

2017 ONWSIAT 303
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 3084/16

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DECISION NO. 3084/16

S. Darvish V-Chair, M. Falcone Member, K. Hoskin Member

Heard: November 28, 2016

Judgment: January 26, 2017

Docket: 3084/16

Counsel: K. Jeffery, for Worker

Employer — in person

Subject: Employment; Occupational Health and Safety; Public

S. Darvish V-Chair, M. Falcone Member, K. Hoskin Member:

(i) Introduction

1 The worker appeals a decision of the ARO, which concluded that the worker did not have initial entitlement for traumatic mental stress ("TMS") and strep throat. As a consequence, the worker was not entitled to loss of earnings ("LOE") benefits from August 18, 2011 and health care benefits.

2 At the outset of the hearing, Mr. Jeffery advised that the worker was withdrawing the issue of initial entitlement for strep throat. The employer had no objection to the withdrawal of this issue. The Panel granted the worker's request to withdraw the said issue. Any attempt to renew the appeal with respect to the issue of initial entitlement for strep throat will be subject to the time limit provisions set out in subsection 125(2) of the *Workplace Safety and Insurance Act, 1997* (the "WSIA").

(ii) Issues

3 The issues under appeal are as follows:

1. Does the worker have initial entitlement for traumatic mental stress based on an alleged incident at work on August 14, 2011?

2. If initial entitlement is granted, does the worker have entitlement for health care benefits and LOE benefits from August 18, 2011?

(iii) Law and policy

4 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.

5 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;

6 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.

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

8 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*.

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

10 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."

11 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

12 The appeal is denied for the reasons set out below.

13 The worker was employed as a customer sales and service agent for an airline company. She worked at the airport. The worker stated that her job duties required that she deal with customers, who were mainly airline passengers, at the check in counters and at various gates. The worker claimed that on August 14, 2011, at approximately 4 o'clock in the afternoon, she was working at one of the airport gates where passengers connect from international flights to USA

flights. She was checking passenger passports, when a female passenger approached her and intentionally coughed and spit all over her face.

14 The worker testified that there was a long line up of passengers that afternoon because there had been some delays caused by inclement weather. She was checking boarding passes and passports for passengers connecting to other flights. The worker stated that a female passenger, who had been standing in line, reached the front of the line and handed her passport to the worker. The worker stated that as she was checking the passenger's passport, the passenger coughed and spit all over the worker's face. The worker could not recall at the hearing how often the passenger coughed, although an email on file from the worker from August 22, 2011 indicated the passenger coughed approximately three times. The worker stated that she could not recall anything about the passenger because her head was down the entire time checking passports. The worker stated that she had her head down the entire time because she was checking passports and she did not look at the passenger until after the incident. The worker claimed that the passenger coughed and spit intentionally because she must have been angry about the delay and long line up. The worker stated that she and the passenger did not exchange any words prior to the incident. The worker claimed that the passenger intentionally gathered saliva in her mouth, filled her mouth full of saliva, and then intentionally spit the saliva onto the worker's face.

15 When the worker was asked how she determined that the passenger spit on her intentionally, the worker stated that other passengers standing in line behind this woman told her that it was done on purpose. The worker testified that after the incident she called her manager and airport police. The passenger told airport police that she had merely coughed. Airport security and the manager did not pursue the matter further and they allowed the passenger to board her flight without incident.

16 The worker went home early after the incident on August 14, 2011. She reported for work on August 15, but she was not feeling well. The worker claimed that she developed post-traumatic stress disorder ("PTSD") as a result of this incident. She testified that she had symptoms of shaking, heart racing, insomnia, and nightmares of the incident. The worker stated that she has not worked since August 14, 2011 because of her severe psychological symptoms arising from this incident.

17 The worker also stated that she developed a throat infection as a result of the spitting. The worker claimed that her face became swollen and red two weeks later, on or about August 30 or 31, 2011.

18 Having considered the evidence before us, the Panel finds that the evidence fails to establish that the alleged workplace accident, as described by the worker, in fact occurred. The Panel finds there was no proof of accident. The Panel was not persuaded by the worker's testimony that this passenger intentionally coughed and spit on her face.

19 First, the worker and the passenger did not speak one word to one another prior to the alleged incident. The worker claims that the passenger was angry due to the delay and long line up, but the worker could not know this if she had not even spoken to the worker. This is just conjecture on the worker's part. Second, the worker stated that other passengers standing in line behind this woman told her that the act was intentional. We find this was not plausible. Other passengers in the same line would have been standing behind this woman. There was no evidence of those other passengers having spoken to this woman and there was no evidence that these other passengers saw this woman's face since they would have been standing behind her in line. We are not convinced that these other unidentified passengers would have known that this woman intentionally coughed and spit on the worker.

20 Third, the worker admitted that she had her head down the entire time because she was checking passports. If the worker's head was down, as she stated, then the worker would not have seen the passenger's face and could not have known if the passenger intentionally gathered saliva in her mouth in order to spit it on her face. Furthermore, if the worker's head was down, as she stated, then spit could not have landed "all over" the worker's face, it would have landed on the top part of her head and hair.

21 Fourth, we note that there is no indication that the passenger in question was charged with any offensive act. Materials on file from the employer indicated that police were called and they spoke to the passenger in question. However, it was determined that the alleged incident did not warrant any charges or further investigation. The passenger was permitted to continue with her travel that day. In fact, as the worker testified, the police rushed the passenger to her flight to ensure that she did not miss the flight. Had the passenger actually assaulted the worker by spitting on her, it would have been very unlikely that the police would have allowed the passenger to board a plane. The worker also claimed to have witness reports of the incident, but none of these eye witness reports were produced in the file materials before us. Even if there were witness reports, the fact remains that the police were called but they determined that the incident was not significant and no further investigation was warranted.

22 Thus, the Panel finds that the evidence falls significantly short of establishing, on the balance of probabilities, that the passenger in question intentionally coughed and spit on the worker. Accordingly, there is no basis for entitlement to traumatic mental stress.

23 Despite medical notes in 2013 and in 2016 from the worker's family physician and psychiatrist in Vermont, indicating that the worker had PTSD as a result of a workplace incident, the Panel is not persuaded that the incident as described by the worker led to her developing PTSD or any other psychological impairment. First, we note that these medical opinions were based on the worker's account that she was "assaulted". Thus, the medical opinions are based on the erroneous factual underpinning that the worker was in fact assaulted at work by an unhappy customer. As noted above, this was not the case. There was no evidence whatsoever that the worker was in fact the subject of an assault at work. Therefore, we did not put weight on these medical opinions.

24 Furthermore, evidence indicated that the worker had pre-existing psychological difficulties and she was taking medication for psychological symptoms up to six weeks prior to workplace incident. The worker also testified that she had pre-existing diagnosed fibromyalgia, for which she had taken medication.

25 The Panel also found instructive a document on file from the Aviation Business Gazette, dated September 2013, which indicated that the worker took flying lessons and she exceeded high educational, licensing, and medical standard established by the Federal Aviation Administration ("FAA"). Another document from the FAA indicated that the worker was issued a student pilot license in September 2011. This evidence indicated to us that it was not likely the worker had any psychological impairment, let alone the significant PTSD symptoms that she described, given that she passed a medical examination in order to take flying lessons and become a licensed student pilot.

26 The worker denied having a pilot's license and claimed that the document was a mistake. She relied on a letter from a flying school in Vermont, USA, which stated that the worker stopped taking flying lessons in 2011 due to side effects of medication that she was taking at the time. The Panel considered the letter from the flying school, but prefers the evidence that came directly from the FAA, which indicated that the worker had a license. Even if the worker temporarily stopped taking flying lessons in 2011, it appeared that she continued with her lessons and went on to obtain a license. We further note that the worker testified she was not taking any medication in September 2011. Thus, the worker's testimony contradicts the letter from the flying school.

27 The Panel is therefore not convinced that the worker had PTSD that arose from the workplace incidents that she described.

28 In support of the worker's claim, Mr. Jeffery relied on *Decision No. 259/08*, in which the Tribunal granted entitlement for traumatic mental stress to worker. We reviewed that case, but found it to be distinguishable from the facts of the case before us. In *Decision No. 259/08*, someone verbally abused and spit on the worker. The perpetrator was charged and convicted with assault under the *Criminal Code* with regard to the spitting. However, in the case before us, the alleged perpetrator was neither charged nor convicted of spitting on the worker. We note that although airport police investigated the matter, they did not lay charges on the woman accused of spitting. There was no charge for assault

and there was certainly no conviction for assault or any other criminal act. Thus, the facts of the case before us are significantly different than the facts in *Decision No. 259/08*. Contrary to Mr. Jeffery's submission that the passenger committed a criminal act of assault and battery when she spit on the worker, there was no evidence whatsoever of any assault or any other criminal act. On the foregoing basis, we find that *Decision No. 259/08* is not similar to the facts of the case before us and its findings do not apply to the present case.

29 Mr. Jeffery also submitted *Decision Nos. 410/13* and *344/10* regarding an employer's obligation to offer suitable modified duties. Given our finding that the worker did not have initial entitlement to benefits for traumatic mental stress, it follows that the worker is not entitled to any other benefits including LOE benefits. Thus, these two decisions dealing with modified jobs do not apply to the case before us.

DISPOSITION

30 The appeal is denied.

31 The worker withdraws her appeal with respect to initial entitlement for strep throat. Any further appeal on these issues is subject to the time limit provisions set out in subsection 125(2) of the WSIA.