



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 482/07

BEFORE: S. Peckover: Vice-Chair

HEARING: March 2, 2007 at Toronto
Oral

DATE OF DECISION: April 5, 2007

NEUTRAL CITATION: 2007 ONWSIAT 926

DECISION(S) UNDER APPEAL: WSIB ARO decision dated December 30, 2003

APPEARANCES:

For the worker: Mr. Sampson, Consultant

For the employer: None (Closed – Not Participating)

Interpreter: None

REASONS

(i) The Issues

- [1] There issue before me is ongoing entitlement for the worker's low back injury, including:
1. entitlement to a non-economic loss (NEL) award; and
 2. entitlement to a full Future Economic Loss (FEL) beyond December 17, 1997.

(ii) Introduction

- [2] The worker, now age 52, was working as a baker when he injured his back on March 10, 1997. As he picked up a 40-kg. bag of flour, he experienced the onset of pain in his low back. Entitlement was allowed for a lumbar strain, and the worker received temporary total disability benefits from March 12, 1997 through May 5, 1997. The Board's information indicated that as of that date, he returned to work at four hours per day, and received temporary partial difference benefits to June 20, 1997.
- [3] In a decision letter dated June 13, 1997, the Board advised the worker that a medical review of his file indicated that he was fit to return to his regular job. Therefore, entitlement to temporary total disability benefits would be finalized seven days from the date of the letter.
- [4] On August 11, 1997, the worker advised the Claims Adjudicator that he had received her letter dated June 13, 1997. He indicated that the had returned to work half-days on May 5, 1997 for a period of two weeks, during which time he was supervising and training a helper. He was unable to continue working due to increased back pain. He complained of numbing pain across the groin area and down the left leg. He had seen a specialist on July 8, 1997, who recommended traction (physiotherapy). The Board requested that the worker obtain copies of all medical investigations and submit them to the file for review.
- [5] The medical information submitted included a CT scan dated June 26, 1997, which revealed a disc herniation and sciatica. Board Medical Consultant Dr. Smith reviewed the new information, and on September 12, 1997, opined that the worker's symptoms now were compatible with discogenic pain. The CT scan had revealed pre-existing anatomical abnormalities and an L4-5 disc lesion. He considered the worker to be partially disabled with standard back restrictions. Based on this opinion, entitlement beyond June 20, 1997 was extended.
- [6] In September of 1997, Vocational Rehabilitation services were opened, as the employer was unable to accommodate the worker. Also, as the worker's recovery appeared to be prolonged, the Board sent him for a Regional Evaluation Centre (REC) assessment, which occurred on October 25, 1997. The resulting report of the same date diagnosed a lumbar strain, and indicated that there was no need for further medical investigation at that time. The worker was to pursue four to six weeks of physiotherapy in a MacKenzie Exercise Program, followed by an independent program and the normalization of all activities. Some functional limitations for heavy lifting or repetitive bending were indicated over the full period of treatment.

[7] On December 22, 1997, the Board advised the worker that it was now six weeks after the REC assessment, and in the absence of any new medical information, his benefits had been finalized as of December 17, 1997, in accordance with the REC's findings. A further decision letter of the same date indicates that his vocational rehabilitation (VR) service was now complete, as, according to the medical information on file, he was now fit to return to his pre-accident job.

[8] The receipt of further medical information in late December of 1997, and again in September of 1998, did not convince the Board to change its December 22, 1997 decision. In decision letters dated January 29, 1998 and September 22, 1998, the Claims Adjudicator stated that a Board Medical Advisor had reviewed the new information submitted, and was of the view that there were no findings contained in the new medical reports to confirm an assessable permanent impairment, and they listed no medical restrictions. The worker objected, seeking a non-economic loss (NEL) award, a FEL award, and VR services.

[9] A decision letter dated February 3, 2003 advised that new medical information had been received indicating that the worker had had frequent flare-ups of back pain with no neurological deficit. An x-ray in November of 2001 indicated that the worker had degenerative disc disease (DDD). A Board Medical Advisor had reviewed this new medical information, and had determined that there was no evidence to support that the worker's ongoing impairment was related to the accident history. Entitlement to a permanent impairment therefore was denied.

[10] In a decision dated December 30, 2003, the ARO reviewed the medical evidence, and included some information regarding DDD. He then indicated as follows:

In this case we know the bulging disc was pre-existing because of the stenosis. To allow ongoing entitlement there would have to be evidence of a residual neurological impairment caused by increased damage to the disc and nerve roots since the strain per say [sic] would resolve.

Otherwise, from a medical standpoint, the WSIB would accept the worker acutely inflamed the disc and experienced temporary inflammation. Flare-ups in the future are then attributed to the nature of the DDD. The fact that straight-leg raising and heel [sic] toe walking was normal on December 17, 1997 is indicative of recovery from the acute aggravation cause [sic] by the accident in March 1997.

Although Dr. Lasko supported the worker's choice not to return to heavy lifting, this is a precautionary recommendation that is logical due to the pre-existing condition but it is not related to the basis for which this claim was established. While this injury brought to light for the worker that he has a pre-existing problem, the injury did not alter the nature of the DDD in a traumatic way causing permanent nerve root damage. Therefore the restrictions are related to the DDD not a permanent impairment caused by the March 1997 accident.

CONCLUSION

1. The evidence does substantiate impairment related to the accident beyond December 17, 1997 precluding the worker from returning to his regular job. The recommendation for lighter worker [sic] is reasonable noting the findings on the C.T. scan, however, these findings were not caused by the accident.
2. There is no evidence of permanent impairment as a result of the March 10, 1997 accident.

[11] The worker appeals from this decision.

(iii) The Representative's Submissions

[12] Mr. Sampson submitted, on behalf of the worker, that the worker's injury was a significant contributing factor to the client's aggravation of his pre-existing, asymptomatic medical condition. He argued that, while there had been periods in which the worker had felt that he was getting better, they were followed by periods of relapses, indicating that the worker's degenerative disc disease had become totally symptomatic. He reviewed the medical record, and argued that the worker's treating medical practitioners all agreed that there was a residual impairment resulting from the workplace accident, in contrast to the REC report. Further, he submitted that orthopaedic surgeon Dr. Langer's report was very powerful, in that he reviewed all of the worker's file, and came to the conclusion that the workplace injury was the cause of the worker's problems. The worker therefore was entitled to a Permanent Impairment assessment for the lumbar spine injury. He submitted that the evidence was very clear that the worker had no problems before the workplace injury, and a host of problems after, which were continuing at the present time.

[13] Further, he submitted that the worker was entitled to FEL benefits beyond December 17, 1997, as his condition had been continuous, ongoing, and caused by his workplace injury.

(iv) Analysis and Conclusions

[14] Since the worker was injured on March 10, 1997, the pre-1997 *Workers' Compensation Act* (the pre-1997 Act) is applicable to this appeal. The hearing of this appeal commenced after January 1, 1998; therefore, certain provisions of the *Workplace Safety and Insurance Act, 1997* ("WSIA") also apply to the appeal. All statutory references in this decision are to the pre-1997 Act, as amended, unless otherwise stated.

[15] The presence of a pre-existing condition makes relevant some of the provisions found in Document No. 08-01-05, "Second Injury and Enhancement Fund (SIEF)", of the *Operational Policy Manual* (OPM). The relevant portions are as follows:

Pre-existing condition impact on claims

The policy on aggravation of pre-existing condition, exclusive of the SIEF policy, applies to both Schedule I and Schedule II claims in which

- A relationship is shown between an underlying condition and the degree of disability arising from the accident
- The period of treatment and recuperation is prolonged due to an underlying condition, and/or
- An increased degree of residual disability occurs, which exceeds the usual, owing to the underlying condition.

Temporary disability

A claim for an occupational injury involving a pre-accident disability is allowed for the acute episode only and entitlement to payment of compensation ceases when the worker's

condition has returned to the pre-accident state. In a claim where there is a pre-existing condition but the worker is symptom-free at the time of the work-related accident there is no limitation of benefits throughout the period of temporary disability.

[16] The principles governing benefits related to an aggravation of a pre-existing condition are well established in Tribunal case law. The analysis revolves around determining whether or not the workplace accident was a significant contributing factor in the worker's ongoing disability. In this context, the following factors are considered:

- The existence of a pre-existing condition at the time of the workplace accident;
- The nature of the workplace accident itself; and
- The seriousness of the worker's condition after the accident. That is, was there a permanent worsening? Did the worker return to his pre-accident state?

[17] On the issue of a pre-existing condition, for example, *Decision No. 1354/00* outlines the principles as follows:

It is a well-established principle of compensation law that workers who sustain injuries which aggravate an underlying condition are entitled to compensation benefits for the period of acute disability, and that benefits are payable until the worker reaches his or her pre-accident condition. When the underlying condition has been asymptomatic, and there is a permanent aggravation of the underlying condition, there is no restriction on the payment of benefits. Each case must be decided on its own facts, and requires an assessment of the extent to which the pre-existing condition has been disabling before the accident, and an assessment of whether or not a recovery has taken place to the point that the worker's condition is the same as it was before the accident.

[18] The above quotation and excerpts clearly indicate that, where a worker has a pre-existing, asymptomatic condition which becomes symptomatic as a result of a workplace accident, there is no limitation on the benefits to which the worker is entitled. The worker testified that he had never experienced any back pain prior to the accident date, and had never lost any time from work for this reason. A review of the medical record corroborates this testimony. There is no indication in the Case Record that the worker had complained of back pain at any time prior to the March 10, 1997 incident. If the worker had a pre-existing condition, therefore, it was completely asymptomatic up to the date of the workplace accident. It follows that, should entitlement be granted, there would be no limitation on the worker's benefits, including a Non-Economic Loss assessment for any residual impairment in his back.

[19] Turning to the medical record, I note that, while the worker's treating physicians, including family physician Dr. Lasko (March 25, 1997) and orthopaedic surgeon Dr. Weinberg (May 2, 1997) initially diagnosed a low back strain, a CT scan, dated June 26, 1997, revealed a small bulging of the L2-3 and L3-4 discs, with no spinal stenosis or disc herniation, along with moderate bulging of the L4-5 disc, associated with ligamentous hypertrophy leading to mild spinal stenosis. There was no disc herniation at the L5-S1 level, as the disc there was rudimentary. In light of this CT scan result, in his report dated August 5, 1997, Dr. Weinberg changed his diagnosis to a protruding disc with some nerve root irritation on the right, and sent the worker for another round of physiotherapy. Board Medical Advisor Dr. Smith's September 12, 1997 opinion was that the worker had anatomical abnormalities and an L4-5 disc

lesion, both of which were pre-existing, but compatible with the accident history. Benefits were extended beyond the initial stop date of June 20, 1997, on the basis of those findings.

[20] The worker's benefits were terminated as of December 17, 1997, based on the October 21, 1997 REC assessment, which diagnosed a lumbar strain, and expected complete recovery within six weeks. Anticipated limitations, for a period for four to six weeks, were no heavy lifting or repetitive bending. It was recommended that the worker go for four to six weeks of MacKenzie-style physiotherapy, followed by an independent program. At the time of the assessment, the worker reported that he had experienced a 90% improvement in his overall symptom complex. (When asked about this at the hearing, the worker indicated that he initially thought that he was going to get better. However, shortly after the REC assessment, he discovered that, with one little turn the wrong way, he would be bedridden again for a number of days.) He indicated that his leg pain had developed over the four or five weeks following the initial injury, and he had some complaints of right hip pain, with shooting pain into the back and the right leg. The symptoms were aggravated with prolonged sitting, and walking at a fast pace or jogging. There also was some numbness in the right hip, and some mild bilateral groin pain, with the right side worse than the left. He indicated that his lifestyle was markedly diminished compared to his pre-injury state. I note that there is no mention anywhere in this report of the worker's June 26, 1997 CT scan.

[21] On December 17, 1997 (i.e., the same date that the Board declared the worker wholly recovered), Dr. Weinberg reported that the worker's back pain was persisting, despite his participation in the MacKenzie Back Exercise Routine. His leg pain had subsided, but he still had discomfort in the low back, particularly with bending. He noted that the worker had marked restriction on forward bending, with his hands just reaching his knees. The worker's straight leg raising (SLR) was full, and his reflexes were symmetrical. He was able to walk on his heels and on his toes. He opined that the worker had residual back pain from a strain. He expressed the hope that the worker would be evaluated for a training program so that he could get into lighter work.

[22] On January 23, 1998, Board Medical Advisor Dr. Maehle reviewed the file, and indicated that Dr. Weinberg's report dated December 17, 1997 reflected the findings of the REC report dated October 21, 1997. Therefore, there was no assessable permanent impairment.

[23] I am uncertain how Dr. Maehle arrived at this conclusion, as the findings in the two reports differ widely. While the REC assessors felt that the worker's back pain would resolve within six weeks, after which he should be able to return to his regular work, Dr. Weinberg clearly was of the opinion that the worker could not resume his regular work, and needed to be retrained for lighter work. The latter implies, and I find, that Dr. Weinberg felt the worker had a permanent impairment.

[24] A second CT of the lumbar spine, dated November 5, 2001, revealed degenerative disc disease (DDD), minor narrowing of the disc spaces, and gas in the disc space at L5-S1, as well as mild-to-moderate bulging of the annulus at L4-5. The diagnostic opinion was DDD at L5-S1.

[25] The worker continued consulting his family physician and various other medical practitioners with respect to his back pain. Orthopaedic surgeon Dr. Kliman

(November 15, 2001) reported ongoing back pain, radiating right leg pain, and activity-related back difficulties. Family physician Dr. Castiglione (December 7, 2002) reported that the worker had frequent flare-ups of back pain lasting 8 to 12 days, in which he was confined to either bed or house. He opined that the worker had a chronic back disability which required further evaluation, investigation, and treatment. Those symptoms were continuing as of Dr. Castiglione's December 2, 2003 report.

[26] On May 25, 2006, the worker representative wrote to orthopaedic surgeon Dr. Langer with respect to the worker's case. He sought an assessment of the worker's condition to determine if he had a permanent impairment, and if so, whether that impairment was directly or indirectly sustained as a result of the March 10, 1997 accident. In his report dated June 12, 2006, after examining the worker and reviewing the medical reports on file, Dr. Langer opined as follows:

There is some question as to whether his ongoing impairment is due to degenerative disc disease. Obviously, [the worker], who is 51 years of age, does have degenerative disc disease in his low back. However, he was able to work without problems in the period prior to March 1997. There is absolutely no evidence that [the worker] would have the symptoms he asserts had the work accident of March 1997 not occurred. **His disability is the result. In other words, the presence of degenerative disc disease in the lumbosacral spine in the period prior to the accident was not of importance in that he was not symptomatic. It would, however, increase the vulnerability of [the worker] to the physical effects of the lifting accident, as happened in March 1997, and one would anticipate that once established the chronic mechanical back pain would persist indefinitely. This has, in fact, occurred.** [Emphasis added]

Therefore, it is my view that [the worker] has sustained a lumbar spine injury as a result of an exacerbation of pre-existing disc disease in the low back, which was asymptomatic prior to the accident, rendering this condition symptomatic indefinitely and associating it with mechanical spine pain.

The prognosis is obviously quite poor as [the worker] has remained symptomatic up to the present time. ...

[27] The worker's treating physicians therefore agreed that he has ongoing back pain, and that he has permanent restrictions as a result. I have already found that the worker's pre-existing condition was asymptomatic prior to the accident date. Dr. Langer's opinion is clear and unequivocal that the worker's back condition was asymptomatic prior to the accident, and was rendered symptomatic as a result of the workplace accident. The only dissenting opinions are those of the REC assessors, who apparently did not have a copy of the CT scan before them and who saw the worker on only one occasion, and Board Medical Advisor Dr. Maehle, who conducted a paper review, in which he compared the REC report to Dr. Weinberg's December 17, 1997 report. Given my reservations with respect to both of those documents, as outlined above, I find the opinions of the worker's treating physicians and Dr. Langer more persuasive.

[28] In summary, based on all of the above, I find that the workplace accident was the significant contributing factor in rendering the worker's pre-existing DDD in his low back symptomatic. He therefore is entitled to ongoing benefits in this claim, including a permanent impairment assessment.

[29] Given my findings that the worker is entitled to ongoing benefits in this claim, it follows that he has entitled to lost-time benefits from December 17, 1997. The determination of the level of the FEL benefit is intimately connected to the results of the NEL assessment, as that assessment will determine the worker's level of impairment and the extent of his ability to work. I therefore refer the matter of the quantum of the worker's FEL benefit to the Board, for determination following the NEL assessment.

DISPOSITION

[30] The appeal is allowed. The worker is entitled to ongoing benefits in this claim, including a NEL assessment for the permanent impairment in his low back and a FEL benefit from December 17, 1997. I refer the matter back to the Board to determine the nature and extent of those benefits, including the quantum of the worker's FEL benefit, following completion of his permanent impairment assessment.

DATED: April 5, 2007

SIGNED: S. Peckover