WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1810/05

[1] This appeal was heard in Toronto on October 3, 2005, by a Tribunal Panel consisting of:

C. M. MacAdam : Vice-Chair,
G. V. Stewart : Member representative of employers,
F. Jackson : Member representative of workers.

THE APPEAL PROCEEDINGS

[2] The employer appeals the decision of Mrs. C. Whittaker, Appeals Resolution Officer (ARO), dated July 21, 2002. That decision concluded that the worker was entitled to a loss of earnings (LOE) benefit from July 13 to August 2, 2000.

[3] The employer appeared and was represented by Mr. David Brady. The worker appeared and was represented by Mr. Kevin Conley.

THE RECORD

[4] The Panel considered the material included in the Case Record prepared by the Office of the Vice-Chair Registrar (Exhibit #1). In addition, we considered five addenda and the Hearing Ready Letter.

[5] The Panel heard oral evidence from the worker. Submissions were made by Mr. Brady and Mr. Conley.

THE LAW

[6] This appeal concerns an injury that occurred on July 11, 2000. For this reason this appeal is decided under the *Workers' Safety and Insurance Act*, 1997 [“the Act”].

THE ISSUES

[7] The issue for determination in this appeal is whether the worker was entitled to loss of earnings (LOE) benefits from July 13 to August 2, 2000.

THE REASONS

(i) Background

[8] The worker was born on May 23, 1951. He works in the stores/service area of the workplace retrieving items/supplies as requested.

[9] This is a case where the worker could not understand why he began to feel discomfort down his left leg to his foot on the evening of Wednesday July 12, 2000 while sitting in a lawn chair at his neighbour's cottage with his wife. The next day the discomfort down his left leg remained and became painful. On Friday, the 14th it was worse. On Saturday the 15th, the worker first turned his mind to what had caused the pain. The only incident he could think of was an incident at work on Tuesday July 11th. For this reason he reported the injury on Monday July 16th. The Medical Consultant questioned the diagnosis of femoratica diagnosed by the family physician, though he agreed with the family physician that the worker's symptoms were related to the July 11th incident. The ARO accepted the opinions of the Board Medical Consultant and the worker's family physician and granted entitlement on that basis.

[10] The worker and employer take no issue with the detailed history of the injury found in the ARO decision of July 21, 2002. The history is summarized below.

[11] Prior to the injury in question the worker had no prior back problems other than an incident in December 1992 when he had a cold/virus in his back and was off work for one week. He has arthritis in his right foot and right hand. He built his cottage including most of the cabinets and furniture, though most of the heavy work was completed in the 1990's. Prior to the injury in question the worker was able to do household lifting and chores. In July 2000 about one month before the accident in question, the worker was able to trim trees with a ladder and chainsaw without experiencing any pain in his back.

[12] The worker recalls that in July 2000 he had been recovering from a non-work-related left shoulder injury he had suffered from falling on ice the previous January. Due to the injury the left-handed worker had been using his right hand to protect the left arm and shoulder as much as he could. He had been on mild pain medication for his shoulder and for the arthritis in his foot for several months.

[13] On the morning of July 11, 2000, the worker recalls retrieving a 25 to 30 lb. spool of cable and a cable-cutter in the regular course of his duties. He put his two right-hand fingers in the hole at the top of the spool and lifted it from a knee-high shelf to place it on a waist-high counter. He took the cable-cutter in his left hand; he felt the spool slipping from his fingers and so successfully swung it up onto the counter before it gave way. The worker felt no pain or discomfort in his body immediately after this incident apart from mild soreness in his fingers.

[14] The worker is president of his union local and for this reason he does union business for four hours every working day in the afternoon. On the day in question the worker completed both his employment and union duties without any feeling of discomfort in his back or left leg. After finishing work in the late afternoon, he drove home, changed his clothes, drove 30-35 minutes to his cottage, went for a light swim, sat at his computer to check his e-mail, and had no further physical activity that evening.

[15] The next day, the 12th, the worker had a previously scheduled doctor's appointment in the morning concerning arthritis in his right hand. For this reason he arrived at work at about 10:00 a.m. He completed his work and union duties, though he did no heavy lifting that day. After work he changed his clothes at home then drove to his cottage. There he checked his e-mail, went for a swim, watched television, had supper with his wife, walked next door with his

wife to his neighbour's cottage, sat in the lawn chair and drank tea into the evening. At about 6:30 p.m. he began to feel not pain, but an uncomfortable feeling down his left leg to his foot. Back at his cottage that night he lay down on a couch to watch television before going to bed.

[16] The next morning, Thursday the 13th, the worker had trouble getting out of bed, dressing and walking. He had pain down his left leg. The drive from his cottage to the city made his back feel better. At home he changed his clothes, sat at his computer and felt better for sitting on a straight back chair. When he arrived at work he had problems walking. He headed straight to the nurse's station. He had to stop and lift his leg several times to relieve the pain. The nurse put him on a stretcher and applied ice to his left lower back. He decided to visit his doctor and used a motor cart to travel to his car. His pain was on the left side, below the belt, around his pelvis and down his left leg.

[17] The family physician, Dr. Cristoveanu, told the worker he had a pinched nerve and he should stay off work for a week. If the pain did not subside then he should have an x-ray. The worker took pain relief medicine on Thursday and the pain did not worsen. He stayed at home the rest of the day. He could sit on a hard chair, though he had trouble walking.

[18] On Friday morning the worker awoke immobilized by pain. His wife drove down from the cottage to bring him pain relief medicine. She also went to the family doctor to obtain a stronger prescription.

[19] The worker delayed until Monday the 16th before reporting the injury to the employer. This was because until Saturday he was focussed on the pain and mystified by it. Only on Saturday the 15th did the worker turn his mind to what might have precipitated the pain. The worker concluded that the lifting of the spool on the Tuesday morning had been the only physical activity that in his mind could explain the discomfort and eventual pain that he began to feel on Wednesday evening.

[20] The worker saw Dr. Cristoveanu next on July 20th at which time he was referred for an x-ray and physiotherapy.

[21] In total the worker was off work at full pay for two weeks until August 2, 2000.

(ii) Medical evidence

[22] The worker saw his family physician, Dr. Cristoveanu, on July 13, 2000, though Dr. Cristoveanu did not complete the Form 8 Health Professional's First Report until July 20, 2000. Dr. Cristoveanu made a diagnosis of femoratica, probably discogenic. Restrictions were noted as "can't stand, walk for any length of time, can't sit comfortably." It should be noted that as per the ARO's decision, information on the Form 8 concerning the spool-lifting incident would have been based on information received from the worker not on the 13th, but on Saturday the 14th or later, when the worker had recollected the event.

[23] A radiologist report in evidence notes that x-rays taken on July 20, 2000 indicate "[l]ipping … at the margins of the L3 and L4 vertebral bodies." He concluded there was "equivocal" evidence of degenerative disc disease at L3-4 and "probable" degenerative disc disease at L5-S1.

[24] The Claims Adjudicator asked Medical Consultant Dr. B. Pritchett to comment on the medical compatibility between the worker's job duties, including carrying items, and the left femoratica diagnosis. He replied August 10, 2000 as follows:

> Without there being a specific incident or a specific onset of pain subsequent to an incident, it is very difficult to try and attach any significance to the particular work activities or other possible activities that happened away from work. These situations are always difficult to sort out.
>
> Problems subsequent to disc disruption or disc herniation often come on several hours and sometimes several days later and a gradual process. Joint problems usually happen immediately. There is no way of knowing what particular aspect of a job or a home activity might have caused the onset of pain in the low back here.
>
> I note the physiotherapist seems to feel this would be a facet joint irritation and this is much more likely to happen immediately at the time of an incident or injury. With the discogenic problem as noted before, this tends to come on later and it is very difficult to try to pinpoint what has happened.
>
> It would appear the injured worker has been doing this particular job for a long time and there does not appear to have been at least from history any significant problems with the back prior to this. Medically there is no way of knowing what has caused the onset of pain here.

[25] The worker's claim was denied on the basis of Dr. Pritchett's opinion.

[26] On September 6, 2000, the family physician, Dr. Cristoveanu, wrote the Board stating the diagnosis of femoratica and linking it to the spool incident of July 11 though noting the onset of pain on the 12th. He states "…the onset of classic femoratica within 24-48 hours…is compatible with this mechanism of injury" (i.e., likely mechanical disc injury with subsequent inflammation of the nerve taking time to develop). He also commented that the delay between injury and symptom could be explained by the anti-inflammatory medication taken by the worker at the time for his shoulder and foot.

[27] When asked to comment on this new information, Dr. Pritchett on December 12, 2000, stated again that this is "…a difficult situation without a specific incident." With respect to the spool incident the doctor wondered if the worker's job involved the regular carrying of weights like the spool and whether the worker regularly carried similar weights at home. He commented further:

> …it is so difficult to try and relate the specific back problem here to anything done at work including this one particular feature. Back pain is not usually something that develops because of a specific incident or a specific injury but is something that has been developing over years of wear and tear that has contributed by almost all activities of living. Sometimes there is a specific incident that can bring on significant symptoms but I cannot tell whether this is the case here or not.

[28] The refusal of the worker's claim was upheld.

[29] On March 26, 2000, after the appeal hearing at the Board, the ARO sent a long and very detailed history of the claim to a second Medical Consultant at the Board, Dr. A.D. Kanalec. Dr. Kanelec was asked his opinion on three points: whether there was evidence of a disc bulge or herniation; whether Dr. Cristoveanu's diagnosis of femoratica or any other cause would have led to the nerve root irritation; and finally what could explain the delay and onset of symptoms.

[30] In the memo to Dr. Kanelec, the ARO makes extensive reference to testimony given by Dr. Adams at the Board appeal hearing. He has treated the worker since his return to work on August 2, 2000 after the injury. Dr. Adams diagnosed a pinched nerve root. He concluded from the worker's symptoms that the worker had a disc protrusion. If the symptoms were caused by muscle strain then the pain would have been in the back only and not down the left leg. Dr. Adams had viewed the x-ray and noted that the disc degeneration was the result of a long slow process and not the result of a specific lift. If the spool incident had caused the protrusion then the worker would have felt pain immediately.

[31] Dr. Adams did not agree with Dr. Cristoveanu that the pain would be delayed for any reason, including the worker's use of anti-inflammatory medication at the time. Pain could only be delayed if there was only disc bulging - and this would occur over time – and no pressing on the nerve root. Dr. Adams went on to testify, according to the ARO's memo, that any small move, even just sitting hunched over, could cause the disc to further slip and press on the nerve root causing immediate pain. The initial herniation could have occurred when the worker was pruning trees with the chainsaw in June 2000 and it could have slipped further when the worker was sitting at his neighbour's cottage on July 12 causing the worker to feel the onset of pain.

[32] Dr. Kanelec replied to the ARO's memo on April 25, 2002, stating that he had reviewed the file including the medical opinions of *femoratica*, from Dr. Pritchett and Dr. Adams. He was unable to tell if a disc bulge or herniation had occurred because he had not seen the x-ray and there was no CT or MRI scan. He noted the evidence of degenerative disc disease and lipping. On the question of the *femoratica* diagnosis he opines that this is probably based on the worker's symptoms of left anterior leg discomfort and has never been documented by an EMG study. On the third question, Dr. Kanelec opines that the evidence does not suggest that the spool incident resulted in the femoral symptoms or the diagnosed femoratica. Again he reiterates that there is no medical proof of such a diagnosis. He then concludes with the following:

> However, because of the temporal nature of the event and the events occurring before and after the work-related event, I still believe that it is unlikely that this is not a work-related injury.

[33] The ARO allowed the appeal and granted entitlement based on the opinions of Dr. Kanelec and Dr. Cristoveanu concluding "…that is more likely that the [worker's] back pain was related to the lifting of the spool on July 11, 2000."

[34] The accident employer has produced a medical opinion from Dr. R. J. Walsh and Dr. M.C. Wills, specialists in occupational medicine, based on their review of the medical file. In their report of March 19, 2004 they draw the following conclusions. They agree with Dr. Kanalec that there is no medical evidence, e.g. CT or MRI scans, to support a diagnosis of femoratica and that the x-rays do not clarify the diagnosis. They note that most low-back pain is multi-factoral in origin whereas the spool incident was a single routine movement where no discomfort was felt shortly thereafter. They concede that disc injury may take 24 to 48 hours to develop though again, they correlate disc injury to heavy repetitive work rather than a single episode. They opine that the worker's pain medication would have treated inflammation at the time and would not have masked pain caused by the spool-lifting incident. The doctors find that the time delay between the spool incident and onset of symptoms opens up the possibility of many other actions having caused the worker's injury. They find the issue of causality "very

unclear" and "perhaps unknowable," a finding similar to that of Dr. Prichett. They find Dr. Kanelec's use of a double negative in his concluding that the worker's symptoms are linked to the spool incident are "confusing at best."

[35] Dr. Walsh and Dr. Wills summarize their conclusions as follows:

> The relatively modest single incident at work, the multiple pre-existing patient factors, the very lengthy time before the onset of back/leg symptoms, and the uncertain finite diagnosis, all mitigate against any clear connection between this man's symptoms and his workplace duties.

(iii) The accident employer's submissions

[36] The employer representative submits that the worker's symptoms correlate to the definition of accident found in section 2(1)(b) of the Act, namely "a chance event resulting from a physical or natural cause." He submits however, that in the absence of a persuasive diagnosis, of any discomfort felt immediately after the spool incident and that this incident is only the worker's best guess at causality, the Panel must conclude that the spool incident was one of many chance events in the significant period preceding the onset of symptoms that could have precipitated those symptoms.

[37] The employer representative submits that a more plausible theory of this case is based on the only reliable medically supported diagnosis in evidence; that being the worker's degenerative disc disease found in the x-ray. He submits that the symptoms first felt by the appellant while sitting at his neighbour's cottage are best understood as symptoms of his degenerative disc disease brought on by either the cumulative effect of the worker's many and sundry minor activities in the preceding period or by one particularly exacerbating action in the preceding period that *may* have been the spool incident. He submits that such a breadth of causal possibility is so wide that to fix on the spool incident is not reasonable and hence does not meet the significant contribution test. If the spool incident is found to have made a significant contribution to the onset of symptoms arising from the worker's degenerative disc disease, then a similar finding could be made concerning the worker's almost innumerable minor preceding actions that could equally precipitate symptoms of his disc disease.

(iv) The worker's submissions

[38] The worker's representative submits that the spool incident meets the significant contribution test in relation to the worker's injury. In the alternative, he submits that evidence indicating the cause of the worker's symptoms as unknowable should apply in the worker's favour using the benefit-of-doubt provision in the Act. He submits that Dr. Cristoveanu's diagnosis of femoratica deserves significant weight since only he among the doctors commenting on this case actually examined the worker. The worker's representative concedes that the worker has degenerative disc disease, though he submits that the spool incident was an aggravation of that pre-existing condition.

Conclusions

[39] There are several significant aspects to this case. One is the significant delay in symptoms after the spool incident. A second aspect is the paucity of objective medical evidence and the resulting disagreements among the doctors over a diagnosis. Related to this is the apparent firm

diagnosis of pre-existing degenerative disc disease. Finally, there is the evidence that the spool incident is only the worker's best guess of what led to his symptoms.

[40] After reviewing all the evidence the Panel is not persuaded, on a balance of probabilities, that the spool incident made a significant contribution to the emergence of his symptoms. While the alleged incident does not have to be the primary cause of injury and may be as low as a 20% causal factor, the Panel finds that a work-related incident must, at least, be significant in comparison to the majority of the worker's other physical activities that impacted on his symptoms. In this case, the Panel is unable to conclude that the spool incident was significant in this respect.

[41] The Panel is not persuaded that Dr. Cristoveanu's diagnosis of femoratica is reliable. There is no objective medical evidence (e.g. CT or MRI scan) to support it, and no documentary evidence that persuasively correlates it to the worker's symptoms. Be that as it may, the Panel takes no issue with the history of symptoms described by the worker. We also accept that the appellant has probable degenerative disc disease at L5-S1 as per the x-ray of July 20, 2000. In this context the Panel finds that the worker had an aggravation of his disc disease that precipitated the onset of symptoms while he sat at his neighbour's cottage. What caused the aggravation is the central issue for determination in this appeal.

[42] In the absence of more medical evidence of the worker's condition when he was symptomatic, the Panel is guided by the Tribunal's 2003 discussion paper, "Back Pain" by Dr. W.R. Harris and Dr. J.F.R. Fleming and supplemental information by Dr. S.D. Gertzbein. Both Dr. Harris and Dr. Fleming are Professors Emeritus in orthopaedic surgery and neurosurgery respectively, at the University of Toronto. The paper sets out that a pre-existing condition, including degenerative disc disease can become symptomatic following trauma. It states the following caution, however:

> There are a great many causes of back/leg pain and it is important that a careful diagnosis be made in each case before jumping to the conclusion the pain is necessarily due to work related activity or injury.

[43] In the paper, the only mention of back pain leading to the possibility of pain/numbness reaching down the leg to the foot, as in this case, is a disc herniation. It describes how herniations vary greatly in degree and resultant pain symptomology. In the case of a herniation, the author's state that "…an injury, sometimes relatively trivial..." permits a pre-symptomatic herniation to become symptomatic. (Emphasis added.)

[44] In the Panel's opinion this evidence and the medical opinions in evidence support a finding that the worker suffered a mild nerve root irritation aggravated by his pre-existing degenerative disc disease.

[45] The Panel places significant weight on evidence from Dr. Adams, Dr. Pritchett and the paper on back pain, that an otherwise minor or trivial action can render symptomatic an otherwise asymptomatic disc problem like that found by the x-ray of this worker.

[46] The Panel, however, is not persuaded that the spool incident was significant in relation to what might have triggered the worker's symptoms. We note that the worker felt no discomfort

in his back/leg for 1 ½ days after the spool incident and that he did not link his symptoms to the spool incident for two days after the onset of symptoms. While the medical evidence indicates that such a delay in symptoms is not unheard of in low-back injuries, we find no persuasive medical evidence that links the worker's symptoms more to the spool incident than to his numerous other physical actions preceding the onset of symptoms. We also find it significant that according to Dr. Cristoveanu, the worker was overweight during the time in question. In these circumstances and in light of our finding that even a minor physical action could have triggered the worker's symptoms; we are not persuaded that the spool incident meets the significant contribution test.

[47] The Panel finds that the worker was reasonably active during the period in question. He is handy, he fixes things, he built his cottage, and he had been pruning trees up a ladder with a small chainsaw about a month before the spool incident. The Panel is not persuaded that the worker was any more or less active in his private life than in his work life.

[48] The Panel is not persuaded by Dr. Cristoveanu's February 19, 2002 arguments for why the worker's back pain was more likely caused by the spool incident and not by other activities. He writes that

> [The worker] is very active and does a lot of physical summertime activity such as yardwork, etc. It seems unlikely that these activities were the cause of his injury given that:
>
> a) He does these often and regularly without any problems
>
> b) He does not recall any untoward event or pain doing these activities
>
> c) He can relate the back pain onset to this precise work event.

[49] With respect, that the worker was not symptomatic while or after doing yard work or other household duties is not persuasive since he had no "problems" after the spool incident as well. With respect to the worker not recalling any other precipitating event, we note that the worker recalled no pain in his back at the time of the spool incident and only settled on it as the causal factor in a process of elimination. Finally, it is not accurate that the worker can relate the back pain onset precisely to the spool incident. The evidence is that the worker first experienced the onset of symptoms while sitting in a lawn chair at his neighbour's cottage.

[50] The Panel is not persuaded that the benefit of doubt applies in this case. It would apply if the Panel concluded that the evidence was roughly equal that the spool incident did or did not, on a balance of probabilities, make a significant contribution to the worker's symptoms. In this case the Panel finds that the evidence for and against such a finding is not roughly equal. The issue is not whether the spool incident is equally set against the other precipitating possibilities, but that the number of other equally possible precipitating actions far outnumber the single spool incident. It is more probable that one or more of the numerous other actions in the days prior to the onset of symptoms made a significant contribution to the onset of symptoms than the spool incident.

[51] In making this decision, the Panel notes that pursuant to OPM Document #18-01-04, a benefit-related debt created by the allowance of this appeal would not be pursued by the Board.

THE DECISION

[52] The appeal is allowed. The worker is not entitled to loss-of earnings (LOE) benefits from July 13 to August 2, 2000.

DATED: November 24, 2005.

SIGNED: C. M. MacAdam, G. V. Stewart, F. Jackson