

2016 ONWSIAT 3300
Ontario Workplace Safety and Insurance Appeals Tribunal

Décision no. 2018/16

2016 CarswellOnt 20205, 2016 CarswellOnt 20206, 2016 ONWSIAT 3300

DECISION NO. 2018/16

J. Frenschkowski V-Chair

Heard: August 3, 2016

Judgment: December 5, 2016

Docket: 2018/16

Counsel: Y. Côte, parajuriste, for the worker

Subject: Employment; Public

Headnote

Labour and employment law

J. Frenschkowski V-Chair:

(i) Introduction to the appeal

1 On October 18, 2011, the worker filed a Report of Injury ("Form 6"), advising that she had sustained an injury to her left knee on September 21, 2011, while in the course of her employment as a customer service agent at in an airport.

2 The Appeals Resolution Officer ("ARO") decision of November 29, 2013 concluded that the worker did not have initial entitlement for a left knee injury, because the nature of the injury was not compatible with the mechanism of the accident. The worker appeals this decision to the Workplace Safety and Insurance Appeals Tribunal (the "Tribunal") and seeks initial entitlement for a left knee injury.

(ii) Background

3 The worker has been employed as a customer service agent for an airline at an airport since 1987. She was 57 years old and had sustained a number of compensable injuries over the course of her career at the time of the incident on September 21, 2011. She was working as a kiosk agent at the time of the events in question.

4 The worker's Form 6 of October 18, 2011, described the incident of September 21, 2011 in the following manner:

At the kiosk, as I went to bend down to p[ick]up a passport that a psgr dropped on the floor, I couldn't get up.

5 The worker also wrote that her work involved standing on a ceramic floor for long periods of time and that this activity had become increasingly difficult for her, particularly in the previous 7-8 year period before the claimed accident.

6 The worker was seen in the emergency room of a local hospital on September 21, 2011. A Physician's Report of Injury ("Form 8"), completed by Dr. Khaul on that date, reported a mechanical strain injury to the worker's left knee, as well as a diagnosis of tendonitis. The worker's primary health care professional, Ms. Ménard, a registered nurse practitioner,

submitted a Form 8 dated October 12, 2011, in which she advised that she had seen the worker on September 28, 2011, as well as October 11, 2011. She indicated that the worker was:

Standing for her job at work, repetitive movements — bending, twisting. Knee (L) « locked » while bending — Ø trauma

[Translation]

7 Ms. Ménard queried whether the worker might have a tear of the meniscus or the ACL, and advised that the worker had been referred for an MRI.

8 The Eligibility Adjudicator ("EA") contacted the worker and recorded their initial conversation of October 20, 2011, concerning the incident in Board Memorandum No. 1, dated October 25, 2011. He wrote that:

- IW states she has never had any left knee issues in the past
- Did not experience any left knee symptoms prior to the incident on 21Sept11
- IW works on her feet, and states she has precautions of no prolonged standing related to a prior compensable claim
- Her position is to help ... passengers at the self-check in kiosks and at the main check-in counter at the ... airport
- States that there was no change to her job duties on 21Sept11 or prior to 21Sept11
- Bent at the knees in order to reach a passport that had been dropped, did not go all the way down to the floor, only low enough to reach the passport with her hand, there was no awkward movement
- States when she tried to stand, her knee "blocked"
- Attributes the left knee issues to her regular job duties which require standing and walking on the ceramic floor ...

9 The EA denied the worker's claim by decision dated November 15, 2011.

10 An MRI of the worker's left knee was performed on December 12, 2011. All of the ligaments of the knee were reported to be intact. There was evidence of:

... moderate fraying of the medial meniscal body. In the mid- to central aspect of the mid-body there is a tiny vertically on the fissure extending from the superior surface to the undersurface with a tiny adjacent undersurface tear. There is also evidence of marked fraying of the superior and inferior surfaces of the more anterior body which are borderline for small tears.

There is evidence of mild myxoid degeneration of the medial meniscus but no tear is identified.

... There is evidence of a tiny amount of subchondral marrow edema in the lateral trochlea. There is mild thinning of the overlying articular cartilage.

Impression:

1. Myxoid degeneration medial meniscus.
2. Tiny lateral meniscal tear with associated fraying.

3. Trochlear chondropathy.

11 The worker sent a letter to the EA, dated January 16, 2012, in which she objected to the decision to deny her claim. She pointed out that the EA had not awaited receipt of the MRI results before rendering a decision, and also attempted to clarify some of the statements she had made concerning the accident and injury. The worker wrote that she did not bend down to pick up the documents, but knelt down and, when she found she was unable to get back up on her own, she held onto the kiosk in order to raise herself. The worker also denied that standing and walking on a ceramic floor caused her injury, but believed that this might have contributed to it.

12 As her claim for benefits was refused by the Board, the worker applied for disability benefits through the employer's private health care insurance plan. She was referred to Dr. Tadros, an orthopedic surgeon, for an independent medical evaluation, and was examined on October 19, 2012. In his report, dated October 22, 2012, Dr. Tadros provided his understanding of the events and responded to a number of questions posed by the disability claims manager with the insurer:

BACKGROUND

On September 21, 2011, [the worker] was helping a passenger who had dropped his passport and other objects on the floor.

[The worker] crouched down to pick up the passport and made a twisting movement while still squatting in order to pick up the other things. At that moment she felt acute pain in the medial aspect of her left knee.

...

Since the pain persisted, [the worker] had a magnetic resonance imaging study of her left knee on December 12, 2011. This examination showed degenerative impairment of the medial meniscus with a fissure at the middle horn and a tear. The radiologist noted intra-articular effusion and degenerative changes of the meniscus.

Given this description of degenerative changes, the injury was denied by the CSST.

...

1. Given your field of specialization, please provide us with your principal diagnosis and clinical impression. Are there any other medical problems that are affecting the plan member's recovery?

[The worker] is complaining of what is likely a torn left medial meniscus. I could not identify any other medical problems that might be affecting [her] recovery.

2. Given your field of specialization, what symptoms is the plan member presenting with? Based on your exam findings, are the symptoms corroborated by the clinical pathology?

[The worker] reports pain in the medial aspect of the left knee. This pain appears primarily when she is in a standing position or walking. This pain is corroborated by my clinical findings.

3. Given your field of specialization, did you observe any limitations or restrictions of functional capacities at the time of your examination?

My examination showed slight atrophy of the left quadriceps compared with the right. Range of motion, as well as sensation, were normal.

[The worker] complained only of pain on palpation of the medial joint line.

4. Given your field of specialization, do you recommend continuing treatment that could promote the plan member's recovery?

It is my opinion that the physiotherapy treatments may be stopped. The recommended treatment is a referral to orthopedics for an arthroscopy of the left knee, more or less medial meniscectomy.

5. Given your field of specialization, do you have other treatments to recommend that could promote the plan member's recovery?

See above.

6. Given your field of specialization, are additional medical examinations necessary?

There is no additional medical examination necessary.

7. On the basis of your examination, please provide details concerning factors that may have caused or prolonged the illness, if applicable, including factors related to the work environment.

In my opinion, the factors prolonging the illness are the lack of resources and the wait time to be seen by an orthopedic surgeon. These factors are causing a delay in treatment and thereby an extension of the disability period.

8. According to what [the worker] indicates, the injury is directly related to an event that occurred when she had to kneel down to pick up documents. At that time, she apparently felt intense pain when she stood back up. From the documents provided and on the basis of your examination, do you believe there is a relationship between the injury and the event that occurred at work?

According to the description given by [the worker], when she was squatting down she made a twisting movement with her torso in order to pick up objects. It was at that moment that she felt acute pain in the medial aspect of her left knee.

In my opinion, this description is likely in relation to my diagnosis of a torn left medial meniscus.

13 The worker underwent surgery to her left knee in November 2014. The surgical report was not included in the case record. Up until the date of the appeal hearing, the worker had not returned to work with the accident employer.

(iii) Law and policy

14 Since the worker claimed to be injured in 2011, 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.

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

- (a) a willful 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;

16 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.

17 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*.

18 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*.

19 The following policies are relevant to the decision on the issues in this appeal:

- *Operational Policy Manual (OPM) Document No. 11-01-01, "Adjudicative Process"*;
- *OPM Document No. 15-02-01, "Definition of Accident"*.

20 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."

21 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?

(iv) Analysis

22 In order to be granted initial entitlement, the worker must demonstrate that the events of September 21, 2011, are compatible with the development of her left knee condition and, more likely than not, made a significant contribution to the worker's left knee condition.

23 In his report of October 22, 2012, Dr. Tadros concluded that the worker's accident "description is likely in relation to my diagnosis of a torn left medial meniscus". The description of the incident provided by Dr. Tadros in his report is one in which the worker was squatting down and twisted at the torso. Dr. Tadros' opinion regarding compatibility is, therefore, based on the actions of squatting and turning at the waist. The worker confirmed that she was squatting, and not kneeling on the ground, as described in her letter of January 16, 2012, and that she turned slightly, to pick up the documents. She stated that she could not get up and felt a sharp, burning sensation, in her left knee.

24 The worker's testimony regarding the events of September 21, 2011, and the account in Dr. Tadros' report, differ from the prior versions of the incident. In the weeks and months following the incident, the worker provided her account of the incident on numerous occasions, the first time being at the emergency room on the day of the incident. She then

sought treatment from her nurse practitioner, Ms. Ménard, on October 11, 2011. In her Form 8, Ms. Ménard notes that she had previously seen the worker on September 28, 2011, for the left knee. The worker provided her Form 6 on October 18, 2011, reported the incident to the employer, and then spoke with the Eligibility Adjudicator on October 20, 2011, as recorded in Board Memorandum No. 1. After her claim was denied, she provided a clarification of the events in her letter dated January 16, 2012. None of these accounts of the incident refer to a twisting motion while the worker was squatting to retrieve the documents that had been dropped. Dr. Tadros' report, written over a year after the incident, is the first account in which a twist, or a pivoting motion, is mentioned.

25 The worker testified that she likely forgot about this detail, due to the passage of time between the incident on September 21, 2011, and her receipt and completion of the Form 6 on October 18, 2011. She held her supervisor responsible for this omission, as the supervisor did not complete the Form 7 on the date the incident occurred.

26 The worker recited the events of September 21, 2011, on numerous occasions in the subsequent months. With each reiteration of the events, the possibility of remembering the detail of the twisting motion presented itself, however, there is no mention until approximately 13 months afterwards. To further compound matters, the worker testified that she did not recall that she turned at the waist, until Dr. Tadros explained to her that a meniscal tear would not likely result from squatting, but that it could arise from a squat with a twist. It was at this point, the worker testified, that she recalled that she had twisted in order to gather some of the documents that were on the ground.

27 I am not able to accept that the worker twisted while she was squatting to pick up the documents. This version of events was provided more than a year after the incident and, seemingly, in response to the information provided by Dr. Tadros. I prefer the narrative provided in the documents between October 18, 2011 and January 16, 2012, and find this to be a more accurate reflection of the events of September 21, 2011. These accounts are consistent and more contemporaneous with the episode in question. I therefore find that the worker did not twist while she was squatting and picking up the documents.

28 Dr. Tadros' opinion regarding compatibility is based on the action of squatting and twisting, immediately preceding the onset of the worker's left knee pain. I have found that the worker did not twist or turn, and am therefore unable to accept his opinion in the matter of the compatibility of the diagnosis with the accident history.

29 Even had I accepted that the worker had turned at the waist while picking up the documents, I would have found that compatibility between the diagnosis and accident history was not established.

30 Dr. Tadros' opinion that the accident "description is likely in relation to [his] diagnosis of a torn left medial meniscus" is ambiguous and speculative. Entitlement is not granted based on the possibility or likelihood that works duties or an accident contributed to a worker's condition. Entitlement is only granted if it is more likely than not that this is so, or if the evidence is equally balanced and the statutory benefit of the doubt applies.

31 Further, although Dr. Tadros indicates that there may be a relationship between the events of September 21, 2011, and the torn meniscus, it is not clear from his report that the relationship is a causal one. The worker experienced an onset of pain at work, but it is not sufficient under the WSIA to establish that an injury occur in the course of employment. It must also arise out of the employment, which means that the work must be a material cause of the injury.

32 Neither the activity of squatting and twisting at the waist, or squatting alone, is sufficient to be considered a significant contributing factor in the injuring process. Tribunal decisions have allowed entitlement when a worker suffered a meniscal tear due to a twisted knee, however, that is not the case here, as the worker claims to have twisted at the waist, while in a squatting position. It is not evident how such a movement could have resulted in a torn meniscus.

33 The MRI of December 12, 2011 revealed that the worker had a degenerative condition of the meniscus in her left knee. The presence of fraying in both the medial and lateral menisci, small surface tears, and a degeneration of the articular surface of the trochlea, were noted in addition to a small tear in the lateral meniscus. The Medical Discussion

Paper¹ entitled "Knee Conditions and Disability", prepared by Dr. John Cameron, orthopedic surgeon, and Dr. Marvin Tile, orthopedic specialist (contributing editor) for the Tribunal in August 2013 distinguishes between "two general types of meniscal tears: acute tears, which generally occur in younger people after trauma, and degenerative tears, which typically occur in older people with minimal or no trauma". The authors go on to note that degenerative tears "may be considered as age related changes that are seen in other joints and in the spine" and that they "may cause symptoms of pain, locking, giving way and/or swelling or they may be asymptomatic".

34 Given the presence of degenerative changes present in the worker's left knee, and a purported injuring mechanism that was minor in nature, I find that the act of squatting and twisting at the waist, was not a significant contributing factor in the development of the tear in the meniscus in the worker's left knee.

35 In conclusion, compatibility of the diagnosis to the accident history has not been established. As such, the five criteria required for an allowable claim under OPM Document No. 11-01-01 have not been satisfied and, accordingly, there is no initial entitlement for a left knee injury arising from events on September 21, 2011.

36 The appeal is denied.

DISPOSITION

37 The appeal is denied.

Footnotes

1 Tribunal medical discussion papers provide general information about a medical issue. They are intended to provide a broad and general overview of a medical topic that is frequently considered in Tribunal appeals. Each medical discussion paper is written by a recognized expert in the field, who is asked to provide a balanced view of the current medical knowledge on the topic. Discussion papers are not peer reviewed. Discussion papers do not represent the view of the Tribunal. A Panel may consider and rely on the medical information provided in a discussion paper, but the Tribunal is not bound by an opinion expressed in a discussion paper in any particular case. Every Tribunal decision must be based on the facts of the particular appeal. Tribunal adjudicators recognize that it is always open to the parties to an appeal to rely on or to distinguish a medical discussion paper, and to challenge it with alternative evidence.