2007-829

Representative: Aidan Sheridan, BPA
Decision No: 100001226829
Decision Type: Federal Court Order to Rehear - Entitlement Appeal
Location of Hearing: Charlottetown, Prince Edward Island
Date of Decision: 13 November 2007

The Board rules:

POST CONCUSSION SYNDROME

Entitlement granted in the amount of five-fifths for service with the Royal Canadian Mounted Police.
Section 32, *RCMP Superannuation Act*
Subsection 21(2), *Pension Act*

Entitlement effective 13 November 2004 (three years prior to the date of award).
Subsection 39(1), *Pension Act*.

Original signed by:
_____Member
R. MacCuish

Original signed by:
_____Member
Bonita M. Small

REASONS FOR DISSENT HEREINAFTER INCLUDED

INTRODUCTION

This claim is brought forward for a reconsideration hearing pursuant to an Order dated 14 June 2007 made by Hugessen J. of the Federal Court at Ottawa, Ontario, allowing an application for judicial review on consent of the parties in the matter of the Applicant and Attorney General of Canada (Respondent). The Order sets aside the Entitlement Appeal Decision of the Veterans Review and Appeal Board dated 11 July 2006 regarding the Appellant's appeal of an earlier Entitlement Review Decision of the Board dated 27 June 2005 under section 32 of the *RCMP Superannuation Act* and subsection 21(2) of the *Pension Act*.

Accordingly, the Veterans Review and Appeal Board constituted an Appeal Board of three of its members to re-hear the matter on reconsideration. Said hearing took place on 13 November 2007.

Submitted as additional evidence for this hearing is:

EA-S1:	The Appellant's Federal Court documentation (14 pages).
EA-S2:	A Medical Report from Dr. M.G. Penrose dated 12 November 2007.
EA-Attach-S1:	Federal Court of Appeal Decision - The Attorney General of Canada vs. Donald G. Wannamaker (10 pages).

FACTS

On 9 December 2003 the Appellant, arriving to commence her regular work shift, fell while exiting her personal vehicle in the parking lot of her RCMP detachment. As a result of the fall the Appellant struck her head; following which she suffered headaches, nausea, and vomiting, and presented for medical attention.

The following day, on 10 December 2003, she was given a CT scan, which was found to be normal; revealing an intact cranium vault with no intercranial abnormality.

On 15 December 2003 the Appellant was seen in follow-up and was assessed by Dr. Trina Mathison as having post concussion syndrome. She was given a note to be off work for one week, was prescribed a course of Demerol tablets as needed for her pain, and advised to follow-up if necessary.

On 22 December 2003 the Appellant was seen again, this time by Dr. Hein Peters, complaining of increased pain following physiotherapy treatments. She was, once again, assessed as having post concussion syndrome and advised to continue with Tylenol, Demerol and Gravol.

On 23 December 2003 the Appellant presented for medical attention again, and was advised to remain off work for an additional two weeks due to her ongoing concussion symptoms.

On 6 January 2004 the Appellant was seen a final time and advised the attending physician that although she continued to have a mild headache she was feeling better, had an increased activity level at home, and wished to return to work. The doctor assessed her as "concussion improved" and advised her to return immediately for another visit if any of her symptoms such as headache, nausea, or dizziness, returned.

In a Transit Slip dated 10 January 2004 the Appellant's Commanding Officer, Staff Sergeant C., wrote to the Health Services, "D" Division, as follows:

> The Appellant recently submitted to me two Accident Investigation Forms for Injuries sustained on 2003-11-28 and 2003-12-08. The incident on December 8 led to a substantial amount of sick leave and the Appellant returned to work on 2004–01-06.
>
> I was not previously advised of the accident on November 28 and I can only rely on the Appellant's word about the nature of the incident and the injury to her shoulder.
>
> With regard to the incident on December 8, it should be pointed-out that the Appellant was not on duty nor acting in a capacity as a peace officer when she slipped on the ice in the detachment parking lot. I concur that the parking lot was snow covered. It should be further stated that the height of the Appellant's pick-up truck was likely an aggravating factor. That is, the truck is rather high in proportion to the Appellant and, in my opinion, may have caused her some difficulty in negotiating her safe exit from the vehicle.

On 29 January 2004 the Appellant made her disability pension application for post concussion syndrome to the Department. In completing the "How is the claimed condition related to service?" section of the form, the Appellant wrote:

> On Dec. 9, 2003 I arrived at work and was getting out of my vehicle for work. I slipped on the ice in the parking lot and hit my head/neck on the running board of the truck. I'm unsure if I lost consciousness. By 10:30 p.m. I was sick and I was taken to the hospital for medical treatment. I had a cat scan done the next day. I have received physio therapy treatment, massage therapy treatment as well as chiropractic treatment.

On 10 July 2004, Dr. Mike Penrose completed a Physician's Statement for Veterans Affairs Canada, writing, in part:

> **Effects on everyday activities**
> Post-concussion syndrome. Severe for 1 week ... Gradually improved over 6 months.

Following consideration by the Department of her application for a pension, the Appellant was denied pension entitlement for the condition of post concussion syndrome in a Minister's Decision dated 5 November 2004.

In a letter dated 11 February 2005, Supt. R.T. R. states in part:

> On December 08th 2003, the Appellant incurred an injury in the parking lot of the RCMP Detachment. The Appellant advised that you were seeking clarification on whether this incident could be considered an "on duty injury."
>
> Within the Royal Canadian Mounted Police, our members are expected to be ready to commence their shifts on time, enabling our Force to maintain a continuity of service in our policing communities. This generally requires our members to arrive at their worksite, a minimum of 15 -20 minutes prior to their shift, so that they can obtain their firearm from their security lockers and review pertinent messages, such as "lookout" details of vehicles or persons of interest, preparatory to commencing their scheduled patrols.
>
> The Appellant's untimely accident occurred at 6:45 pm, fifteen minutes prior to the commencement of her scheduled tour of duty that evening. At that time, the Appellant was in uniform and preparing to enter our Detachment facilities, to prepare for the start of her shift. I have discussed this matter with S/Sgt C. and, in our opinion, the Appellant was effectively "on duty" at the time of her accident.

In a Medical Report dated 11 April 2005, Dr. M.G. Penrose states in part:

> I have followed the Appellant since her fall with head injury December 8th, 2003.
>
> At that time she fell backwards, striking the occipital part of her head on the running board of her trunk. She was unsure whether she had loss of consciousness. She was seen that evening in Emergency with a complaint of headache, nausea with vomiting, very tender area over the occipital part of the scalp as well as pain in the paracervical muscles. She was seen and had investigations including CT scan of the brain. She later had x-rays of the C-spine as well as an MRI and copies are included for your view.
>
> Since the injury, she has had ongoing continuous global headaches, and a very hyperesthetic area of the occipital part of the scalp. This area is very tender to lie on and even to touch lightly. She has ongoing pain in the paracervical muscles, mostly in the top of the cervical spine area radiating to both trapezius muscles.
>
> Many years ago she did have a neck injury however did not experience pain similar to what she has now or prior to the fall of December 8th, 2003.
>
> The Appellant has not responded well to physical therapy or Tylenol and is allergic to numerous other medications making her treatment options limited.
>
> I have referred her to a neurologist today and will await opinion for further management of her headache and neck discomfort as well as hyperesthetic area of the occipital scalp.
>
> [*As transcribed*]

The Board has reviewed all of the documents associated with this claim, including the previous Entitlement Appeal Decision, and the Consent Order of the parties before the Federal Court of Canada. The Board has also carefully considered its obligation to favourably weigh the credible uncontradicted evidence of Appellants coming before it, in accordance with section 39 of the *Veterans Review and Appeal Board Act*.

DECISION

For the reasons set out below, the Board rules to award full entitlement to the Appellant by majority decision. Two Board members rule for entitlement, and one Board member would rule to affirm the previous Decision and withhold pension entitlement.

There is no difference of opinion among the Members as to whether the fall suffered by the Appellant resulted in a permanent disability. The medical evidence on file, in particular the Medical Report from Dr. M.G. Penrose dated 12 November 2007 (EA-S2), establishes that the Appellant suffers from post concussion syndrome.

The remaining issue, and the one on which the Members' conclusions differ is this: Did the Appellant's fall on 9 December 2003 arise out of, or was it directly connected with, service in the Royal Canadian Mounted Police pursuant to section 32 of the *RCMP Superannuation Act* and subsection 21(2) of the *Pension Act*?

The essential facts are not in dispute. On or about 9 December 2003 the Appellant arrived, in uniform, at the RCMP Detachment parking lot approximately 15-20 minutes before her scheduled work time, which was 7:00 p.m. While exiting her personal vehicle in the parking lot she slipped on the ice or snow in the parking lot and hit her head/neck on the running board of her truck.

Direct Cause of Accident

These members find the direct cause of the Appellant's fall was the snow or ice in the parking lot, combined with her inability to gain a sure footing when she exited her vehicle. The presence of snow or ice is noted by the Appellant and confirmed by S/Sgt. C.

S/Sgt. C. also offers his opinion that the height of the Appellant's vehicle, in comparison to her height, may have contributed to the fall. While S/Sgt. C. may have been familiar with the Appellant's vehicle, and obviously knew the Appellant, he did not witness the accident. His opinion regarding the contribution of vehicle height to the cause of the accident is speculation and is given no weight by these Members.

The actual event of the Appellant slipping on ice or snow while exiting her personal vehicle is not connected to RCMP service. This sort of mishap can happen to anyone, at any time, and in any place, where weather conditions have created the necessary elements. The actual mechanism of accident is therefore not sufficient to allow a finding of any connection to RCMP service.

Duty Status

Two reports from the Appellant's supervisors regarding this incident have been quoted above. S/Sgt. C.'s report states the Appellant was not "on duty or acting as a peace officer" when the fall occurred. Supt. R., in his report dated 11 February 2005 notes RCMP officers are required to be present at their worksite 15 to 20 minutes before the official start of their shift and notes the reasons for that requirement. His report goes on to state:

> I have discussed this matter with S/Sgt C., and in our opinion, the Appellant was effectively "on duty" at the time of her accident.

The Board notes no further communication from S/Sgt. C. on the file subsequent to Supt. R.'s indication they both agreed the Appellant was effectively "on duty" when she fell.

The Advocate submits that the report of Supt. R. should be given more weight as it was made by a high-ranking RCMP officer, familiar with RCMP administration.

These Members have carefully reviewed these reports and conclude they are not contradictory. These Members find both statements are credible evidence to the extent the authors are commenting on matters within their knowledge.

S/Sgt. C. says the Appellant was not ***on duty*** when she fell. Supt. R., with explanation, states the Appellant was ***effectively on duty*** at the relevant time. Having arrived at the conclusion that both statements are credible, these Members do not consider it necessary to weigh the statements of S/Sgt. C. and Supt. R. against one another. Both speak to the issue of duty status but address slightly different questions: whether the Appellant was formally on duty (S/Sgt. C.) and whether the Appellant was effectively on duty, even though her formal shift starting at 7:00 p.m. had not begun (Supt. R.).

Duty status is not necessarily determinative of whether the accident arose out of RCMP service. It is one factor to be considered. Even where an Appellant is clearly "on duty", in that they are at the worksite and their shift has commenced, it is not ***necessarily*** the case that an accident therefore arose out of such service.

Defined narrowly, “on duty” would not include the activity in which the Appellant was engaged. Her exit from her personal vehicle could not be said to be an activity which occurred in her discharge of RCMP duties. However, though not discharging the duties normally ascribed to a peace officer, the Appellant’s activities were reasonably incidental to RCMP service, considering (among other factors discussed below) the statements of S/Sgt. C. and Supt. R.. These Members consider that such a finding, in and of itself, is not a sufficient basis upon which to find the accident arose out of service.

Degree of RCMP Control over the Appellant

Whether the RCMP was, at the time of the accident, exercising some degree of control over the Appellant is another important factor to be considered. The statement by Supt. R. that members are required “... to arrive at their worksite, a minimum of 15-20 minutes prior to their shift ...” indicates some degree of control.

The Appellant was in uniform. Certainly there are numerous situations in which an accident might befall a member where being in uniform would not be sufficient to establish significant control by the RCMP. For example, a member who falls down the steps of his personal residence or is involved in a motor vehicle accident on her way to or from work would not establish a connection to service simply by being in uniform.

In regard to RCMP control over this Appellant, these Members consider the following factors to be significant:

• The Appellant was, in arriving at her worksite 15 or 20 minutes early, complying with a requirement imposed by the RCMP.

• The Appellant was in uniform, indicating some degree of readiness for service.

• The accident occurred not on a public road or in a public parking lot, but at a location under the control of the RCMP.

These factors, combined, indicate the RCMP was exercising a degree of control over the Appellant.

Accident Location

The accident occurred in a parking lot. There is no evidence as to whether the Appellant was parking in an assigned spot but it seems apparent the parking area was close to the worksite. It also seems apparent the parking lot was under the control of the RCMP. These facts distinguish this case from cases where the accident location was a public place, including a public highway.

The analysis on this aspect of the case is not a determination of negligence. These Members are not considering whether the parking lot was properly maintained or whether a lack of maintenance allowed an accumulation of snow or ice which contributed to the accident. Indeed, no evidence was led on that point.

These Members find the presence of RCMP control over the location of the accident is indicative of some degree of control over the Appellant at the time of her accident. The location of the accident was also addressed in the previous section, as evidence of some degree of RCMP control over the Appellant at the time of the accident. Though inadequate, in and of itself to ground a finding of a connection to RCMP service, these Members find the accident location, being a place under the control of the RCMP, is another factor which favours the Appellant’s contention.

The Wannamaker Cases

The Advocate urged the Board to consider the reasoning of Justice Blais in Wannamaker (Fed Ct. Citation) in regard to that Appellant’s alleged 1959 fall in a DND parking lot prior to the beginning of his shift.

The subsequent decision in Wannamaker (FCA Citation) overturns the Trial Division decision. The Advocate argues the Appeal Court did not specifically address the Trial Judge's findings as to whether the accident arose out of service of the decision and therefore the Board can consider that portion of the decision as legal precedent (see paragraph 43 of Wannamaker TD in particular).

The Board cannot accept the Advocate's position. The Appeal Court allowed the Crown's appeal of the Trial Court decision. The decision of the lower Court is therefore quashed. The Board does not consider the decision in Wannamaker (Fed TD citation) to be binding and declines the Advocate's invitation to rely on the reasoning provided therein.

Conclusion

These Members have analysed the facts of this case in detail. There are significant factors that weigh *against* the Appellant's contention that her accident arose out of RCMP duty. There are also significant factors which *support* the Appellant's position. Weighing all of the factors carefully, and considering the evidence in a light most favourable to the Appellant, these Members find the accident suffered by the Appellant on 9 December 2003 arose out of RCMP service. These Members rule to award full entitlement to the Appellant.

EFFECTIVE DATE OF RETROACTIVITY

The Appellant first applied for pension entitlement for the condition of Post Concussion Syndrome more than three years prior to this decision. This Board will award retroactivity effective 13 November 2004 pursuant to subsection 39(1) of the *Pension Act*, which allows for retroactivity from the later of the day on which application is first made or a day three years prior to the day on which pension is awarded. The application date for pension entitlement does exceed three years from the date of this decision; however, there is no evidence to substantiate an award under subsection 39(2) of the *Pension Act*.

Applicable Statutes:

Pension Act, [R.S.C. 1970, c. P-7, s. 1; R.S.C. 1985, c. P-6, s. 1.]

Section 2
Subsection 21(2)
Section 39

Royal Canadian Mounted Police Superannuation Act, [R.S.C. 1970, c. R-11, s.1; R.S.C. 1985, c. R-11, s.1.]

Section 32

Veterans Review and Appeal Board Act, [S.C. 1987, c. 25, s. 1; R.S.C. 1985, c. 20 (3rd Supp.), s. 1; S.C. 1994-95, c. 18, s. 1; SI/95-108.]

Section 3
Section 25
Section 39

REASONS FOR DISSENT

The dissenting member would affirm the decision at the previous level and deny entitlement arising from the fall in the parking lot at the RCMP Detachment.

All of the members agree on the essential facts of the case. The main points of departure are: a) the degree of control exercised by the Force over the Appellant at the time of the fall; and, b) the location where the fall occurred.

On-Duty Status

It is for this Board to make the determination as to whether a duty relationship has been established. Evidence from superior officers is informative to the Board, but not solely determinative of the issue of on-duty status. The meaning of the term "on duty" for the purposes of the *Pension Act* is not necessarily common with other meanings the phrase may have elsewhere in society, or in other legal jurisdictions. This Board should make determinations of performance of duty very carefully, and in concert with the guidance received from the courts. It ought not to defer to opinions from superiors or colleagues of claimants in such determinations. Nor should it apply principles from other jurisdictions.

In the case at Bar, this member is of the view that the majority did apply the proper test and did not consider the opinion of Supt. R. in isolation. Supt. R., as already quoted by the majority, referred to the Appellant being “effectively on duty,” when she arrived early for her shift. This member does not dispute that conclusion.

The minority would place the most weight, however, on the Appellant’s immediate superior officer, S/Sgt. C., who wrote – for operational purposes in the month following the incident – that she was neither on duty nor in the performance of her duties when the accident occurred.

The Law

In *Ewing v. Canada (Veterans Review and Appeal Board)* (1997), 137 F.T.R. 298 (F.C.T.D.), Gibson J. said, at paragraph 8:

> ... Whether or not he was on duty is simply not the test. The test is whether or not the applicant's injuries leading to disability "... arose out of or [were] directly connected with ... military service [in peace time]"...

In other similar cases this Board has been faced with making the determination as to whether an injury is pensionable under subsection 21(2) where there are questions raised as to the activities being performed by the member at the time in question, and whether those activities arose out of or were directly connected with military service.

In *McTague v. Canada (Veterans Review and Appeal Board)* [2001] 1 F.C. 647 the Court considered this Board’s decision to use the words "setting" and "contributing cause" in its determination of the degree of contribution by military service to injuries leading to a disability - even though those words are not found in the legislation.

In his decision, Evans J. wrote at paragraphs 66 and 67:

> **66.** Second, counsel submitted, the Board misinterpreted the *Pension Act* by importing terms not contained in the language of the statute itself, namely the distinction between "contributing cause" and "setting". In particular, it stated in its reasons that the fact that the applicant's injury occurred in the course of a working day did not provide a sufficient cause nexus to bring it within paragraph 21(2)(a). That the injury occurred during a working day was merely the "setting" not a "contributing cause".
>
> **67.** It is true that these words are not in the legislation; however, the phrase "directly connected" in my opinion required the Board to consider the strength of the causal connection between the injury and the applicant's military service. In contrasting "contributing cause" with "setting", the Board was distinguishing stronger from weaker causal connections between the injury and the performance of military service. Given that it is not sufficient that, when injured, the applicant was serving in the military, I find that the Board committed no error of law here in its understanding of the statutory test.

This Board is presented with the same statutory test in its determination of whether this Appellant's involvement in the slip and fall is pensionable under subsection 21(2) of the *Act*.

In deciding this matter of performance of duty, this Board must also be cognizant of Parliament's will expressed in the *Pension Act* that the legislation must be construed broadly in order to discharge Canada's obligation to compensate those members of the Armed Forces (and RCMP) who have been disabled as a result of their service, and that any reasonable inference should be drawn from the evidence in favour of claimants. The wording of section 3 of the *Veterans Review and Appeal Board Act*, which is similar but not identical, must also be considered.

In that light, the Board must always consider the two issues enumerated above: First, the strength of the causal connection between the injury and the Appellant's service; and, second, the connection between the injury and the claimed disability.

There is no dispute that the injury is the cause of the present disability, so this member need deal only with the first point.

It is the Appellant's position that entitlement is warranted for the following reasons:

• The fall took place on the premises of the RCMP Detachment.

• She was in uniform at the time of the incident and was about to report for her regular shift inside the Detachment when the incident occurred.

• Supt. R. confirms in a letter addressed to the Bureau of Pensions Advocates that the Appellant was, "effectively 'on duty' at the time of her accident," as she was reporting ahead of her official shift time to retrieve her service weapon, and review waiting messages and instructions in preparation for her shift.

In determining duty status, the majority has considered several factors and made findings with respect to each of them. It has written that the direct cause of the accident and on-duty status were – in and of themselves – not specifically determinative of entitlement.

This member agrees with the majority that the Appellant was not performing any of her service related duties at the time of the fall. Even if one accepts Supt. R.'s position that the Appellant was "effectively 'on duty'" at the time of the fall, one must still determine whether that duty was being discharged at the time of the accident, and it was not.

If, as Supt. R. states, the Appellant was expected to report early to retrieve her weapon from its storage locker, to check for waiting messages, and to review other operational information or items in advance of her shift, then in this member's view it would still have to be shown that she was in the course of doing one or more of those activities when the fall happened.

Such was not the case. The fall took place before the Appellant even entered the Detachment building to commence any of the activities for which she was expected to report early. Taken further, if the Appellant had arrived late for her duty shift and the fall happened ten minutes *after* she was officially "on duty" even by the most restrictive interpretation, entitlement would still not be triggered as the time on the clock is not the issue; rather it is the nature of the activities being performed at the time of the accident.

Other RCMP Service Factors

This member has also, in his determination of whether the aspects of the RCMP environment caused or contributed to the accident, considered whether there were any factors surrounding the parking lot at the RCMP Detachment that made it materially different from any other, ordinary, place. The likelihood of a fall was not higher or lower than had the Appellant exited her vehicle at any similar location at that same time, therefore the RCMP parking lot did not present any additional risk, and the accident was not a product of the RCMP milieu.

As the Appellant has not alleged that her RCMP uniform or footwear were, in any way, related to the increased likelihood of her fall, this Board need not make any finding as to that aspect of possible cause.

Degree of Control

The majority has found that the accident occurred on the premises of the RCMP and that the Force did exercise some degree of control over the Appellant; a sufficient degree to militate in favour of entitlement.

It is here that this member departs with the majority opinion and finds that at the time of the fall her superiors were exercising no control over her movements. There was no evidence she was being followed by a dispatcher, was logged on to any communications system, and no evidence that she was deployable in any way prior to her physical entry into the premises of her Detachment building, which had not yet occurred when she fell. Neither is there any evidence that any of her superiors or peers knew exactly where she was at the time of the fall.

As to the location itself, the minority agrees that the parking lot was part of the RCMP premises. However, for the reasons stated above, this member is of the view that there was nothing about the parking lot that made it any different from any other place, or that it was in poor repair or being maintained improperly. No occupier's negligence on the part of the RCMP has been alleged, and would have no bearing on entitlement in any event.

None of the factors in the circumstances of the fall, in the view of this member, had their cause rooted in RCMP service.

The *Wannamaker* Case

This member concurs with the majority as to the *Wannamaker* decision of the Federal Appeal Court. The entire decision was set aside, and it is not open to pension advocates to pick and choose jurisprudence from a decision that has been set aside.

Conclusion

This member finds that RCMP service was not a contributing cause of the fall that led to the Appellant's disability. Rather, the parking lot of her RCMP Detachment was merely the setting in which the unfortunate accident occurred. This member would affirm the decision of the Review Panel, and deny pension entitlement.

Original signed by:
_____Presiding Member
Brent Taylor

Date Modified: 2012-04-13