



## WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

### DECISION NO. 2468/07

**BEFORE:**

B. Doherty : Vice-Chair  
B.M. Young : Member Representative of Employers  
D. Broadbent : Member Representative of Workers

**HEARING:**

October 31, 2007 at Windsor  
Oral

**DATE OF DECISION:**

December 27, 2007

**NEUTRAL CITATION:**

2007 ONWSIAT 3367

**DECISION(S) UNDER APPEAL:** WSIB ARO decision dated November 1, 2005

**APPEARANCES:**

**For the worker:**

Rod Lesperance, Consultant

**For the employer:**

Did not participate

**Interpreter:**

None

## REASONS

### (i) Introduction

[1] These are the reasons for decision in an appeal by the worker from the decision of Appeals Resolution Officer (ARO) Boland of the Workplace Safety and Insurance Board (WSIB or “the Board”) dated November 1, 2005. The worker was seeking initial entitlement for his low back and hip pain as well as loss of earnings (LOE) benefits and non-economic loss (NEL) entitlement. ARO Boland concluded that the worker’s job duties caused a temporary aggravation of his underlying degenerative disease, awarded him LOE benefits for the time that he was off work from September 2003 until he returned to work on March 1, 2004, and concluded that the aggravation phase was over by the time of his return to work on March 1, 2004. She found that the worker was not entitled to a NEL assessment as the underlying problems were considered non-compensable and degenerative in nature.

[2] The issue in the worker’s appeal to this Tribunal is entitlement to a NEL assessment.

### (ii) Background

[3] The worker, who was born in 1947, was 60 years old at the time of the hearing. He had worked as a mould maker in the automotive industry. He had done this work for 23 years at the time of his workplace injury in 2003, and had been with the accident employer since 1993.

[4] The worker’s job was physically demanding. A description of the job, Shop Toolmaker Leader, was provided to the Board by the employer, and the worker had described it in his Form 6 report to the Board. The duties that he described included machining steel, drilling, boring, reaming, grinding, and fitting mould components, operating cranes, and assembling and disassembling moulds. The components varied in size and weight from as little as half a pound to as much as 150 pounds. The worker told the Board in his Form 6 that the walking, bending, lifting, twisting and pushing associated with the job severely aggravated his lower back and right hip.

[5] The worker first experienced low back problems in 1998. He stated in his Form 6 (in this claim) that he had had chiropractic treatment, 18-20 visits, and did not lose time from work.

[6] Although the report of the investigation by the Board has the worker reporting that he fully recovered from the episode of low back pain in 1998 and had no ongoing back problems until June 2003, that was not his evidence at the hearing. He testified that the severe radiating low back pain that he first experienced in 1998 continued. The worker took medication, Tylenol #2, for the back pain. It was his evidence that he continued to have a problem with his low back after 1998, and it was worsening.

[7] In June 2003, the low back pain had reached the point that the worker once again sought chiropractic treatment, with Dr. S. Whittal. The condition did not improve, and the worker had to stop working on September 28, 2003. His explanation for the delay in reporting the matter to the Board was that he was believed that his condition would be corrected as it had been in 1998.

[8] The worker had x-rays of his lumbar spine, and pelvis and hips on September 29, 2003. The report of the x-rays refers to mild degenerative disc disease and mild to moderate hypertrophic facet changes in the lumbar spine and mild degenerative disease in the hips. A CT scan carried out later, in April 2004, was said to show minimal dorsal displacement of S1 nerve root sheaths, mild narrowing of the lateral foramina and minimal degenerative changes in the superior sacroiliac joints.

[9] There are various diagnoses of the worker's condition in the medical records. The chiropractor, Dr. Whittal, provided a diagnosis of lumbosacral strain/sprain with associated subluxation and right hip arthritis. The physiotherapist referred to strain of the right hip and possibly the back. The family doctor, Dr. L. Strausz, referred to lumbar disc injury and bilateral hip arthrosis. Dr. R. Farley, the surgeon who assessed the worker at the request of his representative in connection with this appeal, was of the opinion that he had a combination of degenerative lumbosacral disease and myofascial soft tissue injury.

[10] When he stopped working in September 2003, the worker applied to his extended health care insurer for disability insurance benefits. In the application, he was asked whether his accident was work-related, and he stated that it was. The insurer denied benefits on the basis that the worker's disability was work-related.

[11] The worker and the employer filed their reports to the Board in November 2003. The employer's report stated that the employer had no reason to doubt that the injury was work-related.

[12] The Board conducted an investigation in November 2003.

[13] The worker remained off work until March 1, 2004 when he returned to modified duties. He testified that he was unable to perform his regular work. He never returned to regular duties, and continued with the modified duties from the time of his return to work in March 2004 until he was laid off in December 2006.

[14] Prior to the exacerbation of his back pain in 2003 the worker had worked a significant amount of overtime, usually working 55 hours per week and sometimes 60 hours per week or more. He testified that after he returned to work in March 2004 he was no longer able to work overtime, that he reduced his hours to the minimum, and that he was sometimes not able to work a full day.

[15] He continued to be paid his regular rate of pay while he was doing light duties until the employer company was sold. He testified that the new owner reduced his wages in early 2006.

[16] On December 1, 2006 the worker was laid off as part of a general layoff. The employees were called back to work in July 2007, but the worker did not return. He testified that he assumed that the modified duties were still available, but he was not able to return to work in July 2007. He described a number of health and medical problems that he had at the time: ongoing back pain, a heart condition, a chronic lung infection, and vascular problems (an arterial blockage).

[17] He testified that when he was diagnosed with the heart condition in January 2007 the family doctor, Dr. Strausz, suggested that he retire because of the medical problems he had. The worker stated that, financially, he could not afford to retire, and Dr. Strausz suggested that he apply for CPP disability benefits.

[18] He applied for and was granted CPP disability benefits which he started receiving in April or May 2007. There were no retroactive benefits. He receives \$975 per month. The worker testified that that is his only source of income other than the cashing in of his RRSPs.

[19] The application and medical report form for the CPP disability benefits were not provided to us. The worker testified that his application for CPP disability benefits referred to his back and hip problem dating back to 1998, and the other medical conditions. He stated that the back and hip pain was the most significant of his multiple medical problems.

[20] The worker's claim for benefits was initially denied by the Board on the basis that proof of accident had not been established, and there was no initial entitlement. As described earlier, the ARO granted the worker's appeal in part, and allowed the claim on an aggravation basis, that there had been a temporary aggravation of the worker's pre-existing condition.

[21] The worker testified as to his current condition. He stated that he continues to have pain in his lower back that goes down his legs and into his right hip. He takes medication two to three times a day as needed. He is having chiropractic treatment. He had chiropractic treatment with Dr. Whittal until September 2004 and then began chiropractic treatment again in December 2005, seeing another chiropractor, Dr. R. Strausz. He continues to see Dr. R. Strausz.

[22] The worker testified that he is limited in some household activities because of his condition. He has difficulty carrying things such as groceries. He cannot move furniture. Sometimes his wife has to cut the grass.

### (iii) Relevant law and Policy

[23] The *Workplace Safety and Insurance Act, 1997* (WSIA) provides, in section 13(1), that a worker who sustains an injury in an accident arising out of and in the course of employment is entitled to benefits.

#### (a) Accident

[24] "Accident" is defined in the WSIA to include disablement arising out of and in the course of employment.

[25] This Tribunal is directed by the WSIA to apply WSIB policy in its decision-making. WSIB policy is contained in its *Operational Policy Manual* (OPM).

[26] OPM Document #15-02-01, "Definition of an Accident," states that the definition of disablement includes:

- A condition that emerges gradually over time.
- An unexpected result of working duties.

**(b) Impairment/Permanent Impairment**

[27] The WSIA provides that a worker is entitled to compensation for NEL if his or her injury results in permanent impairment. Impairment is defined as follows:

“impairment” means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

[28] “Permanent impairment” is defined in the WSIA to mean impairment that continues to exist after the worker reaches maximum medical recovery.

**(c) Aggravation Basis**

[29] OPM Document No. 11-01-15, *Aggravation Basis*, applies in a situation where a worker has a pre-accident impairment and suffers a minor work-related injury to the same body part. Entitlement to benefits is considered for the acute episode only, until the worker returns to his or her pre-accident state. If the worker never returns to his or her pre-accident state, the worker may be entitled to a NEL benefit.

**(iv) Analysis, findings and conclusions**

[30] The ARO accepted that the worker’s job duties in June 2003 caused the disability that began at the end of September 2003. That conclusion, that there was a causal connection between the job duties and the disability, was not appealed by the employer (who had been involved in this appeal until shortly before the hearing) and it underlies our analysis.

[31] The ARO found entitlement on an aggravation basis, that the worker had experienced an aggravation of his pre-accident impairment; concluded that the aggravation was only temporary; and that the symptoms that the worker continued to experience were degenerative in nature.

[32] The *Aggravation Basis* policy applies where there is a pre-accident impairment. “Pre-accident impairment” is defined in the policy as a condition which has produced periods of impairment requiring health care and has caused a disruption in employment. The policy states that, although the period of time cannot be defined, a decision-maker may use a one to two year timeframe as a guide. On the basis of this definition, the worker here did not have a pre-accident impairment such that the policy would apply. The worker had had an onset of low back pain in 1998. It had required some health care, chiropractic treatment. It is not clear when the chiropractic treatment ended, but it involved 18-20 visits and there is no evidence that it continued into the timeframe referred to in the policy, one to two years. The worker did not lose time from work in 1998 due to the condition, and although he had ongoing pain that was worsening, there is no evidence of disruption in employment in the one to two year timeframe. He continued to work at his regular job, including working substantial overtime. We find that the worker did not have a pre-accident impairment in the terms of OPM Document #11-01-15.

[33] For that reason, the *Aggravation Basis* policy, does not, in our view, apply here. Even if it did apply, the policy recognizes that there are cases where workers never return to their pre-

accident state, and states that where the work-related injury has permanently aggravated the pre-accident impairment, the worker may be entitled to a NEL benefit.

[34] There is ample evidence that the worker did not return to his pre-accident<sup>1</sup> state. The worker never returned to his regular duties but rather to modified duties. He did not work overtime, as he had before. He continued to work modified duties, minimum hours, from the time that he returned to work on March 1, 2004 until December 2006 when he was laid off.

[35] The worker has ongoing impairment, physical and functional abnormalities as a result of his low back condition. The question is whether the impairment is attributable to the worker's job duties or to the degenerative process.

[36] As noted earlier, the worker was assessed by Dr. R. Farley in connection with this appeal. Dr. Farley's report relating to his examination on August 18, 2006 discusses, among other things, functional impairments and causation. He suggests that the worker's right hip symptoms are related to the low back: "This man has lower back pain and what he describes as right hip and leg pain. He has many subjective manifestations of sciatica."

[37] Dr. Farley found that hip examination was normal. He reviewed the report of the September 2003 x-rays and the CT scan. He described a number of activities that were limited: the worker could not cut grass; could not help with the housework; was limited to walking about two blocks due to pain with sciatic distribution into the right hip and leg; could not lift anything more than 20 pounds; could not twist; and was limited in his driving to about one to one and a half hours. Dr. Farley describes the worker's activities of daily living as "markedly restricted," and states that he has a permanent disability. In his opinion:

[The worker] has a combination of degenerative lumbosacral disease and myofascial soft tissue injury brought on by long-term labouring occupations and by two specific injuries.

[38] The two specific injuries that Dr. Farley was referring to were the 1998 back condition and the back condition in September 2003 that caused the worker to stop working.

[39] Dr. Farley went on to answer a number of questions posed by the worker's representative having to do with, among other things, whether the low back aggravation had ceased/the low back had returned to its pre-accident state and whether there were objective findings to confirm a continuation. The surgeon stated:

This man's low back aggravation has definitely not ceased and has not returned to [its] pre-accident state. I do not see any documentation of range of motion, but flexion of 35° and extension of 5° [Dr. Farley's measurements] confirm marked restriction of range of motion.

[40] Dr. Farley stated that, in his opinion, there would be no further improvement and likely further degeneration.

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<sup>1</sup> The date of accident established for this claim is June 18, 2003, the date reported by the worker in his Form 6 as the date of injury.

[41] Dr. Farley's opinion regarding the prognosis was echoed by the worker's chiropractor, Dr. R. Strausz, in her report of July 27, 2006, where she stated that the outlook was not particularly promising.

[42] We accept Dr. Farley's opinions and find that the worker has permanent impairment as a result of his low back condition and that his job duties caused, that is, were a significant contributing factor to, the impairment. We further accept Dr. Farley's opinion that the worker's right hip pain is likely attributable to his low back condition, and is not a separate problem. We conclude that the worker is entitled to a NEL assessment for his low back condition.

**DISPOSITION**

[43] The worker's appeal is allowed. He has work-related permanent impairment of his low back and is entitled to a NEL assessment.

DATED: December 27, 2007

SIGNED: B. Doherty, B.M. Young, D. Broadbent