**WCAT # 2008-298-AD**

# NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: **[*] (Worker)**

Participants entitled to respond to this appeal: **Inverness County Home Care Society (Employer)** and

**The Workers' Compensation Board of Nova Scotia (Board)**

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## APPEAL DECISION

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Representatives: Anthony Magliaro for the Worker

Form of Appeal: Oral hearing, held on January 23, 2009, at Wagmatcook, NS

WCB Claim No.(s): [*]

Date of Decision: January 30, 2009

Decision: The appeal of the April 16, 2008 Board Hearing Officer decision is denied, according to the reasons of Appeal Commissioner Glen Johnson.

**CLAIM HISTORY AND APPEAL PROCEEDINGS:**

This is an appeal from an April 16, 2008 Hearing Officer decision. The Hearing Officer found that the Worker did not sustain a personal injury by accident arising out of and in the course of her employment. In particular, the Hearing Officer made two distinct determinations. First, the Hearing Officer found that the injury to the Worker's low back, which occurred at home on December 19, 2007 when she slipped on ice in her driveway, did not occur in the course of her employment. Second, the Hearing Officer determined that the Worker did not sustain a back injury while lifting a patient on the evening of December 19, 2007.

The Worker is a home care worker, who travels to patients' homes to provide them with home care and assistance. On December 19, 2007, when leaving for her first visit of the day, the Worker slipped in her driveway and fell on her tailbone. The Worker completed her schedule for that day; she experienced pain the next morning and called in sick. The Employer filed a WCB Accident Report dated December 21, 2007, which was prepared by the Employer. The early morning slip and fall was the only incident described in the WCB Accident Report.

A Benefits Administrator spoke with the Worker by telephone on December 27, 2007. At that time, the Benefits Administrator verbally advised the Worker that there would be no Board coverage because the injury occurred in her driveway as she was leaving for work.

The Worker filed a Notice of Appeal to Hearing Officer dated January 23, 2008, which apparently appealed the Benefits Administrator's verbal decision. The Notice of Appeal to Hearing Officer contains the first reference on file to an employment-related incident which allegedly occurred on the evening of December 19, 2007. As a result of the Notice of Appeal to Hearing Officer, the Benefits Administrator prepared a formal decision dated February 19, 2008. The Worker's appeal led to the April 16, 2008 Hearing Officer decision which forms the subject matter of this appeal.

This appeal was commenced by the filing of a May 16, 2008 Notice of Appeal with the Workers' Compensation Appeals Tribunal [the "Tribunal"].

This appeal proceeded by way of oral hearing, held at Wagmatcook, Nova Scotia, on January 23, 2009. The Worker was the sole participant to attend the hearing. The Worker provided testimony, while the Workers' Representative assisted the Worker by questioning her and by providing oral submissions. The Tribunal reviewed an invoice-type document respecting eight chiropractic treatments provided to the Worker by Dr. Dunn between December 31, 2007 and February 1, 2008. This document was not entered as an exhibit.

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This decision contains personal information and may be published. For this reason, I have not referred to the participants by name.

## ISSUE AND OUTCOME:

At issue is whether the Worker is entitled to recognition that she sustained a compensable injury on December 19, 2007.

The Worker's appeal is denied. The Worker did not sustain a compensable injury on December 19, 2007. First, the slip and fall in the Worker's driveway occurred prior to the Worker commencing her employment activity, and thus did not occur in the course of employment. Second, the entirety of the evidence does not support a finding that the Worker sustained a back injury on the evening of December 19, 2007.

## ANALYSIS:

I reviewed all the materials in the Board and Tribunal files. In addition, I reviewed the recording of the oral hearing. I will set out only those portions of the testimony, evidence and submissions most relevant to this decision.

Testimony

The Worker testified that she slipped on ice in her driveway at approximately 9:00 a.m. in the morning, prior to leaving for her first call of the day. She landed on her "hip side", but did not experience pain and was able to continue her shift. The Worker did not suffer any pain throughout her shift, which she was able to complete.

The Worker had a "tuck in" for 9:00 p.m. that evening. This involved helping a male stroke victim from his couch, to his wheelchair and then to his bed. The patient weighed anywhere from 130 to 150 pounds. Although the Worker indicated she has been trained in the proper mechanics of lifting a patient, she stated that this particular patient was like a "dead weight" because he could not move his leg and arm as a result of the stroke. The Worker immediately experienced pain, but she managed to complete the "tuck in" and returned to her home at approximately 9:30 p.m. The next morning she was in serious pain and could not work.

The Worker speculated that the "tuck in" caused the back pain, because she did not experience any pain following the slip and fall.

The Worker initially testified that she advised her supervisor the pain began when she lifted the patient. Almost immediately afterward, she suggested that she did not tell the supervisor and finally stated that she was not sure whether she told the supervisor about the evening visit incident.

The Worker merely reported the incident to her supervisor; she did not see or sign the Accident Report until recently, while preparing for the oral hearing. She does not know

why the Accident Report does not refer to the evening incident.

The Workers' Representative questioned the Worker with respect to the December 27, 2007 Contact Sheet prepared by the Benefits Administrator, respecting a conversation between the Worker and the Benefits Administrator. The Worker replied that she could not recall that conversation.

The Worker attended the hospital, and later received physiotherapy and chiropractic treatments. At the time I was reviewing the document concerning the eight chiropractic treatments, the Worker answered that she had benefitted from those treatments. In response to a question from the Tribunal, the Worker did not recall having an x-ray of her tailbone on December 20, 2007.

The Worker returned to work on January 28, 2008. However, soon afterward, she was diagnosed with a cyst on the brain. As a result, she underwent surgery on February 17, 2008, and further surgery in May 2008. The Worker has now returned to work as a home care worker. The Worker suggested that her memory, and recollection of events, may have been affected by the cyst and the brain surgery.

Submissions

The Workers' Representative indicated that the Worker was a credible witness, and that her testimony should be accepted. Further, the Worker played no role in filling out the Accident Report, and she did not sign the document. The Worker did describe the "tuck in" incident in detail in the Notice of Appeal to Hearing Officer, a document which she prepared on her own. The Workers' Representative suggested that the effects of the brain surgery may have impacted on the Worker's recollection of events and/or her reporting of the incident at the time it occurred.

With respect to the issue of whether the incident occurred in the course of employment, the Workers' Representative argued that the Worker's automobile was in essence her office, given that she travelled from patient to patient. This factor should be considered in assessing whether the incident occurred "in the course of" her employment.

Reasoning

I deny the Worker's appeal, substantially for the reasons set out by the Hearing Officer.

The December 27, 2007 Contact Sheet is of particular significance, and I will set out its contents herein:

> 1:18 p.m. - she telephoned back. She confirmed she was in her own driveway leaving for work at 8:25 a.m. when she fell and landed on her tailbone. She did not realize she hurt herself and continued to work. She

> worked her shift without any symptoms. When she awoke the next morning to get into the shower, she could not lift her leg and realized she could not work like that. She then reported to her employer on Dec. 20. She has been off work since that date. She had seen Dr. LaFrance on Dec. 20 and was prescribed Cyclobenzaprine 10mg. tid. She then saw Dr. Bennett on Dec. 27 and was also prescribed Naproxen 375mg. tid and told the take the other only HS. She also had x-rays of her tailbone on Dec. 20. Dr. Bennett advised off work three weeks.
>
> She called Baddeck Physio and cannot get an appointment until next week. She is seeing Dr. Dunn on Dec. 31 as instructed by Dr. Bennett.
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> I advised that because her injury occurred in her own driveway as she was leaving for the work in the a.m., no WCB coverage in this case. She understood. [Errors in the original].

The Benefits Administrator's notes were prepared contemporaneously with the conversation with the Worker. They were prepared by the Benefits Administrator for the purpose of carrying out her employment duties, which involved the investigation of the circumstances of incidents which could be work-related, and to render decisions with respect to those incidents. Consequently, the circumstances surrounding the preparation of the Contact Sheet would suggest that they are accurate and complete. Further, the notes on their face appear to be quite thorough.

The Worker's testimony suggests that she did not experience any pain following the slip and fall, but only after the "tuck in". If that were indeed accurate, one would reasonably expect that the reports at the time of the injury would have pointed to the "tuck in" and not the slip and fall as the probable cause of the Worker's pain. Yet, the Accident Report and the Contact Sheet refer only to the slip and fall incident. Moreover, the Contact Sheet indicates that x-rays were taken of the Worker's tailbone, which further suggests that the slip and fall was viewed by the Worker as the probable cause of her pain. In short, the materials prepared at a time contemporaneous to the incident refer only to the slip and fall, and there is no reference to pain while lifting a patient. Consequently, I find that the slip and fall incident was the only incident which occurred on December 19, 2007 which was perceived by the Worker is being a possible cause of her back pain.

In reaching this conclusion, I have reviewed the February 19, 2008 Contact Sheet concerning the Benefits Administrator's conversation with the Employer, as well as the Employer's March 6, 2008 correspondence to the Board. Although the Employer apparently supports the Worker's claim in the March 6, 2008 correspondence, there is no indication in either the correspondence or the Contact Sheet that the Worker advised of the incident which allegedly occurred during the "tuck in", at the time of the incident. If lifting the patient had indeed been the triggering event for the Worker's pain, one would have expected that incident and not the slip and fall to be the focus of the initial reports.

The Employer noted that the nature of the Worker's employment could have caused the Worker's pain, or exacerbated an injury sustained in the initial fall. I recognize that the Worker's line of work is one which often gives rise to back problems. However, in this appeal, there is no medical opinion evidence positing a link between the Worker's employment duties and the pain she experienced on the morning of December 20, 2007.

With respect to whether the Worker's injury occurred in the course of employment, I agree with the reasoning of the Hearing Officer and the Benefits Administrator. In fact, it is quite straightforward and clear that the slip and fall did not occur in the course of the Worker's employment. There was no special request by the Employer for the Worker to travel that day; rather, the Worker was starting her regular shift. The Worker slipped in her own driveway, even before entering her vehicle. Thus, although the Worker would have been acting in the course for employment had she been injured while driving or otherwise travelling to see patients (given the nature of her employment), in this instance the Worker never commenced the process of travelling on a public highway to see patients. Rather, she slipped on her own property prior to commencing her employment activities. Therefore, in the light of all the circumstances, the accident did not occur in the course of her employment.

**CONCLUSION:**

The Worker's appeal is denied. The Worker did not sustain a compensable injury on December 19, 2007. First, the slip and fall in the Worker's driveway occurred prior to the Worker commencing her employment activity, and thus did not occur in the course of employment. Second, the entirety of the evidence does not support a finding that the Worker sustained a back injury on the evening of December 19, 2007.

DATED AT HALIFAX, NOVA SCOTIA, THIS 30TH DAY OF JANUARY 2009.

Glen Johnson
Appeal Commissioner