

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1253/02

[1] This appeal was heard in Burlington on September 24, 2002, by Tribunal Vice-Chair R. Nairn.

THE APPEAL PROCEEDINGS

[2] The worker appeals the decision of Appeals Resolution Officer P. Hall dated September 29, 2000. That decision confirmed that the worker's Non-Economic Loss ("NEL") award would be reduced by 50% in light of his major pre-existing disability.

[3] The worker appeared and was represented by Ms. Antoinette Serra from the Office of the Worker Adviser. The employer, while advised of the appeal, decided not to participate.

THE RECORD

[4] The material in the Case Record prepared by the Tribunal Counsel Office (Exhibit #1) was considered. In addition, I considered:

Exhibit #2: Addendum No. 1 dated January 31, 2002;

Exhibit #3: Addendum No. 2 dated September 4, 2002;

Exhibit #4: A letter dated February 15, 2002, from the Office of the Vice-Chair Registrar;

Exhibit #5: A copy of *Operational Policy Manual* Document #18-05-05.

[5] Oral evidence was heard from the worker. Submissions were made by Ms. Serra.

THE ISSUE

[6] The issue to be determined in this case is whether the worker's NEL award, granted with respect to injuries sustained on February 24, 1993, should be reduced because of a pre-existing non-compensable disability.

THE REASONS

(i) Background

[7] The following background information is, generally speaking, not contested and I have relied on it in reaching my decision:

- At the time of the accident under consideration here, the worker was employed as a labourer with the accident employer.
- On February 24, 1993, the worker experienced an onset of pain in his right hip and lower back when he slipped and fell on a greasy floor.

- The Physician's First Report of February 25, 1993, provided a diagnosis of "R. hip strain, ? herniated lumbar disc". In his report, under the heading "Prior History of Similar Problem", Dr. R Levy noted "? 1989- lumbar disc problem".
- As noted above, the worker had suffered a herniated disc in 1989, which had been treated surgically. At that time, he lost about 18 months from work, returning in October 1990. He continued with treatment for his back until October 1991.
- After experiencing further back discomfort, a CT scan was performed in December 1992 which revealed disc bulging and large osteophytes at L4-L5 and a larger disc herniation at L5-S1.
- The injuries sustained on February 24, 1993, were recognized as compensable by the WSIB (the "Board"). As noted in Memo No. 4 dated June 9, 1993, the worker's claim was allowed on an aggravation basis – the incident having aggravated, what Dr. David (of the Board), described (in Memo No. 3) as "major....pre-existing state".
- On July 4, 1994, Dr. D. Bednar performed an "external spinal skeletal fixation L4 to sacrum" on the worker.
- The worker had further back surgery on February 26, 1996, when Dr. Bednar performed a "posterior lumbosacral fusion L4 to sacrum...".
- In Memo No. 82 dated January 29, 1999, the Claims Adjudicator requested a medical opinion on the following matters:
 1. As previously outlined, entitlement is in order in this claim on an aggravation basis noting the pre-accident disability (L5-S1 disc herniation Dec 92 and L4-5 herniation with surgery Dec 89).
 2. Noting the worker required approximately one and a half years off work for the original injury and he was having increasing problems prior to this injury, Claims will accept that there was a major pre-accident disability for NEL purposes.
 3. Your medical comments are requested as to whether a permanent impairment exists or if it is felt the worker has returned to his pre-accident state..
 4. Claims will accept 30Apr98 (Dr. Bednar) as the MMR date.
- In memo No. 83 dated February 4, 1999, Dr. Macarthur of the Board replied:
 1. Major SIEF here as the pre-existing was very significant and aggravated.
 2. There is a PI present as the surgery never really got him back to the pre-accident state. At MMR and the date of April 30, 1998, is appropriate.
- The worker was eventually granted a 29.45% NEL award for his back condition which was subsequently reduced by 50% to an award of 14.50% because of the pre-existing disability.
- The worker objected to the reduction of his NEL award and the matter was eventually considered by an Appeals Resolution Officer. In a decision dated September 29, 2000, the Appeals Resolution Officer denied the worker's appeal and concluded:

...A pre-accident disability is defined as a condition, which has produced periods of disability in the past requiring treatment and disrupting employment. The worker says that his back problems had not disrupted his employment after his return to work in 1990 and that he performed normal duties until the time of his injury in 1993. While this may be true, is also true that the worker sought treatment in November 1992 and again in January 1993 for the same condition that eventually disabled him following the

workplace injury. I conclude that the worker's condition was symptomatic prior to the date of injury and required treatment. By definition, for purposes of the Act, the worker had a pre-accident disability that was aggravated by the work injury.

The degree of pre-accident disability is expressed as minor, moderate or major for purposes of adjudication. The decision to describe a pre-accident disability in one or another of these categories is guided by the opinion of medical consultants. In this case the medical opinion is that the worker has a major pre-existing disability because of the prior surgery at the L4-5 level. That opinion is expressed in memo #3 in the claim file. Later, in the file at memo #83 written about six years after memo #3 by a different medical adviser, the opinion was that the worker has a major pre-existing disability. In all of the circumstances I prefer the opinion of the Board medical consultants and conclude that the worker has a major pre-existing disability.

According to Policy if a worker being assessed for a NEL award has a measurable non-work-related impairment to the same body area as the injury, the work-related injury is rated independently and the non-work-related impairment is subtracted to determine the work-related impairment. In this case the worker was assessed and as a result of the pre-existing disability the NEL award was reduced by 50%. I conclude that the reduction is correct according to policy.

(ii) Medical evidence

[8] The medical evidence on file includes the following:

- In a report dated March 18, 1993, Dr. S. Chin of the employer's medical department provided a diagnosis of "Acute lumbar strain with prior history of microdissectomy of the L4-L5 disc".

- In a report dated November 21, 1994, Dr. T. Wright (orthopaedics) advised:

This young man was seen in consultation at the request of Dr. Drew Bednar for a second opinion with regard to his back.

His injury goes back to the age of 18 when he hurt his back playing football. He had subsequent problems with his back which necessitated a decompression of his spine at the L4-5 level.

Subsequently he injured his back when working in the grease pit approximately two years ago...

- In a report dated November 5, 1998, Dr. Bednar advised:

This patient was first seen by me for second opinion in referral from Dr. Timothy Brox, formerly of Hamilton, Ontario, on 7 September 1989. The gentleman presented himself as suffering from left buttock and leg pain with some associated back ache. CT scan at the time had revealed bulging of the L4-5 disc. Having failed in conservative therapy after initially presenting to me, he was treated with a left-sided discectomy for disc prolapse on 15 September 1989 – with such expeditious treatment being facilitated by a cancellation booking.

The patient was followed in the Fracture Clinic of the Hamilton General Hospital, undergoing investigations including EMG and CT scanning for continuing back pain problems, and that one year postoperative (26 September 1990) he was seen in my office again for review. At that point the patient still had some episodes of intermittent soreness and numbness through the left leg into the foot but was functional to the point of being able to undertake a modified return to work.

He was seen again on 25 January 1993, at which time a CT scan report (dated 18 December 1992) revealed a large left posterolateral lumbosacral disc herniation with some osteophytes. This was a new pathology. MRI scanning of the lumbar spine

(25 November 1993) was equivocal, and the patient subsequently underwent a facet block to delineate possible surgical pathology (20 January 1994) – which was also reported equivocally.

[The worker] elected the diagnostic option of external spinal skeletal fixation test (undertaken on 6 July 1994) in the hopes of delineating his candidacy for arthrodesis (fusion surgery) to relieve his persisting back pain symptoms. ...

After seeking the second opinion from Dr. Thomas Wright of Toronto, [the worker] again presented to my attention on twenty-nine November 1995 and, after discussions, the surgery was booked for 26 of February 1996.....

...Due to implant bursitis, [the worker] was again taken to the Operating Room on 9 December 1997, where, under general anaesthetic, his Rogozinsky instrumentation was removed...

(iii) Relevant law and policy

[9] In accordance with section 126 of the *Workplace Safety and Insurance Act, 1997*, (“WSIA”) the Board has identified the following policies as applicable to the issues on appeal:

- Policy Package #107 – revision #5 “Aggravation Basis or SIEF”
- Policy Package #180 – Revision #5 “NEL Quantum”
- Policy Package # 300 – Revision #5 “Decision Making”

[10] *Operational Policy Manual* Document No. 05-06-07 “Effect of a Pre-existing Condition or Impairment” provides:

Policy

If a worker being rated for a permanent impairment has a pre-existing condition or impairment, the Board should apply the rating schedule of the AMA Guides without using the combined values approach. Each impairment should be rated, with the pre-existing condition having no impact on the rating of the work-related impairment, unless the same body area is involved, in which case the prior impairment will be subtracted to determine the work-related impairment.

Guidelines

....

If the worker has a measurable non-work-related impairment and then suffers a work-related impairment to the same body area, the work-related impairment is rated independently, with the prior impairment being subtracted to determine the work-related impairment.

....

If the worker has a non-measurable non-work related impairment and suffers another work-related impairment to the same body area, the impairment rating is determined by using the combined values chart if applicable and the impairment may be reduced based on a moderate or major pre-accident disability.

(iv) The worker’s testimony

[11] The worker acknowledged undergoing back surgery in 1989 to correct the condition which had been caused by his playing sports. At the time of the surgery, he was employed as a “ladleman”, a position which required him to perform very physical demanding duties including operating a jackhammer. The worker was off work following his surgery for approximately a year and a half.

- [12] When the worker returned to work in November 1990, he was placed in the mobile cleaning services. Technically, this was classified as modified duty although the worker felt it involved some fairly significant physical labour. In this job, he was required to clean the “powerhouses” which contained transformers. There were 40 such powerhouses on the employer’s premises and some were very large. The worker was required to sweep the area first and then mop. There was often a great deal of grease on the floor in the powerhouse which made the cleaning rather difficult. He was also required to change the water in these buckets frequently. As mentioned above, the worker did not consider these duties to be “modified” because of the amount of mopping involved. The worker was able to continue performing these duties for approximately two years. During that period, he never lost any time from work nor did he seek any medical attention for his back.
- [13] When his work in the powerhouses was completed, the worker began working nights as a janitor. He was required to clean conference rooms. This included sweeping floors, emptying garbage cans, mopping floors and operating a buffer machine. While it was not as physically demanding as the powerhouse job, it could become difficult especially when he had to carry the buffer machine up the stairs. He performed these duties for about four months and then returned to cleaning the powerhouses.
- [14] In June 1992, following a meeting with the employer, a decision was made that the worker would begin a return to regular duties. Initially, he was asked to work with bricklayers who were replacing lids in the coke ovens. The worker was required to jackhammer out the old leaves, clean up the debris and mix cement for the bricklayers. They would work on three or four coke ovens a day. The worker suggested that these duties were about as physically intense as his work as a ladleman. He worked with the bricklayer for the summer and most of the winter of 1992.
- [15] The worker acknowledged that in January 1993, he visited his family physician, Dr. Levy, with some complaints of back pain. Dr. Levy arranged an appointment with a specialist, Dr. Bednar, and sent the worker for a CT scan. Dr. Bednar provided the worker with some Naprosyn and advised him to take the medication and see if it relieved his pain. Arrangements were made for a follow up examination a month later. According to the worker, the pain medication relieved his discomfort and he was able to continue working. Unfortunately, the compensable accident occurred before he returned to see Dr. Bednar.
- [16] The worker testified that at the time of his accident in February 1993, he had been placed in a job which required him to assist in the clean up of the cold mill. He suggested that these duties, which included cleaning grease and picking up steel strapping and chips, were as heavy as the work he performed in the ladleman position. On February 24, 1993, he was carrying a number of steel straps when he slipped on some grease and fell to the floor, injuring his back.
- [17] In the years which followed the compensable accident, the worker underwent three bouts of back surgery and did not return to work until 1998. Over the months which followed his return, he performed a number of duties including making signs, picking up skids and landscaping before being placed in permanent modified work as a cleaner in the tube mill. According to the worker, these cleaning duties are much lighter than those performed earlier in his career as he is able to drive a sweeping machine and operate a “walk behind scrubber”. This is a self-propelled piece of machinery which cleans the floors. He continues in this position at the present time.

(v) Submissions of the worker's representative

[18] Ms. Serra did not dispute that the worker had a pre-existing non-compensable back condition which had required surgery in September 1989. She did disagree however, with the Board's conclusion that this should be classified as a "major" pre-existing condition. In her view, it was more appropriate to classify the severity of the condition as "moderate" which would mean that the worker's NEL award would be reduced by only 25% rather than 50%.

[19] In support of her position, Ms. Serra noted that in the period between the worker's return to employment in November 1990 and his accident in 1993, there had been little, if any, lost time, no medical attention sought from the employer and only a relatively few visits to the family physician. Ms. Serra also stressed that following his return in 1990, the worker had performed very physically demanding work and by June 1992, had been authorized to return to regular duties.

[20] Ms. Serra also disputed the Board's contention that the incident on February 24, 1993, was a "minor" accident. In her view, it ought to have been described as an accident of "major" severity since it resulted in permanent disability, requiring three back surgeries.

(vi) Conclusions

[21] As acknowledged by Ms. Serra, there is no dispute in this case that, at the time of his accident, the worker had a pre-existing non-compensable back disability. *Operational Policy Manual*, Document #08-01-05 (Second Injury and Enhancement Fund) defines a "pre-accident disability" as a condition "... Which has produced periods of disability in the past requiring treatment and disrupting employment". As he acknowledged in his testimony, the worker underwent surgery for his back condition in 1989 and lost approximately a year and a half from work because of it.

[22] *Operational Policy Manual*, Document #05-06-07 provides that where the worker has a measurable non work-related impairment and then suffers a work-related impairment to the same body area, "... the work-related impairment is rated independently, with the prior impairment being subtracted to determine the work-related impairment". Unfortunately, this policy document gives no assistance as to how one determines the extent of impairment caused by the non work-related injury. There is no definition of the terms "minor", "moderate" or "major" nor does it indicate how much an award is to be reduced once the severity of the pre-existing condition is determined.

[23] While not applicable in this case, the current Board policy, *Operational Policy Manual*, Document #18-05-05 (Effect of a Pre-existing Impairment), provides some guidance as it indicates that a NEL rating will be reduced "... according to the significance of the pre-existing impairment" and suggests "if minor, there is no reduction, if moderate, there is a 25% reduction and if major, there is a 50% reduction". Again, unfortunately, this document does not provide a definition of minor, moderate or major conditions.

[24] In his decision, the Appeals Resolution Officer indicated that "the decision to describe a pre-accident disability in one or another of these categories is guided by the opinion of medical consultants". As indicated earlier, Dr. David of the Board, in Memo #3, suggested that the

pre-existing state was “major” noting the prior surgery. Similarly, Dr. MacArthur, in Memo #83, confirmed that the pre-existing condition was “very significant” but gave no reasons for that conclusion.

[25] As noted earlier, there is no dispute in this case that the worker had a pre-existing non-compensable back condition upon which surgery was performed in September 1989. In my view however, the fact that the worker had surgery is not sufficient on its own, to support classifying its severity as “major”. The worker’s recovery after the operation and the level of functioning he attained, is also relevant.

[26] After reviewing the material before me and considering the worker’s testimony, I find myself in agreement with Ms. Serra that the worker’s pre-existing condition could more appropriately be classified as of “moderate” severity. In reaching that conclusion, I have taken particular note of the following:

- Following his surgery in 1989, the worker returned to the employer in November 1990. While technically classified as modified employment, his duties were relatively strenuous in that they involved a significant amount of mopping, sweeping and lifting of buckets.
- While likely less physically demanding than the powerhouse duties, the worker also successfully performed cleaning duties in the conference room area which required significant mopping and operating of a buffer machine.
- In a memo dated June 9, 1992, the employer’s Occupational Therapist, was satisfied that the worker’s condition had improved to allow him to “... gradually increase the heavier components of the job over approximately two to four weeks”.
- From June 1992 to the date of his accident, the worker performed physically strenuous duties which included operating a jackhammer and mixing cement.
- The worker did not lose any time from work between 1990 and his accident in 1993.
- While the worker did visit his family physician on November 23 and December 17, 1992, with complaints of back pain, he was able to continue working and was prescribed Tylenol #3.

[27] In my view, when one attempts to assess the severity of a pre-existing condition, one must consider more than whether or not the worker has had surgery for that condition. In this case, it is important to recognize that while the worker had surgery in 1989, he was eventually able to return to work and continue performing relatively physically demanding duties between November 1990 and February 1993. He was able to continue working with no lost time, no visits to the employer’s medical department and relatively few visits to his family physician. While he did visit Dr. Levy in November and December 1992, he was able to continue at work while taking Tylenol #3.

[28] While it seems clear that the worker’s back condition was symptomatic at the time of his accident in February 1993 (he had visited Dr. Bednar just a month earlier), I am satisfied that the balance of evidence supports the finding that the severity of his pre-existing condition can more correctly be described as “moderate” rather than “major”. According to current Board policy which I find to be of assistance in this case, the existence of a moderate pre-accident disability would result in the worker’s NEL award being decreased by 25% rather than 50%.

THE DECISION

[29] The worker's appeal is allowed.

[30] The worker has a pre-existing impairment of moderate severity resulting in a 25% reduction in his NEL award.

DATED: October 30, 2002.

SIGNED: R. Nairn.