 460.