

In the matter of an appeal under section 21 of the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*, S.N.B. 1994 c. W-14, as amended.

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION

Date of Hearing:	July 19, 2023
Date of Decision:	October 11, 2023
Decision Number:	20230232
Decision of the Appeals Tribunal:	This appeal is accepted.
Policy affected:	

DECISION UNDER APPEAL

The appellant is appealing the June 9, 2022 decision of the Workplace Health, Safety and Compensation Commission (the Commission) of New Brunswick, advising her that based on section 7 of the *Workers' Compensation Act* (the *WC Act*), her claim for compensation benefits is denied as her vaccine reaction did not arise out of and in the course of employment. The decision of April 4, 2022, is therefore confirmed.

INFORMATION CONSIDERED

The following material was presented to, reviewed, and considered by the Appeals Tribunal:

- Appeal Record dated June 29, 2023
- Explanations provided during the hearing by:
 - The appellant
 - The appellant's representative, a workers' advocate
 - A hearing representative on behalf of the Commission

The employer was neither present nor represented at the hearing.

FACTS

- [1] The appellant is an employee of the Government of New Brunswick. She had received her first dose of COVID-19 vaccine on May 17, 2021, and on October 1st, 2021, she received her second dose of the vaccine. In an *Application for Workers' Compensation Benefits*, dated October 21, 2021, the appellant describes her injury as:

I was mandated by my employer to receive the Covid-19 vaccination. I had an adverse reaction to the 1st dose and was originally told by public health not to have the 2nd. In August, I was told I could try it, under observation of a Doctor. I had PCG testing at the Asthma & Allergy Clinic in [name of city], NB on Friday, October 1st. I became weak after administration of the vaccine. I had extremely slow processing, and could not communicate effectively, had chest pain and pressure in my chest then started with gas building and needing to burp. I was given Gaviscon in the clinic and after over an hour of observation, I was sent home.

I began taking Benadryl, my blood pressure dropped. I was weak. 811 called 911 on Saturday Oct 2nd. Paramedics assessed me and noticed swelling reduced with liquid Benadryl. My heart looked okay so I stayed home. Oct 6th I had an in-person appointment

with my family doctor, Dr. Erica Brown from the [name of health clinic] in [name of town]. NO. I was written off work for the remainder of the week. I had a provincial deadline so I went to work and sat at my desk completing the paperwork I needed. Oct 13th I was in the [name of hospital] for CT scans to check my legs, heart and chest. Any type of movement causes chest pain and makes it hard to breathe. My tongue has been swollen. It is difficult to eat.

911 was called on Friday, Oct 15th when the symptoms of chest pain and shortness of breath would not go away.

I was released from Hospital on Oct 16th and have been taking prescriptions.

Pain is not going away. Walking even short distances increases pain.

My heart is fine. I have been told it is my esophagus triggered by the vaccine.

I have another appointment on Oct 25th with my family Doctor, Dr. Brown.

I have also experienced numbness in both arms and in my jaw going down my left arm. The inflammation is also causing pain to an already approved worksafe claim for my left wrist, Claim # [number given], injury date of Feb 28, 2019. [sic] [page 5 of the Appeal Record]

- [2] The following paragraphs outline in chronological order a series of events that took place before and after the appellant received her second dose of the COVID-19 vaccine on October 1, 2021.
- [3] On May 17, 2021, the appellant presented herself to the hospital with symptoms after receiving a COVID-19 vaccine. She experienced “a numb tongue, weakness, headache, nausea and swelling of mouth/tongue” [page 155 of the Appeal Record].
- [4] On July 15, 2021, Dr. Pascale Clark, clinical immunology and allergy specialist, sent a letter to Dr. Erica Brown, the appellant’s family physician, indicating:

[...]

She does not want to get her second dose, because she was advised by Public Health not to receive it....

Assessment and plan:

[The appellant] developed light headedness, weakness, facial edema and respiratory difficulties after receiving the Covid-19 vaccine. Hours later, she developed urticaria and angioedema which lasted for 34 days. This is in the context of recurrent episodes of urticaria since she developed Grave’s disease at the age of 17.

I think anxiety was the major contributor to her reaction, and that it was unlikely an allergic reaction. Anxiety can be difficult to differentiate from anaphylaxis and she was treated with epinephrine. Delayed urticaria is not uncommonly seen after the COVID-19 vaccines, and it is related to immune system activation rather than an allergic reaction...

[...] [emphasis added] [page 113 of the Appeal Record]

[5] On August 20, 2021, the employer sends a letter to its employees stating:

[...]

To help protect the health and safety of [clientele and employees], particularly vulnerable ones, some protective health layers will remain in place through the coming year. These will focus on promoting healthy behaviours, cleaning, wearing masks in common indoor areas, requiring... staff to be vaccinated with two doses or undergo regular testing, and limiting visitors... to minimize the possibility of exposures from the community. If you are sick, stay home.

[...] [sic] [page 36 of the Appeal Record]

[6] On August 25, 2021, an email was sent from appellant's professional organization. In that email, they speak of the requirement of vaccination stating:

[...]

With respect to requirements for vaccination, the government recently approved a policy that requires GNB employees:

- to provide proof of full vaccination against COVID-19; or
- if they do not provide proof of full vaccination, wear a mask at work and be tested regularly for COVID-19 until they are fully vaccinated.

[...]

The policy also requires that all new hires be fully vaccinated against COVID-19 (except those who provide a medical certificate indicating exemption from the vaccine).

[...]

The [professional organization] does not intend to grieve the policy as the advice received was that the employer's policy of requiring [employees] to be fully vaccinated is reasonable in the context of COVID-19. The serious health and safety issues associated with COVID-19, the amount of information still unknown about its transmission and long-term effects, the prevalence of variants, and the impact of an outbreak in [work environment] communities

would outweigh the invasion of [employees'] privacy. Moreover, the current circumstances see health officials stating that unvaccinated [clientele] are now a vulnerable population.

It is important to know that the implementation of vaccination measures are subject to the normal requirements: that the policy be clear, that [employees] have a reasonable opportunity to comply, and that provisions be made for those seeking accommodations under the Human Rights Act, such as a medical exemption. [sic] [pages 39-41 of the Appeal Record]

[7] A memo from the employer dated August 26, 2021, stated:

The vaccination policy for GNB employees announced last week will be effective in... workplaces on August 30, 2021.

[...]

You can make a vaccination appointment [here](#).

[...]

Should you not provide your record of full vaccination, as of September 7, 2021, you will be required to adhere to COVID-19 rapid testing on the basis of three (3) days per week, which will be coordinated by the [employer]. You will also be required to undergo a monthly test administered by Public Health. In addition, you will be required to wear a mask at all times inside and outside the [workplace]. Masks can be removed while eating subject to maintaining a minimum of 2 meters from other [co-workers] and not be in the same room as [clientele].

[...]

Instances where an employee who has not provided proof of full vaccination does not comply with either the masking or testing requirements will be subject to the disciplinary process, up to and including dismissal.

[...] [sic] [pages 47-48 of the Appeal Record]

[8] A memo from the employer was sent dated August 30, 2021:

Following the memo from the [employer] (attached to this message) you received on Thursday, August 26th, all staff must provide proof of vaccination against COVID-19 to ensure the healthy and safe return to [the workplace].... We will be taking note of your record of COVID-19 immunization. No personal information will be collected beyond name and a note that you have shown proof of full (both doses) vaccination.

[...]

If staff is unable to show proof of full immunization against COVID-19 by Friday, September 3rd, please refer to the attached memo for testing and masking requirements. [sic] [page 49 of the Appeal Record]

[9] In a memo dated August 30, 2021, Dr. Christopher Vaillancourt, general practitioner certified in emergency medicine and allergy specialist, states: "... I think for peace of mind I will PEG challenge test [the appellant] in the coming weeks so she is comfortable getting her subsequent second shot of Pfizer Covid vaccine." [sic] [page 111 of the appeal Record].

[10] In a memo dated September 2, 2021, the employer states:

As a follow-up to the memo issued from the [the employer] on August 26, 2021, with respect to the update on vaccination requirements, the information below is being provided as clarification concerning various elements of the new mandate.

Current Employees

Employees will have until Friday, September 3, 2021, to provide proof of full vaccination (i.e. 2 doses). Your [workplace] will not keep a copy of vaccination records. You will simply maintain a list of all employees who have shown proof of vaccination. Managers will then receive regularly updated lists of their employees who have provided proof of vaccination. Employees should be directed to the [MyHealthNB](#) site in instances where they do not have their record of vaccination. There is an FAQ available on the site to guide them through the process.

[...]

Employees who do not provide proof of vaccination by September 3, 2021, will be required to:

- wear a mask inside and outside the workplace at all times, except when they are alone in their personal workspace with the door closed or when eating. That said, they must be at least two (2) metres away from other staff and not in the same room as [clientele] while they are eating; and
- follow the COVID-19 testing requirements (see details below) until they provide proof of full vaccination.

New Employees

Newly hired employees who are not fully vaccinated at the time of their job offer will have 45 calendar days to provide proof of full vaccination to their employer or else file employment will be terminated. In the meantime, they will follow the masking guideline stated above and the testing requirements detailed below. New employees who provide a certificate for a

medical exemption to the vaccine will not be required to be vaccinated but will follow the testing and masking requirements.

Note: A new employee means an employee not already working in the NB Public Service. For example, an employee hired by the [employer] who is employed by a GNB Department, SNB or a regional health authority is not considered a new employee.

Testing Requirements

1.) **Complete point of care testing (POCT) three (3) times per week.** The [employer] have been provided POCT kits through Public Health. Employees will begin the testing as soon as the [employer] receives the kits. Testing will be coordinated and administered on-site at the beginning of the day, to minimize impact on operations and [work-related activity]. Results of each test will be provided to the [employer]. A smartphone/tablet application is under development that allows employees to share the test results. We will update you as progress is made in this regard.

AND

2.) **Register and complete a polymerase chain reaction (PCR) test once (1) per month starting the week of September 27, 2021, and then the fourth week of every following month.** Employees will provide the result of their monthly PCR test to their [workplace] contact. Additional details will follow concerning this process.

3.) **Employees must also schedule a PCR test immediately if they get a positive POCT test result or have two or more symptoms.** Employees will not attend at the workplace until they get a negative PCR test result (They can work from home if equipped and feel well enough to do so.). If the PCR test result is negative, employees must still complete their next regularly scheduled monthly PCR test.

Employees who provide a certificate of a medical exemption to the vaccine will also be required to wear a mask and follow the testing requirements. The following is the process for accessing a medical exemption:

1. Employees will need to contact their primary care provider, or specialist physician.
2. The primary care provider, or specialist physician reviews the criteria required for a medical exemption. If the employee meets the requirements, then the primary care provider, or specialist physician completes and signs the Medical Certificate of Exemption.
3. The employee will provide the original signed certificate to the local Public Health Office, who will upload the certificate into the Public Health Information Solution (PHIS) where it can then be accessed by the employee through their MyHealthNB account.
4. The employee will provide a copy of the Medical Certificate of Exemption to the designated contact person in the [employer].
5. It is important to note that the Employer will not keep a copy but will maintain a list of employees who have shown a valid certificate of medical exemption.

Instances where an employee who has not provided proof of full vaccination does not comply with either the masking or testing requirements will be subject to the disciplinary process, up to and including dismissal.

[...] [sic] [pages 50-52 of the Appeal Record]

- [11] In the *Employer Report of Injury or Illness* form dated November 17, 2021, the employer relates that the appellant reports “an allergic reaction to the covid-19 vaccination that is a requirement as per the GNB vaccination policy...” [sic]. It is also indicated that she has missed 8½ days of work (October 1, 4-7, 13, 18 (0.5 day), 22 and 25, 2021), due to complications and illness [page 8 of the Appeal Record].
- [12] On October 1, 2021, despite not wanting to due to health concerns, the appellant received her second dose of COVID-19 vaccine. [page 5 of the Appeal Record].
- [13] On October 15, 2021, the appellant presented herself to the hospital for chest pain. She was taken to hospital by ambulance on that day [pages 162 and 165 of the Appeal Record].
- [14] On December 14, 2021, the appellant presented herself to the hospital for central abdominal pain [page 181 of the Appeal Record].
- [15] An inter-office memo from the employer, dated January 6, 2022, indicates:

[...]

As a follow-up to the December 17th memorandum, you are reminded of the following expectations that will be key to limiting the spread of the virus:

- Stay in your [workspace]/office/workstation as much as possible, use virtual tools for all meetings and discussions with coworkers unless in-person is absolutely required.
- Avoid gathering or staying in common areas.
- If you do use a meeting room or common area, please clean and disinfect surfaces once you are done.
- Kitchen/ lunch areas are only to be used to make coffee or tea, warm up meals etc. In [workplace] settings where employees do not have a personal workspace, they may use the kitchen or cafeteria to eat their meals as long as the 2-metre distancing and facemask rules are followed.
- Follow proper hand washing and respiratory etiquette.

COVID-19 vaccine booster dose

Once again, I invite you to make an appointment for your COVID-19 booster dose as soon as possible. [Workplace] personnel and your families have been identified as a priority group for booster doses and I would encourage you to take advantage. You can find community walk-in clinics in your area online, or make an appointment with a pharmacy or at a Horizon or Vitality clinic. More information is available online.

[...] [sic] [pages 62-63 of the Appeal Record]

[16] A Medical Form 8-10 filed by Dr. Brown on January 7, 2022, indicated as a description of the injury/illness:

- Vaccine - 2nd shot Oct 1st - only received as mandatory at work.
- Subsequent development of severe chest pain which has persisted
- ...(cardiac, resp., CT) (N) so far
- Waiting for GI opinion; currently not able to work
- Vaccine related. No way to be certain. [sic] [page 14 of the Appeal Record]

[17] Dr. Vaillancourt wrote a report dated January 26, 2022, saying in part:

I spoke to [the appellant] on the phone today. She still continues to have ongoing chest pain, muscle pain, joint pain and fatigue. I understand she has been extensively investigated with no obvious etiology. It sounds like most of the serious severe causes have been ruled out.

She was quite upset with me today. She feels this is all related to the Pfizer Covid vaccine administered to her back in the fall. She felt I should've given her 10% the dose first followed by 90%. I didn't find anything in my notes to suggest that I had said that. She had a very strong immunization stress response reaction with brain fog. There were no obvious allergic symptoms.

She is obviously quite frustrated. I don't think there is anything further I can offer her at this time. [sic] [page 100 of the Appeal Record]

[18] On January 31, 2022, the appellant was seen in the emergency department by Dr. Katherine Doucet, general practitioner, for chest pain/epigastric pain [page 15 of the Appeal Record].

[19] A Medical Form 8-10 *Medical Progress Report* filled by Dr. Doucet during the same visit indicates "after received 1 Oct vaccine severe recurrent CP multiple ER visits, awaiting consult with Dr. John Igoe..." [sic] [page 16 of the Appeal Record].

[20] In his report following a consultation that took place on February 10, 2022, and addressed to Dr. Brown, Dr. Stuart McAdam, internal medicine specialist, states in part:

I saw [the appellant] today at your request for evaluation of chest and abdominal pain that's been persistent since her second Covid vaccine.

[...]

I did touch base with Dr. Clark of Allergy and Immunology in [name of city] to review the case with her and **she doesn't feel that there's any contraindication for her to get subsequent doses, and didn't feel she would meet criteria for exemption**, but said she would ultimately leave that decision up to Public Health.... We'll see what Dr. Igoe thinks about her GI symptoms because if any GI pathology is identified then that could provide an explanation for her symptoms. If his assessment comes back negative, then again we may just be left with some type of immune activation post-vaccine causing her symptoms, whether an allergy or not. Ultimately, I would defer to Dr. Vaillancourt and Public Health whether or not it would be suggested that she get a subsequent covid booster shot or not.

[...] [sic] [emphasis added] [pages 249, 253-254 of the Appeal Record]

[21] Dr. John Igoe, gastroenterologist and hepatologist, wrote a report on February 14, 2022, which indicates in part:

[...]

... She tells me today that her GI symptoms were doing very well until she received the second dose of the COVID-19 vaccine. Since that time she has had numerous symptoms of chest pain as well as bloating and nausea. She been having very heavy menstrual periods as well as some numbness in her extremities. She has been seen by internal medicine as well as an allergy physician due to possible side effects from the vaccine. She has been started on numerous GI medications including metoclopramide as well as Sulcrate and a PPI. She tells me that none of the symptoms have really helped however she has recently started an antihistamine and tells me that has made a significant difference. She also reports significant bloating and dyspepsia.

[...] [sic] [page 97 of the Appeal Record]

[22] Dr. McAdam notes through a visit dated March 15, 2022:

[...]

Again, a lot of her symptoms seem to have started after the Covid vaccine so it's possible this could have caused some type of immune activation that's contributing to her symptoms but we're doing everything we can just to rule out other pathology, and optimizing antihistamines to help control any allergic-type symptoms. [sic] [page 96 of the Appeal Record]

[23] On March 18, 2022, in a news release from the Finance and Treasury Board titled, *Updated vaccination policy for provincial government employees*, it notes:

Effective Monday, March 28:

- Vaccination will no longer be a condition of employment with the New Brunswick public service except for employees working in facilities of the regional health authorities, Extra-Mural/Ambulance NB and connections, which remain vulnerable sectors.
- The leave without pay for unvaccinated employees in all other settings in Parts I, II, III and IV will end on March 28. These employees will report back to work on that day.
- Unvaccinated employees working in facilities of the regional health authorities, Extra-Mural /Ambulance NB and corrections will remain on leave without pay until fully vaccinated with two doses of a COVID-19 vaccine.

Full vaccination remains a condition of employment for current and new employees in nursing homes and adult residential facilities licensed by the Department of Social Development.

The amended vaccination policy also applies to volunteers, on-site vendors, suppliers and contractors.

The government will reassess the application of the policy in the vulnerable sectors by the end of March. [sic] [page 65 of the Appeal Record]

[24] Through a letter sent to the appellant on April 4, 2022, she is informed by the Commission that she is denied compensation benefits following an allergic reaction to the COVID-19 vaccine. The reason being:

[...]

For a claim to be accepted, section 7(1) of the WC Act requires that evidence establish three legal tests: 1) that there exists a personal injury or death; 2) that it was caused by accident; and 3) that the accident arose out of and in the course of the worker's employment.

Analysis of the Evidence:

- An Application for Compensation Benefits was submitted for an allergic reaction to the second dose of the Covid-19 vaccine on Oct 1, 2021. On that date you had an adverse reaction that caused several symptoms including weakness, severe chest pain, confusion, a swollen tongue, and difficulty breathing etc. You underwent several medical tests and sought treatment to alleviate your symptoms.
- The Memo from [the employer], Amendments to the Vaccination Policy (COVID-19) was reviewed. The Memo clearly states that an employee must provide proof of receiving two doses of the vaccine or the employee would be placed on leave without pay effective Nov 19, 2021.
- Receiving the vaccine was mandatory to continue working as a [type of employment]. However, there are also other requirements necessary to work as a [type of employment] such as educational qualifications, a [name of profession] license, aptitude etc. Thus, having the vaccine is a job qualification that your employer requires and that you chose to fulfill.
- It was your personal choice to have the vaccine so that you could continue to [work]. A reaction to the vaccine does not meet the definition outlined in section 7(1) *Workers' Compensation Act (WCA)* as the reaction was not an accident or occupational disease. It did not arise out of and in the course of your employment duties as a [type of employment].

Summary

The evidence indicates that your reaction to the COVID-19 vaccine did not result from your [type of employment] duties but is a personal condition that affected your ability to work.

Conclusion

Having reviewed your claim and all the information on file, it has been determined that the vaccine reaction did not arise out of and in the course of your employment, and therefore your claim is denied. [sic] [pages 17-18 of the Appeal Record]

[25] The memo in question is dated October 7, 2021 and had been sent by the employer after the appellant had already received her second dose of the COVID-19 vaccine. The memo states:

As part of the ongoing effort to ensure the safety of our employees and members of the public, ... the following amendments to the vaccination policy... effective October 8, 2021:

1. Mandatory Vaccines

- Employees will have six weeks (until November 19, 2021) to provide their employer with proof that they have received two doses of the COVID-19 vaccine if they have

not already done so. This six-week period provides sufficient time to receive two doses.

Note: During the six-week notice period, employees who have not provided proof of full vaccination to their employer will still be required to complete rapid testing three times per week and wear a mask at all times when at work.

- An employee (without a valid medical exemption for the COVID-19 vaccine supported by a medical certificate) who has not provided proof of two doses by November 19, 2021, **will be placed on leave without pay.**

[...]

Early in the pandemic, GNB directed employees be placed on paid leave when required to self-isolate by Public Health because circumstances were largely beyond the employees' control. Now, with the introduction of vaccines, employees do control whether they will be required to self-isolate under certain circumstances. Absences due to the refusal to get vaccinated are avoidable and create unnecessary strain on our operations and work colleagues.

Please note that emergency leave provisions in collective agreements and non-bargaining policies will not apply in these isolation cases during the six-week period since the employee's isolation is not an unexpected event given current circumstances and is due to the employee's personal choice not to be vaccinated. It is within the employee's control (except for the medically exempt) to get vaccinated and avoid potential isolation periods following close contact with COVID-19 cases.

[...]

Vaccinations have proven to be successful in reducing the spread of the virus. This is demonstrated by the fact that the vast majority of new COVID-19 cases are contracted by unvaccinated individuals. I would urge all who are still unvaccinated without medical exemption to get vaccinated as soon as possible. We all need to do our part to help reduce the risk of spreading the virus to vulnerable and youth populations and reduce the number of hospitalizations which are interrupting or reducing other important medical care. [sic] [pages 11-12 of the Appeal Record]

[26] Through a *Cardiology Report* having a date of admission of April 28, 2022, by Dr. Thomas G. McAvinue, cardiologist, it is noted that:

This [age given]-year-old female attends for assessment. She had her first dose of Pfizer vaccine earlier last year and had some form of reaction afterwards. I understand she was evaluated and felt fit to receive her second dose. She received her second dose of COVID vaccine on 1 October. Since that time she complained of feeling short of breath with exertion

and various burning retrosternal chest discomforts. She presented to hospital on several occasions with ECG and troponin being negative.

[...]

... I am convinced she had a reaction to COVID vaccination, however it appears to be objectively mild although having been significantly symptomatic for her. I think things will resolve entirely in time.... [sic] [page 89 of the Appeal Record]

[27] On May 10, 2022, the appellant had a telephone conversation with Dr. Brown for a follow-up. [page 139 of the Appeal Record].

[28] Following a telephone conversation with the appellant on May 12, 2022 Dr. McAdam notes:

[...]

She went on to get Covid, she said she was diagnosed around March 23rd and mostly had a sore throat with it for a few days and then interestingly, after she got over Covid she said that essentially, a few days after she was diagnosed, not only did her Covid symptoms resolve but all of her symptoms that she had had since the vaccine subsequently resolved.

She said that the abdominal pain and left-sided flank pain that she was having completely resolved. She also stopped having any urticaria and she hasn't required Claritin. She also stopped getting chest pain or shortness of breath on exertion. She also stopped having trouble with any dysphagia, or GI symptoms with food and she was able to stop all of her GI medications essentially. The only symptom she has, she finds that she does feel her heart racing a little bit when she exerts herself but she says that she's pretty much back to baseline, and feels like any residual shortness of breath is likely just from deconditioning. She has no significant cough or wheeze.

She is still having heavy periods, about once a month.

She did get a stress test done by Dr. McAvinue April 28 and it was overall a negative stress test for ischemia. She got to 8.5 mets, her heart rate did go up to 179, which was her max predicted heart rate, and she had to stop the test due to fatigue. Dr. McAvinue has ordered an echocardiogram which is pending but he expects it to be normal.

MEDICATIONS:

1. FeraMAX 150mg daily.
2. Desiccated thyroid 120mg daily.

INVESTIGATIONS: April 5th I did do a tryptase level that came back low at 1.8. Otherwise, April 5th she had a white count of 5.35, Hgb 109, MCV of 79. Plt 438.

ASSESSMENT AND PLAN: Overall, [the appellant] is a [age given]-year old female that had a constellation of symptoms after her Covid vaccine.

It's great that her symptoms have now essentially completely resolved. It's interesting that her symptoms resolved after she got Covid. Given that the rest of the work-up has essentially been negative for other causes, and all of her symptoms started after the Covid vaccine initially, it does make me believe that she had some type of inflammatory response to the vaccine that caused these symptoms. Fortunately, they have now essentially resolved.

[...] [sic] [pages 86-87 of the Appeal Record]

[29] On May 25, 2022, the appellant had a telephone consultation with Dr. McAdam. He states in a letter addressed to Dr. Brown:

I touched base May 25th with [the appellant] by phone in my GIM clinic. You can see my prior letters for details. As you will note from my last letter, she was back to normal And so I had signed off. However, she subsequently contacted my office requesting another phone follow-up. She requested discussing the status of whether or not she would be required to get a subsequent covid vaccine or not. She said that after I had spoken with her that day she said that the Public Health office was in contact with her saying that she wouldn't meet any criteria for exemption and would be required to get subsequent Covid vaccines if it was required, and she said she was also advised that the Public Health office didn't think her symptoms had been caused by the covid vaccine. The copy of my last letter would not have been available at that time when she was contacted, where I state I do think her symptoms were caused by the vaccine. [The appellant] was wondering about whether or not she could get exemption from getting future vaccines, and really doesn't ever want to have to get another covid vaccine given she felt so unwell after the last one. When she received the latest phone call from public health stating she wouldn't be exempt from future covid vaccines, she said she was extremely upset and crying in a severe state of distress.

I told her that I would leave the decision about exemption from covid vaccine to Public Health and the Medical Officer, and Dr. Vaillancourt, given that he's the allergy expert and has been designated by the province to liaise with Public Health with regards to Covid vaccine reactions, and is already involved in her case. I did advise her that I did earlier state in my letter that I do feel that the symptoms that she had post-vaccine were indeed related to receiving the vaccine. I believe she had some type of immune activation that caused her to be quite symptomatic and she did experience significant morbidity associated with this and had to miss quite some time off of work as well because of it. The work-up for other causes was negative. Her symptoms also resolved after she got Covid, which would have affected her immune system, so that may have somehow modulated it to the point that things got back to normal. Given that we didn't fix anything else and given the timeline of her symptoms having started right after her vaccine, her symptoms I do feel, were as a result of some type of immune reaction to the Covid vaccine. Technically, she wouldn't meet criteria for any documented anaphylaxis based on allergy experts' prior findings, nor did she have documented myocarditis (although never had a cardiac MRI), in terms of meeting exception

status criteria. However, despite not meeting any of the absolute contraindications, I do feel that she did experience significant morbidity from her last vaccine, whether or not that would happen again, but certainly she has shown that she is very prone to significant allergic and immune reactions. Ultimately, I told her that I would send a copy of my latest letter to Public Health so that they have my final impression of what caused her symptoms. Given she did have this degree of significant morbidity associated with the covid vaccine I can't blame her for not wanting to get another one. I advised her that I do agree with her that she had significant morbidity from some type of immune response related to the vaccine, but I told her that ultimately I would defer any decision on exemption to Public Health, the Medical Officer, and Dr. Vaillancourt. [sic] [pages 270-271 of the Appeal Record]

[30] The Decision Review Office decision dated June 9, 2022, states as follows:

[...]

Background

You have requested a review of the April 4, 2022 decision finding your claim does not meet the requirements of section 7 of the *Workers' Compensation Act (WC Act)* as it did not arise out of and in the course of employment.

Your decision review request stated that your claim meets the requirement to receive compensation benefits under section 7 of the *WC Act*.

[...]

Explanation

The claim file has been reviewed using the legislation and policies in place at the time of the decision.

The following facts and evidence are identified as relevant to the issue under review:

- On October 7, 2021 a letter from the [employer] advised "Employees will have six weeks (until November 19, 2021) to provide their employer with proof that they have received two doses of the COVID-19 vaccine if they have not already done so";
- A workplace accident claim was submitted on October 21, 2021 for injuries resulting from an adverse reaction to your October 1, 2021 COVID-19 vaccine second dose;
- As noted above, you were mandated by your employer to receive the COVID-19 vaccine;
- You had an adverse reaction to the first dose and were originally told by public health not to have the second dose;
- On November 17, 2021 your employer's report of the injury stated "Ms. [the appellant] reports an allergic reaction to the COVID-19 vaccination that is a requirement as per the GNB vaccination policy";

[...]

After considering the tests of time, place and activity, I find that your adverse reaction to the COVID-19 vaccine is a risk faced by the general public and not a risk you were exposed to because of your specific employment. While we have insufficient information to determine the test of time, the three tests must be considered together when determining entitlement and I find neither the test of place nor the test of activity lead to a conclusion that your injury is from an accident that arose out of the employment. While your employer mandated the COVID-19 vaccine for continued employment, that makes it a prerequisite to employment, similar to education requirements and other prerequisites. However, it does not make the act of getting the COVID-19 vaccine an employment activity. Furthermore, your COVID-19 vaccine was administered in a premises that was not within the care and control of your employer.

I find that you were exposed to risks as a member of the general public rather than risks because of your employment and, as such, you do not satisfy the criteria of section 7(1) of the *WC Act* which is required to be entitled to benefits.

Therefore, the decision to deny your claim has been confirmed in accordance with the legislation and policies. [sic] [pages 26-29 of the Appeal Record]

POSITION OF THE PARTIES

- [31] It is the appellant's representative's position that based on subsection 7(2) of the *WC Act* that the presumption that the injury is connected to the employment as there is no refutable evidence proving that it didn't happen out of and in the course of the employment.
- [32] A lot of emphasis was put on the various vaccination memos provided; employees were told they needed to show proof of vaccination or face leave without pay or dismissal. The appellant interpreted this as a condition of employment.
- [33] The appellant testified that prior to receiving her second dose, she tried to get a medical exemption but was unable to obtain one. She mentioned having felt targeted by her employer and colleagues and had to isolate herself for lunches and always wear a mask. She mentioned that this was a very difficult period in her life and that she really was under the impression that there could be repercussion if she didn't get the second vaccine.
- [34] Furthermore, the appellant mentioned that she has incurred medical expenses and had to take sick days.

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- [35] The Commission's representative's position is that the criteria of subsection 7(1) of the *WC Act* are not satisfied as receiving the Covid vaccine does not meet the test of activity and place. The Commission's representative submits that receiving the COVID-19 vaccine is not an employment-related activity, as it is a prerequisite to the employment.
- [36] With respect to the test of place, the Commission's representative submits that the vaccine was administered in a setting that was not within the control of the employer.
- [37] The Commission's representative also highlights that an exemption could have been obtained by the appellant.

LEGISLATION AND POLICIES

- [38] Section 1 of the *WC Act* describes an accident as:

“accident” includes a wilful and intentional act, not being the act of a worker, and also includes a chance event occasioned by a physical or natural cause, as well as a disablement caused by an occupational disease and any other disablement arising out of and in the course of employment, but does not include the disablement of mental stress or a disablement caused by mental stress, other than as an acute reaction to a traumatic event;

- [39] Subsections 7(1), 7(2) and 7(2.1) of the *WC Act* specify:

7(1) When personal injury or death is caused to a worker by accident arising out of and in the course of his employment in an industry within the scope of this Part, compensation shall be paid to that worker or his dependents, as the case may be, as hereinafter provided, unless the accident was, in the opinion of the Commission, intentionally caused by him, or was wholly or principally due to intoxication or serious or wilful misconduct on the part of the worker and did not result in the death or serious and permanent disability of the worker.

7(2) When the accident arose out of the employment, in the absence of any evidence to the contrary, it shall be presumed that it occurred in the course of the employment, and when the accident occurred in the course of employment, in the absence of any evidence to the contrary, it shall be presumed that it arose out of the employment.

7(2.1) Where there is any evidence that an accident did not arise out of or in the course of the employment, the Commission shall weigh all the evidence before it and determine, on a preponderance of evidence, whether the accident arose out of or in the course of the employment, as the case may be.

[40] The applicable policy 21-100 *Conditions for Entitlement – General Principles* (release 8) says in part:

For a claim to be accepted, section 7(1) of the *WC Act* requires that evidence establish three legal tests: 1) that there exists a personal injury or death; 2) that it was caused by accident; and 3) that the accident arose out of and in the course of the worker's employment.

Section 7(2) of the *WC Act* provides a rebuttable presumption related to the test of arising out of and in the course of employment. If one part of the test is met, then the other part is presumed to have been met, unless there is evidence to the contrary. [sic] [page 295 of the Appeal Record]

[41] The applicable policy 21-104 *Conditions for Entitlement - Tests of Time, Place and Activity* (release 004) says in part:

WorkSafeNB determines if the accident occurred *in the course* of employment by gathering information to show that:

- The accident occurred at a time that is consistent with when the worker typically performs the employment or at a time when the worker has been asked to perform activities for the employment (section 1.1); and
- The accident occurred at a place that is consistent with the place of employment or the employer's premises (section 1.2).

This policy provides further guidance on gathering information related to the tests of time, place, and activity. The New Brunswick Court of Appeal confirmed the three tests as key criteria to assist in determining if an accident arose out of and in the course of employment.

Although the tests of time, place and activity are presented separately in this policy, they are related and all three must be considered together when determining entitlement. WorkSafeNB accepts that an accident arose out of and in the course of employment when the presumption in ss. 7(2) stands, or when there is evidence to the contrary but all three tests are met on a preponderance of evidence, as legislated in ss. 7(2.1).

[...]

1.3 Test of 'Activity'

To determine if an accident *arose out of* the employment, WorkSafeNB must gather information to determine if the activity being performed at that time and in that place was for the purpose or benefit of the employer's business or related to the employer's business. These activities may be:

- Formal – the tasks are directly related to the worker's job; or
- Informal – the activities are related to the employment, but are not part of the normal tasks or assigned work.

In addition, WorkSafeNB must gather information to determine if the medical information shows that the extent and severity of the injury are compatible with the activity that was described as having caused the injury.

WorkSafeNB may ask the following questions relating to formal and informal activities to determine if the activity was work-related:

- Was the activity part of the job and/or included in the job description?
- Was the activity directed or requested by the employer?
- Was the activity during working hours, or outside of working hours?
- Was the worker being paid at the time the activity caused the injury?
- Was the activity supervised and/or a job requirement?
- Was there intent for the activity to further the business interests of the employer?
- Was the worker exposed to the same risks as he is exposed to in the normal course of production?
- Was the injury caused by some activity of the employer or of a fellow employee?
[pages 300-301, 303-304 of the Appeal Record]

ANALYSIS

[42] As per subsection 7(1) of *WC Act*, certain criteria must be established to determine if the appellant could be entitled to compensation. As per policy 21-100, there are three questions to answer:

For a claim to be accepted, section 7(1) of the *WC Act* requires that evidence establish three legal tests: 1) that there exists a personal injury or death; 2) that it was caused by accident; and 3) that the accident arose out of and in the course of the worker's employment.

[43] First, was there a personal injury or death? The appellant reported numerous symptoms experienced after her second dose of the COVID-19 vaccine, which resulted in many hospital visits, such as: central abdomen pain, pressure in chest, gas building, swelling, shortness of breath, pain, numbness in both arms and in jaw going down left arm.

[44] Second, was it caused by an accident? As previously mentioned, an accident is described in the *WC act* as:

a wilful and intentional act, not being the act of a worker, and also includes a chance event occasioned by a physical or natural cause, as well as a disablement caused by an occupational disease and any other disablement arising out of and in the course of employment, but does not include the disablement of mental stress or a disablement caused by mental stress, other than as an acute reaction to a traumatic event;

I consider that the accident in this case was the administration of the second dose of the COVID-19 vaccine on October 1, 2021.

[45] Third, did the accident arise out of and in the course of the appellant's employment? In order to determine that, three tests need to be fulfilled: test of time, place and activity, as per policy 21-104.

[46] With respect to the 'activity' criteria, throughout the evidence in the Appeal Record, ample evidence of memos and notes indicate that the second dose of the COVID-19 vaccine was mandatory. For example:

- On August 20, 2021, a letter was sent by the employer requiring the staff to be vaccinated with two doses or undergo regular testing, and limiting visitors [page 36 of the Appeal Record]
- On August 25, 2021, the appellant's professional organization emailed its members informing them that with respect to the requirements for vaccination, the government had recently approved a policy that required GNB employees:
 - to provide proof of full vaccination against COVID-19; or
 - if they did not provide proof of full vaccination, they were required to wear a mask at work and be tested regularly for COVID-19 until they were fully vaccinated [page 39 of the Appeal Record].
- On August 26, 2021, a letter was sent from the employer indicating where employees could make an appointment to receive their COVID-19 vaccine. This letter also indicated that the employees would be required to provide their full record of vaccination (2 doses) no later than September 3, 2021 [pages 47-48 of the Appeal Record].
- On September 2, 2021, the employer reiterated that employees had until Friday, September 3, 2021, to provide full proof of vaccination (i.e. 2 doses) [page 50 of the Appeal Record].

In my view, this clearly establishes that the COVID-19 vaccine was mandatory and pressed by the employer.

[47] Furthermore, when the appellant testified, it was clear that she feared work repercussions such as leave without pay should she not get her second vaccine. This was, in her mind and without any doubt, a work requirement.

- [48] With respect to the policy 21-104, the Commission “must gather information to determine if the medical information shows that the extent and severity of the injury are compatible with the activity that was described as having caused the injury.” [page 304 of the Appeal Record].
- [49] I find based on a preponderance of evidence, that her injury was directly related to her accident as explained by Dr. McAvinue, cardiologist, giving the expert opinion that he is convinced that the appellant “had a reaction to COVID vaccination” [page 89 of the Appeal Record] and Dr. McAdam who noted: “I do feel that she did experience significant morbidity from her last vaccine, whether or not that would happen again, but certainly she has shown that she is very prone to significant allergic and immune reactions.” [page 271 of the Appeal Record].
- [50] Furthermore, the appellant did try to obtain an exemption. She had expressed her concerns with Dr. McAdams with respect to receiving a subsequent COVID-19 vaccine dose, however, Public Health was in contact with her and indicated that she did not meet the criteria for the exemption [page 270 of the Appeal Record].
- [51] The appellant had also been examined by Dr. Clark who indicated on July 15, 2021:
- I think anxiety was the major contributor to her reaction, and that it was unlikely an allergic reaction. Anxiety can be difficult to differentiate from anaphylaxis and she was treated with epinephrine. Delayed urticaria is not uncommonly seen after the COVID-19 vaccines, and it is related to immune system activation rather than an allergic reaction**
- [...] [emphasis added] [page 113 of the Appeal Record]
- [52] Finally, Dr. Vaillancourt, a general practitioner certified in emergency medicine and allergy specialist who decided to administer the second dose of the COVID-19 vaccine to the appellant, noted: “... I think for peace of mind I will PEG challenge test [the appellant] in the coming weeks so she is comfortable getting her subsequent second shot of Pfizer Covid vaccine. [sic] [page 111 of the appeal Record].
- [53] The appellant was mandated by her employer to get the COVID-19 vaccine. She did not qualify for an exemption. This was an activity that was done at the request of her employer. For the reasons noted above, I deem that the accident occurred out of the appellant’s employment.
- [54] With respect to establishing the “in the course of employment” criteria (the tests of time and place), given that I have determined that the accident occurred ‘out of’ the appellant’s employment, and given that there is no evidence to the contrary, I deem that it also occurred ‘in the course of’ her employment, as per subsection 7(2) of the *WC Act*.

CONCLUSION

- [55] The appeal is accepted. Based on section 7 of the *WC Act*, I conclude that the appellant's reaction to a COVID-19 vaccine was an injury by accident which occurred out of and in the course of her employment. The Commission is directed to manage the claim accordingly.

Original signed by:
CHRISTINE DRAPEAU
CHAIRPERSON, APPEALS TRIBUNAL

CD/sjf