WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1804/10

BEFORE: R. McClellan : Vice-Chair
V. Phillips : Member Representative of Employers
J. A. Crocker : Member Representative of Workers

HEARING: June 29, 2011 at Toronto
Oral
No post-hearing activity

DATE OF DECISION: July 28, 2011

NEUTRAL CITATION: 2011 ONWSIAT 1828

DECISION(S) UNDER APPEAL: WSIB ARO decision dated January 29, 2010

APPEARANCES:

For the worker: G. Majesky, Union

For the employer: M. D'Ambrosio, paralegal, for employer A
E. Rennie for employer B

REASONS

(i) The appeal

[1] The worker appeals the decision of Appeals Resolution Officer Mr. Rubino dated January 29, 2010. That decision concluded that the worker did not have initial entitlement for carpal tunnel syndrome arising out of and in the course of employment.

[2] The issue before the Panel is whether the worker has initial entitlement for carpal tunnel syndrome arising out of and in the course of employment on a disablement basis.

(ii) Background

[3] The worker now age 63, worked as a construction electrician for 35 years. He obtained a position through the IBEW union hiring hall with an electrical contractor (employer A) beginning in March 2007, and finished that job on August 3, 2007. Subsequent to August 3, 2007, the worker submitted a Form 6 Report of Injury claiming entitlement for bilateral carpal tunnel syndrome which he stated had first become symptomatic in June 2007, and which had progressed to the point where he received first medical treatment on August 20, 2007. The Employer's Report of Injury Form 7 stated that the worker's carpal tunnel syndrome and not been reported to them while the worker had been in their employ and that they learned about the worker's condition from the WSIB on August 20, 2007. It was employer A's position that the worker could not have developed carpal tunnel syndrome during the four months that he was employed by them.

[4] The medical file establishes that the worker was diagnosed with diabetes, which neurologist Dr. McKenzie had advised was under reasonable control in 1998.

[5] In a report dated August 28, 2007, Dr. McKenzie reported to the family physician Dr. Chu that baseline nerve conduction studies that day had revealed the presence of bilateral carpal tunnel syndrome. In a further report dated November 26, 2007, Dr. McKenzie reported that based on current nerve conduction studies, the worker's carpal tunnel syndrome was worsening and surgery was advisable.

[6] On March 28, 2008, hand/wrist surgeon, Dr. Margaliot, reported that the worker had advanced right ulnar neuropathy at the elbow as well as bilateral carpal tunnel syndrome and that surgery for both conditions was going to be scheduled. He noted that the worker was Type II diabetic and was receiving prescription medication for this condition.

[7] In Board Memo #8, dated October 17, 2008, the Claims Adjudicator concluded that the worker had been symptomatic prior to starting work with employer A and had not sought medical treatment until after he had been laid off following the completion of the job with employer A. He ruled that the worker's bilateral carpal tunnel syndrome was related to his employment with employer A and the claim was denied.

[8] In the decision of January 29, 2010, the ARO accepted that the worker had been a construction electrician with 35 years of experience in the trade but had never required medical treatment for carpal tunnel syndrome prior to August 2007 and that his symptoms did not

develop until June 2007. There was no evidence of a symptomatic pre-existing condition to justify entitlement on an aggravation basis. He asserted that there was no remedial policy mechanism to apportion or spread liability to prior employers in CTS claims, unlike the situation with respect to occupational disease claims. The ARO also noted that Dr. Margaliot who supported the worker's claim, was a WCB hand specialist who regularly assesses workers referred to the WSIB and had issued a study of the relationship between highly repetitive manual work with forceful grip which Dr. Margaliot considered to be a materially contributing factor to the development of local compression neuropathy including CTS. In the final analysis, the ARO ruled that because the acute onset of the worker's symptoms developed after he had terminated his employment with employer A, and because the claim could not be attributed to employer A, therefore the worker had no initial entitlement.

[9] The case was never referred to a Board Medical Consultant for advice.

Additional medical evidence

[10] In a report dated August 28, 2007, neurologist Dr. McKenzie wrote:

> [The worker] who is now 59 has had intermittent numbness affecting his hands that bothersome more in the last six weeks. It may be coincidental with doing some painting at home…. He has carpal tunnel syndrome and therefore requires most splits.

[11] In a report to the worker's representative dated May 3, 2009, Dr. Margaliot wrote:

> I am happy to answer the question in the general case based on review of the attached Physical Demands Description and Electrician Ergonomic Study, which you had Condit provided describing the specific tasks that electrician is required to perform.
>
> Although there may be other contributing factors, including systemic diseases such as diabetes mellitus, it is my opinion that highly repetitive, manual work such as pulling wire, repetitive or sustained forceful grip and sustained use of vibrating or power tools would be considered a material contributing factor to the development of focal compression neuropathy, including carpal tunnel syndrome or cubital tunnel syndrome.

[12] In a letter dated January 11, 2011, Dr. Margaliot advised the worker's representative that, in his opinion, repetitive or sustained forceful grip and sustained use of vibrating tools would be considered aggravating factors in the development of focal compression neuropathy but could not necessarily be demonstrated as an isolated causal factor.

[13] He wrote:

> There had been an issue regarding the timing of symptom onset. Although the patient reported that he developed initial symptoms prior to the summer of 2007, he did not report these symptoms to his family Dr. until a few weeks after he was laid off from his job in July 2007. However, the patient's reported that he first noted the symptoms in June 2007.
>
> At the time I assessed this patient, he clearly had evidence of bilateral carpal tunnel syndrome and right cubital tunnel syndrome. He had also been diagnosed with type II diabetes mellitus. He described the type of work he performed for many years prior to his layoff as involving repetitive use of both hands including repetitive and forceful gripping, releasing, twisting and use of hand tools, as required by his job description as an electrician. There was also frequent exposure to vibrating power tools. This type of work has previously shown to be a significant exacerbating factor and possibly causal factor

> for the development of focal compression neuropathy such as carpal tunnel syndrome or cubital tunnel syndrome. The development of diabetes, combined with the occupation placed him at high risk of developing compression neuropathies as listed above. He has since undergone surgery for his complaints.
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> There is no doubt that the patient's occupation contributed to the development of aforementioned conditions, notwithstanding the delay in reporting of symptoms to his family physician.

(iii) The worker's testimony

[14] The worker testified that he had worked as a construction electrician for 39 years, beginning his apprenticeship in 1970 and getting his journeyman papers in 1974. He stated that he had always belonged to the IBEW and always obtained his jobs through the union hiring hall, which meant that he had worked for a huge number of separate employers over the years.

[15] With respect to his diabetes, the worker stated that it was diagnosed 20 years ago and had been controlled with oral medication without the need for insulin injections, and it had never interfered with his ability to work as a construction electrician.

[16] The worker described the duties of an electrician in detail and referred to his description of his duties contained in his Form 6 Report of Injury contained in the Case Record. He described the use of various vibratory power tools which required repetitive and forceful gripping as well as hand tools required in the trade. He described the various types of electrical wire ranging from number 14-lamp cord size to the huge 500 MCM cables which weigh 100 pounds per foot. He described the process of installing electrical wire through conduit pipes which always required forceful pulling against resistance.

[17] The worker stated that prior to taking the job with employer A on March 27, 2007, he had not experienced any symptoms of carpal tunnel syndrome. He stated that the job with employer A involved installing wires through conduits in a new sports arena. He stated that the first symptoms of night-time hand numbness and tingling interrupting his sleep began in June 2007 and at the time, he had no idea what was causing the problem. He stated that the problem did not interfere with his ability to work and he saw no reason to take time off work to obtain medical treatment. He stated that he completed the job with employer A on August 3, 2007, and started a new job with employer B on August 21, 2007. In the interval between jobs, he did some painting at home. The worker stated that the painting was easy compared with his regular job duties.

[18] The worker stated that also during this period between jobs he sought treatment from family physician Dr. Chu for the hand condition and that Dr. Chu referred him to Dr. McKenzie, who saw him on August 28 and gave a diagnosis following EMG testing, of bilateral carpal tunnel syndrome. He stated he was then referred to Dr. Margaliot, who scheduled bilateral hand surgery, which took place in December 2008.

[19] The worker stated that at the time he was doing his regular job of electrician with employer B and worked on a number of separate jobs right up until his operation in December 2008. He repeated that the condition right up until the time of surgery had not prevented him from performing his regular electrician duties but that Dr. Margaliot had advised him that if he did not have surgery the condition would deteriorate. The worker stated that the surgery was completely successful.

[20] The worker stated that following the surgery, there was a shortage of work in the trade and when he was unable to find work he decided to take early retirement, which he did in 2010. He stated that his inability to work after the surgery was related to labour market conditions and not to his CTS condition.

(iv) Submissions of the worker's representative

[21] Mr. Majesky presented four Tribunal Decisions dealing with entitlement for disablement accidents and submitted that the evidence before the Panel supported a finding that the worker's 39-year career as a construction electrician was a significant contributing factor in the development of his bilateral carpal tunnel condition. He submitted that any delay in seeking medical treatment between June 2007 and August 2007 was entirely reasonable given that the worker was able to perform his regular duties without any restrictions and was not aware of the nature of his condition. He cited the unchallenged opinion of Dr. Margaliot, above, who is a carpal tunnel expert used by the Board to assist in the adjudication of carpal tunnel cases. He concluded that initial entitlement was in order.

(v) Submissions of the representative for employer A

[22] Ms D'Ambrosio stated that employer A was not disputing that the worker's 39-year career as a construction electrician was a significant contributing factor, among other factors, in the development of his bilateral carpal tunnel syndrome. She stated that employer A objected to being identified as the employer of record for the worker's claim and that it was medically impossible that the worker would have developed his carpal tunnel condition during the short period of time between March 2007 and August 2007 when he worked for employer A. She also pointed out that the acute onset of the worker's condition developed after he had left his employment with employer A. She reiterated that employer A should not have any liability for this workers' compensation claim.

[23] The Vice-Chair explained during Ms D'Ambrosio's submission that the issue of employer liability for the claim was not within the Panel's jurisdiction and was an issue which both employers could pursue after the Panel renders its decision. The sole issue before the Panel was whether or not the worker had initial entitlement for carpal tunnel syndrome arising out of and in the course of his employment on a disablement basis.

(vi) Submissions of the representative for employer B

[24] Ms Rennie submitted that employer B should not have been added as a party to the appeal in the first place: that the worker had already developed his bilateral carpal tunnel syndrome by the time he was sent to employer B from the union hiring hall on August 21, 2007. As was the case with employer A, Ms Rennie stated that employer B did not oppose the worker's entitlement for bilateral carpal tunnel syndrome as resulting from his work duties as a construction electrician. Rather, she submitted that employer B should not be considered an employer of record in this case and had absolutely no liability for the development of the worker's condition. She submitted that the worker's condition was fully present at the time he was hired by employer B and nothing occurred during his period of employment with employer B to aggravate the already symptomatic pre-existing condition.

(vii) Law and policy

[25] On January 1, 1998, the *Workplace Safety and Insurance Act, 1997* ("WSIA") took effect and applies to this case.

[26] The provisions of section 43 as it reads after July 1, 2007 are as follows:

> 43. (1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,
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> (a) the day on which the worker's loss of earnings ceases;
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> (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
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> (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
>
> (d) the day on which the worker is no longer impaired as a result of the injury.

[27] The definition of accident is set out as follows:

> **2.** (1) in this Act,
>
> "accident" includes,
>
> (a) a wilful and intentional act, not being the act of the worker,
>
> (b) a chance event occasioned by a physical or natural cause, and
>
> (c) disablement arising out of and in the course of employment; ("accident")

[28] Section 13 reads as follows:

> **13(1)** A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.
>
> **(2)** If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

[29] Compensation for non-economic loss is set out in sections 46 and 47:

> **46.** (1) If a worker's injury results in permanent impairment, the worker is entitled to compensation under this section for his or her non-economic loss. 1997, c. 16, Sched. A, s. 46 (1).
>
> **47(1)** If a worker suffers permanent impairment as a result of the injury, the Board shall determine the degree of his or her permanent impairment expressed as a percentage of total permanent impairment.
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> **(2)** The determination must be made in accordance with the prescribed rating schedule (or, if the schedule does not provide for the impairment, the prescribed criteria) and,
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> (a) having regard to medical assessments, if any, conducted under this section; and
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> (b) having regard to the health information about the worker on file with the Board.

[30] Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. Pursuant to WSIA section 126, the Board has identified certain policies applicable to this appeal. We have considered these policies as necessary in deciding this appeal.

[31] The relevant section of the current *Workers' Compensation Act* states:

> 4(1) Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the worker and the worker's dependants are entitled to benefits in the manner and to the extent provided under this Act.
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> ...
>
> (3) Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment and, where the accident occurred in the course of the employment unless the contrary is shown, it shall be presumed that it arose out of the employment.
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> (4) In determining any claim under this Act, the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant.

[32] Board *Operational Policy Manual*, Document No. 33-01-02, entitled "Definition of an Accident," states that the definition of disablement includes a condition that emerges gradually over time and an unexpected result of working duties.

[33] The WSIB has produced an adjudicative guideline on the issue of disablement, which reads in part as follows:

> **Adjudicative Advice**
>
> **Initial Entitlement (Disablement)**
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> Workers have a varied level of understanding with respect to causation matters and often rely, quite understandably, on their treating physicians and sometimes their employers to guide them in this regard. Therefore delays in reporting and seeking medical attention must be carefully weighed before reaching any conclusions. This does not negate the significance of the temporal element, as it is possible to have discomfort close to the activity but not immediately associate it with the activity.
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> In weighing the evidence and determining the potential contribution of the work, it is important to ensure the details concerning any preexisting or co-existing conditions be considered. Should a worker have a pre-existing condition that renders them more susceptible to injury, it is important to then consider if the work activity may be a significant factor in triggering the impairment. In these cases entitlement must also be considered on the basis that the activity 'aggravated' the underlying condition to the point it now presents a disabling feature.

> **Conclusion**
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> Assessing whether the causation test has been met requires thoughtful analysis of all the available information. Critical to accomplishing a fair and complete review is a thorough understanding of the work duties, onset of symptoms, diagnosis and other potential causes for the problem.
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> The fact that there is not a strong link to the work activity in each area does not mean there is no relationship, simply that the relationship is less likely. When these situations are encountered it is suggested that additional resources including Medical Consultants, Ergonomists, Nurse Case Managers may be utilized to secure a better understanding of any likely association.

(viii) The Panel's decision

[34] The worker in this case is claiming initial entitlement for bilateral carpal tunnel syndrome as arising out of and in the course of his employment on a disablement basis after a 39-year career as a construction electrician.

[35] The Panel finds as a fact that the worker's duties as a construction electrician involved forceful and repetitive gripping from the use of vibrating power tools as well as forceful and repetitive gripping and pulling required to install electric wire in conduit piping: this included the regular use of 500 MCM wire weighing 100 pounds per foot. In our view, the worker's job duties are entirely compatible with the development of musculoskeletal injuries such as carpal tunnel syndrome.

[36] Dr. Margaliot is a recognized expert in the diagnosis and treatment of carpal tunnel syndrome and is used by the Board to assist in the adjudication and assessment of carpal tunnel claims. It was the opinion of Dr. Margaliot, in two separate reports cited above, that the worker's job duties as a construction electrician were factors in the development of his bilateral carpal tunnel syndrome. Dr. Margaliot made the following statement in his report of January 11, 2011:

> There is no doubt that the patient's occupation contributed to the development of aforementioned conditions, notwithstanding the delay in reporting of symptoms to his family physician.

[37] The Panel accepts the opinion of Dr. Margaliot as determinative.

[38] We also note that employer A and employer B opined that the worker's long-term career as a construction electrician contributed to the development of his bilateral carpal tunnel condition.

[39] The Panel rejects what we understand to be the conclusion of the ARO, in the decision of January 29, 2010, who evidently denied entitlement on the grounds that an employer of record could not be identified. To reiterate, the issue of initial entitlement for a disablement injury is an entirely separate issue from the administrative assignment of the costs of a claim to a particular employer. Both employers in this appeal have made strong arguments that the worker's disablement injury, first, was related to his long career as a construction electrician and second, that this condition did not develop as a result of the worker's employment with either employer A or employer B. Both employers were advised that they have the right to pursue the issue of liability for the worker's claim with the Board following the release of the Panel's Decision.

[40] Based on the evidence before us, including the worker's testimony, the opinion of Dr. Margaliot, and including the opinion of both participating electrical contracting employers, the Panel finds that the worker’s job duties as a career construction electrician were significant contributing factors in the development of his bilateral carpal tunnel syndrome. The worker has initial entitlement for carpal tunnel syndrome arising out of and in the course of employment. The determination of the compensation benefits flowing from this decision is remitted to the Board for determination.

DISPOSITION

[41] The appeal is allowed.

[42] The worker's job duties as a career construction electrician were significant contributing factors in the development of his bilateral carpal tunnel syndrome. The worker has initial entitlement for carpal tunnel syndrome arising out of and in the course of employment. The determination of the compensation benefits flowing from this decision is remitted to the Board for determination.

DATED: July 28, 2011

SIGNED: R. McClellan, V. Phillips, J. A. Crocker