WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1321/05

[1] Tribunal Vice-Chair V.R. Robeson considered this appeal in writing on July 21, 2005.

THE APPEAL PROCEEDINGS

[2] The worker appeals the decision of Appeals Resolution Officer M. De Marco dated July 6,2004.

[3] The worker was represented by C. Oliveiro, consultant.

[4] The Board advised the Tribunal on August 27, 2004 that the employer's account with the Board became inactive effective March 24, 1998.

THE RECORD

[5] I considered the following case materials:

Exhibit #1: Case Record,

Exhibit #2: Addendum #1,

Exhibit #3: NEL Quantum Casebook, and

Exhibit #4: Addendum #2.

[6] Addendum #2 contains written submissions from the worker's representative dated April 11, 2005.

THE ISSUE

[7] The issue in this appeal is whether the worker is entitled to an increase in his 38% non-economic loss (NEL) award for impairment of his low back and pelvis.

THE REASONS

(i) Background

[8] The worker was born in 1966. The worker began working for the employer as a carpenter/framer in August 1996.

[9] The worker was injured in a work-related accident on January 24, 1997. The Appeals Resolution Officer (January 21, 1999) granted the worker entitlement for a low back strain, but denied the worker entitlement for lost time from work.

[10] The worker appealed to the Tribunal. (See *Decision No. 326/02E* dated March 20, 2002, *Decision No. 326/02* dated September 24, 2003 and *Decision No. 326/02R* dated February 27, 2004.)

[11] The Tribunal concluded that the worker had ongoing entitlement to benefits for a low back disability resulting from a work-related accident on January 24, 1997, and granted the worker temporary total disability benefits from January 24 to February 26, 1997, 50% temporary partial disability benefits from February 26, 1997 to June 1, 1998, a partial future economic loss (FEL) benefit at D1 (June 1, 1998), and an assessment for a permanent low back impairment.

[12] Dr. J. Stewart examined the worker on January 30, 2004 for the purpose of a NEL assessment.

[13] The NEL Clinical Specialist granted the worker a 38% NEL benefit on March 26, 2004 and confirmed the benefit on April 23, 2004.

[14] The worker objected to the quantum of the benefit. The Appeals Resolution Officer confirmed the 38% NEL benefit.

[15] The worker appealed to the Tribunal.

(ii) Law and Policy

[16] The accident date in this appeal is January 24, 1997. Accordingly, the pre-1997 *Workers' Compensation Act* applies.

[17] Section 42 of the pre-1997 Act provides for compensation for non-economic loss where a worker has a permanent impairment:

> **42(1)** A worker who suffers permanent impairment as a result of an injury is entitled to receive compensation for non-economic loss in addition to any other benefit receivable under this Act.

[18] The *Workplace Safety and Insurance Act, 1997* (WSIA) repealed sections 42(5) to 42(25) of the pre-1997 Act and replaced them with sections 47(1) to 47(13) of the WSIA with respect to a determination by the Board of the degree of a worker's permanent impairment for the purposes of the pre-1997 Act.

[19] The Board identified the following policy packages (revision #6) as applicable to the subject matter of this appeal:

Package #180: NEL Quantum - DOA prior to January 1, 1998, and

Package #300: Decision Making/Benefit of Doubt/Merits and Justice.

[20] Legislation and Board policy provide that the degree of a worker's permanent impairment is determined in accordance with the prescribed rating schedule or criteria, any medical assessments, and having regard to the health information on file. The prescribed rating schedule for most impairments is the American Medical Association's *Guides to the Evaluation of Permanent Impairment,* 3rd edition (revised) (the AMA *Guides*).

[21] Board policy #18-05-03, “Assessing Permanent Impairment”, states that, to rate permanent impairments, the Board uses a prescribed rating schedule, the reports from a NEL medical assessment, and all relevant health information in the claim file up to the date of the NEL assessment.

[22] This policy also provides for the Board to request a second NEL medical assessment and for the worker or the employer to contact the Board to comment on the completeness or accuracy of the first medical assessment, but does not provide for the worker or the employer to object to the Board’s decision to accept the first NEL medical assessment report or request a second assessment.

[23] This policy further provides for the Board to reconsider its decision if the worker objects to the NEL rating, and for the worker to appeal to the Tribunal if he remains dissatisfied with the Board’s rating.

(iii) Submissions

[24] The worker's representative states that the 38% NEL rating does not reflect the worker’s low back impairment, because the Activities of Daily Living was not sent to the NEL roster physician for completion and information from it was not factored into the worker’s NEL rating, and additional medical evidence enclosed with the worker’s appeal to the Tribunal should have been provided to the NEL roster physician. The worker's representative submits as follows:

> It is…our contention that at best the assessing doctor examined and attempted to complete to her professional ability the NEL assessment. However, when we take into account the possible missing medical documentation and [the NEL physician’s] very own concerns as articulated in her report, it is apparent that, had she [had] all of the pertinent documentation before her she would have been able to more accurately comment and fulfil her medical obligations to the [worker] and to the Board.

[25] The worker's representative requests that I compare the medical evidence not provided to the NEL physician, particularly the MRI and CT reports, to the medical evidence provided to the NEL physician, and increase the worker’s NEL rating. The worker's representative made no submissions on the accuracy of the actual calculation of the NEL rating.

(iv) Conclusions

(a) NEL medical assessment and rating

[26] The Board granted the worker a 38% NEL benefit following a medical assessment by Dr. Stewart.

[27] Dr. Stewart reported the following findings:

- flexion 0°-14° (10°)
- extension 0°
- right lateral flexion 5°
- left lateral flexion 5°

- "severe paravertebral muscle spasm both sides lumbar spine"
- impairment due to specific disorders of the spine : ">six months of documented pain and rigidity with paravertebral muscle spasm; I was not provided with copies of any imaging studies to determine if there are any disc lesions or degenerative changes"
- pelvis: 3f described on the NEL form as "healed fracture WITH displacement, deformity and residual symptoms: f) sacrum, into sacro-iliac joint"; "traumatic compression and small subluxation of left sacroiliac joint"
- neurologic: S-1 sensory deficit 3; "normal neurologic exam with bilateral S1 sensory symptoms".

[28] The Board calculated the 38% NEL rating as follows:

- 10% for flexion (Table 60)
- 7% for extension (Table 60)
- 5% for right lateral flexion (Table 61)
- 5% for left lateral flexion (Table 61)
- 5% for specific disorders IIB (Table 53)
- 10% for pelvis 3f (Table 47)
- 0% sensory deficit (Table 49, 50, 51)
- 10% + 7% + 5% + 5% = 27% combined with 5% for IIb 31% for spine impairment
- 31% combined with 0% combined with 10% for 38% whole person impairment.

(b) Medical evidence

[29] The worker's representative apparently obtained medical reports from the worker's treating physicians for the purpose of the worker's Tribunal appeal which she enclosed with her submissions. These reports consist of a report of a CT of the worker's head and spine dated February 2001, an MRI of the worker's spine dated March 2002 and an x-ray of the worker's face and lumbar spine dated March 2002, and reports from Drs. R.J.H.M. Arts (neurology and neurophysiology) dated December 2001 and January 2002.

[30] The medical reports provided by the Board for the purpose of the worker's appeal contain a report of a bone scan dated June 9, 1997 as well as reports from Dr. B.W. Malcolm (orthopaedic surgeon) and I. Chrappra (orthopaedic surgeon), but do not contain the reports submitted to the Tribunal by the worker's representative. This indicates to me that these reports are not in the Board claim file and, therefore, were not sent to Dr. Allen for the NEL assessment.

[31] Dr. Malcolm saw the worker on May 24, 2001 and commented on x-rays showing "mild degenerative changes" and a CT scan "further [amplifying] the degenerative appearance at L4-5 and L5-S1". Dr. Malcolm also commented that the worker had "back dominant and mechanically aggravated symptoms" and no "surgically feasible pathology", and that "motor power, reflexes and plantars were normal". The bone scan referred to by Dr. Allen was taken at

the request of Dr. Chrappa (orthopaedic surgeon). Dr. Chrappa reported on July 21, 1997 that x-rays of the worker's low back were "negative", motor power at L4-5-S1 was preserved, reflexes at L4-S1 were normal, sensation was preserved, that there was "no neurological sign impairment", and that the bone scan showed "significantly increased uptake of the left sacro-iliac joint" which was "suggestive of sacroiliitis". Dr. Chrappa saw the worker again on April 6, 1998 and reported that he had "pain on the lumbo-sacral junction, percussion pain, limitation of the range of motion but no neurological sign impairment", and that fusion of the sacroiliac joint was not indicated.

(c) Is the 38% NEL rating correct?

[32] Comparing the findings reported by Dr. Allen for flexion, extension, right lateral flexion and left lateral flexion to the percentage impairment rating indicated in Tables 60 and 61, I conclude that the Board was correct in assigning 10%, 7%, 5% and 5% respectively. The Board granted the maximum impairment for extension and lateral flexion.

[33] In completing the Impairment Due to Specific Disorders of the Spine Recording Form, Dr. Allen reported that the worker had "> six months of documented pain and rigidity with paravertebral muscle spasm", but was unable to comment on the level of any degenerative changes due to the lack of "any imaging studies".

[34] Table 53 sets out impairment ratings for specific disorders of the spine. Using Table 53, the Board assigned 5% for category IIB. Impairment in Category IIB is described as "unoperated with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with *none to minimal degenerative changes on structural tests*" (emphasis added).

[35] Category IIB correctly reflects the information from Drs. Allen, Malcolm and Chrappa. However, what additional information do the investigation reports and examination reports provide about the worker's spine?

[36] The February 2001 CT scan report noted the following findings: "L2-L3 and L3-L4 disc spaces…unremarkable", "L4-5 diffuse annular bulging with a small focal herniation in the lateral sac of the disc which is obliterating the perineural fat around the L4 nerve root", "minimal degenerative change…present in the facet joint and a Schmor's node…noted in the inferior end plate of L4", "at L5-S1…a central and left sided disc herniation…producing mild to moderate displacement of the thecal sac" and the "sacroiliac joints are unremarkable".

[37] The March 2002 MRI report noted the following findings: "mild annular bulging of the lower thoracic and lumbar discs", "moderate annular bulging of the L5-S1 disc", "broad-based midline and left-sided L5-S1 disc herniation" "moderate bilateral foraminal stenosis at L5-S1, and L4-L5" and "mild multilevel degenerative facet changes". The March 2002 x-ray report noted the following findings: "multilevel degenerative changes" and an "inferiorly directed broad-based midline and left-sided L5-S1 disc herniation".

[38] Dr. Arts examined the worker in December 2001 and reported that "motor and sensory examination of the extremities" seemed normal, and that the neurological examination did not support the presence of spinal stenosis. Dr. Arts examined the worker in January 2002 and

reported that the worker's "nerve physiological assessment" was "quite unremarkable with normal conduction velocities in peroneal and tibial nerve, normal lower limb somatosensory evoked responses, normal H-reflexes, normal F-responses, and no abnormalities on needle EMG in the paraspinal muscles at L4, L5 and S1, no abnormalities on the left and the anterior tibialis muscle and medial [?] on the left".

[39] Do these reports support additional impairments due to specific disorders of the worker's lumbar spine?

[40] Table 53 provides percentage impairment ratings for fractures, for "spondylolysis and spondylolesthesis, unoperated", and for "spinal stenosis, segmental instability, or spondylolisthesis, operated". The additional reports do not indicate that the worker has a compression fracture or unoperated spondylolysis or spondylolisthesis in his lumbar spine, or that he has undergone surgery for spinal stenosis, segmental instability or spondylolisthesis.

[41] Table 53 also provides for an impairment rating for degenerative changes and disc herniation. Impairment in Category IIC is described as "unoperated with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with *moderate to severe degenerative changes on structural tests; includes unoperated herniated nucleus pulposis with or without radiculopathy*" (emphasis added).

[42] The additional medical information indicates to me that the worker has moderate degenerative changes and a herniated disc as described in IIC in Table 53. Accordingly, the worker is entitled to an impairment rating of 7% for IIC, rather than 5% for IIB, for impairment due to specific disorders of the spine.

[43] The Board granted the worker 0% rating for neurological impairment. Considering the findings reported by Dr. Allen, the information from Drs. Malcolm and Chrappa and the information in the medical reports from Dr. Arts and Tables 49, 50 and 51, I conclude that the Board was correct in assigning a 0% rating for neurological impairment.

[44] The Board granted the worker a 10% rating for the fracture to his pelvis, described in the chart on page 101 of the AMA *Guides* as "3f: sacrum into sacro-iliac joint". Considering Dr. Allen's notation and comment on the NEL pelvis recording form, the reports by Drs. Malcolm, Chrappa and Arts and the AMA *Guides*, I conclude that the Board was correct in assigning a 10% rating for the worker's impairment of the pelvis.

[45] The worker's representative submitted that the Board should have provided the Activities of Daily Living (ADL) form for Dr. Allen to complete.

[46] I do not agree.

[47] In a reply dated September 16, 1997 to a query from the Tribunal concerning a recent change in Board practice to no longer send the ADL form to NEL roster physicians in a number of assessments, including low back assessments, the Board explained that the ADL form was originally completed as part of every NEL assessment, but that this practice was changed so that

the ADL form was completed in cases involving the following types of injuries: upper extremities, dermatology, spinal cord, neurology, mental and behavioural disorders, Hearing (vertigo only), hand/arm vibration syndrome, disfigurement and complex hands. For these types of injuries, the Board explained, the AMA *Guides* provided for a range of percentage impairments and the Board took the impact of such injuries on a worker's activities of daily living into account in determining the worker's percentage of impairment within the range. For injuries where the *Guides* prescribe a specific percentage of impairment, the Board explained, the percentage set out in the *Guides* is used since the Board has no discretion.

[48] The AMA *Guides* prescribe a specific percentage of impairment, not a range of percentage impairments, for flexion and extension in Table 60, for lateral flexion in Table 61, for impairment of the pelvis in Table 47, for neurological impairment in Tables 49-51, and for specific disorders of the spine in Table 53. Accordingly, the ADL form is not completed by the NEL roster physician.

(d) Conclusions

[49] In summary, I conclude that the Board correctly assigned a percentage impairment rating for flexion, extension, lateral flexion, neurological impairment and impairment of the pelvis, but should have assigned 7% for IIC, rather than 5% for IIB, for impairment due to specific disorder of the spine. This increases the worker's NEL impairment rating from 38% to 39% (27% combined with 7% for 32%; 32% combined with 0% combined with 10% for 39% whole person impairment).

THE DECISION

[50] The appeal is allowed. The worker is entitled to a 39% NEL benefit, rather than the 38% NEL benefit granted by the Board.

DATED: July 28, 2005

SIGNED: V.R. Robeson