



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1916/06

BEFORE: T. Mitchinson : Vice-Chair
E. Tracey : Member Representative of Employers
R.J. Lebert : Member Representative of Workers

HEARING: October 5, 2006 at Toronto
Oral

DATE OF DECISION: November 3, 2006

NEUTRAL CITATION: 2006 ONWSIAT 2476

DECISION(S) UNDER APPEAL: WSIB ARO decision dated October 9, 2003

APPEARANCES:

For the worker: Ms. Emmanuelle Lopez-Tambasco

For the employer: Mr. Stephen Roberts

Interpreter: N/A

REASONS

(i) Introduction

[1] This appeal was heard in Toronto on October 6, 2006. The worker appeals the decision of Appeals Resolution Officer (ARO) T. McDonald, dated October 9, 2003. The ARO rejected the worker's claim for initial entitlement to benefits for a neck injury.

[2] The worker appeared and was represented by Ms. Emmanuelle Lopez-Tambasco, union representative. The employer appeared and was represented by Mr. Stephen Roberts, lawyer. The worker testified at the hearing, as did two fellow employees, Mr. M. and Mr. B. No witnesses testified on behalf of the employer. Ms. Emmanuelle Lopez-Tambasco and Mr. Roberts both made submissions.

(ii) The issues on appeal

[3] The only issue in this appeal is whether the worker is entitled to benefits for a neck injury which he claims arose out of and in the course of his employment. The worker filed his claim on April 10, 2001, and maintains that he first became aware of the injury in August 1999.

(iii) Applicable law

[4] The worker claims that the workplace accident occurred in August 1999. Accordingly, the Workplace Safety and Insurance Act, 1997 (the Act) applies.

(iv) Preliminary issues

[5] At the beginning of the hearing, the worker's representative asked the Panel to accept five additional documents as exhibits. The employer's representative did not object to the first four of these proposed exhibits, and the Panel agreed to accept them. They are:

- Workplace Safety and Insurance Appeals Tribunal Discussion Paper titled "*Neck and Arm Pain and Related Symptoms: Cervical Disc Disease*", dated December 2002;
- Hand-drawn sketches of the workplace prepared by the worker - 3 pages, undated;
- Photographs of the workplace (clearer copies of photographs contained in the Case Record) - 10 pages, undated;

[6] Statement of Account from Dr. James Cousineau, the worker's chiropractor, detailing treatment history from December 2000 to January 2004 - 7 pages, dated January 28, 2004.

[7] The fifth document is a July 2005 medical report outlining the results of treatment received by the worker at that time. The employer's representative objected to the admission of this record on the basis that he had not been given a copy in advance and was unaware of its content.

[8] The Panel decided that the July 2005 medical report should not be admitted as evidence. In the Panel's view, the prejudice to the employer in producing the record for the first time at the hearing outweighs the probative value of the record itself. The record was clearly not provided

in accordance with the 3-week rule set by the Tribunal for submitting evidence to be relied on in a hearing. It also had not been provided to the employer in advance of the hearing. The Panel could see no reason why a record dated in July 2005, if determined by the worker to be relevant to this hearing, could not have been provided in advance of the hearing date and in accordance with established Tribunal policy.

(v) Background

[9] There is no dispute between the worker and the accident employer concerning the following outline of the worker's job history and employment duties.

[10] The worker began employment with the accident employer on October 10, 1985 as a labourer in the warehouse of the employer's milling company. Between 1985 and 1989, approximately 1/3 of the worker's job duties involved operating a fork lift. In 1989, the employer undertook an extensive plant expansion. The worker was transferred to other non-manual labour duties during the expansion period, and returned to the warehouse when the expansion was completed at some point during 1990. In 1991 the worker resumed job duties that involved fork lift driving. The workplace had become extensively automated during the expansion, which resulted in less manual labour and more fork lift driving. By 1991, the time spent driving the fork lift had increased from 33% to between 90-95% of the worker's job duties.

[11] The worker's job involved retrieving finished milling products from the warehouse and loading them in transport trailers. The products were stacked on skids, and the majority of fork lift loads involved two stacked skids, weighing approximately 4,000-5,000 pounds at a height exceeding the top of the fork lift vehicle. Each trailer took approximately 22 skids, and the worker was responsible for loading approximately 5-6 trailers per 8-hour shift. The employer was busy, and the worker generally worked 6 and sometimes 7 days per week.

[12] To retrieve the skids from the warehouse, the worker would drive the fork lift forward until he picked up 2 stacked skids. He would then back-up the loaded fork lift approximately 300 feet until he reached the loading dock. This would take approximately 35-45 seconds. During this time, the worker would steer with one hand, and look back over his shoulder in order to ensure safe driving in an area that sometimes had pedestrian and other vehicular traffic.

[13] The warehouse floor often had cracked cement, which contributed to some difficulties in driving, but the main concern within the warehouse was a 7-foot ramp connecting the warehouse to the loading dock. This ramp was required in order to adjust for a 5-inch drop in floor surface between the two areas. The fork lift would shake four times as it crossed the ramp; twice when its two sets of wheels met the ramp, and twice again when it left the ramp surface upon reaching the loading dock.

[14] As soon as the fork lift reached the loading dock surface, the worker would turn to face forward and then proceed a short distance to the tractor-trailer bay. In order to accommodate varying truck heights, the loading dock had an adjustable ramp. The worker would move the ramp to the level appropriate for a particular truck and would then proceed up the ramp and into the trailer. Depending on the individual truck, the vertical height differential between the loading dock and the trailer floor could be anywhere up to 38 inches, which had to be

accommodated by a 7-foot ramp. The fork lift would shake 4 more times as its wheels entered and exited this second ramp.

[15] After dropping the two skids in the trailer, the worker would then drive the empty fork lift backwards down the truck ramp, turn around on the loading dock, drive across the loading dock and up the ramp to the warehouse, and across the warehouse floor to pick up the next load, encountering 8 more shakes as the wheels travelled across the two ramps.

[16] After receiving complaints from the worker and other employees concerning the impact the ramps were having on their work and health, the accident employer took steps to reduce the height differential between the tractor-trailer floors and the loading dock, and also provided new seats for the lift trucks that had more padding. The ramp between the warehouse and loading dock was not changed.

[17] In April 2001, the worker complained to the employer about neck pain which he attributed to strain in turning his neck when driving backwards, as well as jarring when driving across the ramps. The employer immediately accommodated the worker by moving him to other job duties that did not involve fork lift driving.

[18] The worker continues to be employed by the accident employer.

(vi) The worker's position

[19] The worker testified that his neck pain came on gradually, beginning in approximately 1997. The symptoms started as headaches and dizziness that became more frequent during the 1997-1999 period. The worker went to his family doctor, Dr. Guindon, for the first time about these complaints on August 9, 1999. He did not know the source of the problem, and worried that perhaps he had some type of brain tumour.

[20] The worker testified that Dr. Guindon made no enquiries about his job, and referred him to both an ear, nose and throat specialist, Dr. Tang, and a neurologist, Dr. Stoltz. Dr. Stoltz conducted a physical examination in October 1999, and ordered a CT scan. These tests ruled out any focal intracranial mass or vascular abnormality. Dr. Stoltz identified soft tissue damage and prescribed pain medication in November 1999. Dr. Tang's November 1999 examination ruled out any inner ear infection as causing the pain or dizziness.

[21] The worker was also referred in November 1999 to an allergy and immunology specialist, Dr. Pirbhai, who tested the worker for a number of allergies and concluded that "allergy does not seem to be playing a significant role in [the worker's] condition".

[22] The worker's pain symptoms continued until October 2000, when he experienced an unrelated foot infection that required surgery. During the 6-week recovery period, the worker noticed that his neck pain subsided, but he still did not connect the pain to his work duties.

[23] The worker testified that, although he was initially sceptical about seeking chiropractic treatment, no traditional medical treatment had been successful, so he decided to consult a chiropractor, Dr. Cousineau, "out of desperation" in December 2000. He received a number of treatments on his neck, which provided temporary relief.

- [24] According to the worker, while at work one day in April 2001, it suddenly dawned on him that the frequent neck turning and jarring from the ramps might be causing his neck pain, and he raised this possibility with Dr. Cousineau. After describing his job in detail to Dr. Cousineau, the chiropractor agreed that the work duties were a likely cause of the neck problems, and the worker filed a compensation claim with the employer on April 21, 2001. The worker testified that at no time up to this discussion with Dr. Cousineau had any doctor asked him about his job duties or in any way suggested that his neck pain might be work-related.
- [25] As noted earlier, the employer immediately transferred the worker to duties that did not involve fork lift driving. According to the worker, it was at this point that other fork lift drivers made similar complaints, and the employer improved the seats on the fork lift trucks and reduced the height gap between the loading dock surface and the trailer bays.
- [26] The worker testified that he continues to work for the accident employer, and has never been required to drive a fork lift again. The worker testified that the reduction in neck pain began as soon as he stopped driving the fork lift, and got better over time. He continues to be treated by Dr. Cousineau, but on a less frequent basis, and the worker states that while his neck pain continues at times and he occasionally gets headaches, these symptoms are significantly reduced and the dizziness he was experiencing has gone completely.
- [27] The worker points out that, although he has had six other workplace injury claims while employed with the accident employer, in addition to the current claim, he has never lost a day's work as a result of any of the seven claims, and, other than the foot surgery, he has only missed two days of work in his 21 years of employment.
- [28] The worker testified that he continues to be able to golf regularly and to ski infrequently, but is no longer involved in any team sports, such as hockey and baseball. He also points out that Dr. Cousineau encouraged him to continue with any sporting activities that do not affect his neck.
- [29] The two witnesses who testified on behalf of the worker also experienced neck pain while performing fork lift job responsibilities similar to the worker's.
- [30] Mr. M. has worked for the accident employer since 1978. He testified that he drove a fork lift in the warehouse for approximately 20 years. He began to experience neck pain in 1996 and asked the employer for a transfer to other duties in 2003 due to increasing pain. He attributed this pain to the head-turning and backwards driving of the fork lift, as well as jarring from the ramp bumps. Mr. M. was accommodated by the employer. He testified that he received no medication for his neck pain, and did not consult with a doctor. Mr. M. also testified that the worker made a number of complaints to him over the time they worked together about the neck pain he was experiencing on the job.
- [31] Mr. B. began work with the accident employer in 1991, and worked as a fork lift driver on an intermittent basis between then and 2004. He testified that he began to experience neck pain in 2003 caused by jarring from driving over the ramps. The pain became more extreme in 2004, at which point he filed a compensation claim with the Board and consulted with his family doctor. Mr. B. was immediately transferred by the employer to other job duties not involving a

fork lift, and he continues to be employed with the company. He testified that his injury was successfully treated through massage therapy and his claim with the Board was subsequently settled.

[32] The worker argues that his neck injury is compatible with his job duties as a fork lift driver. He takes the position that the medical evidence on file supports a gradual, undiagnosed worsening of his neck injury between 1997 and 2001, at which point it was diagnosed by Dr. Cousineau. This was the first time that any medical practitioner drew the link between the injury and the work duties. The worker relies on the evidence of his co-workers who experienced similar, although less serious, injuries from similar work. The worker argues that in all three cases the pain symptoms only eased when the fork lift driving duties ended through accommodation by the employer.

[33] The worker testified that he mentioned his neck injuries to Dr. Guindon for the first time on August 9, 1999, despite the fact that Dr. Guindon's treatment notes make no mention of neck injury until February 22, 2000. The worker explains that his initial concerns were focused on more serious possibilities of a brain tumour, and it was only after this was eliminated as a possibility that he and his family doctor began to think of other causes for his headaches, including neck strain.

[34] The worker acknowledged that cervical degenerative disc disease in his neck was identified at the time he underwent an MRI in February 2000, and he accepts that most people his age would have some evidence of degenerative disc disease. However, the worker argues that it is not normal for degenerative disc disease to be symptomatic at his age, and the reason it is related directly to his job duties. In the worker's view, the cervical degenerative disc disease was either caused by the neck turning and jarring experienced over an extended time on his job, or the work was a significant contributing factor aggravating a pre-existing condition. In either case, the worker takes the position that he is entitled to initial entitlement for his workplace injury.

(vii) The employer's position

[35] The employer takes the position that the worker's neck pain is most likely caused by the ordinary ageing process. The employer points out that the majority of people in their 40s have some evidence of cervical degenerative disc disease, so it is not surprising that the worker, who was born in 1957, would have this condition as well.

[36] The employer relies on the fact that Dr. Guindon's treatment notes do not mention neck pain from August 1999, when the worker first complained to Dr. Guindon about headaches and dizziness, until February 2000 when an MRI diagnosed degenerative disc disease. The employer speculates that confirming the existence of the disease may have precipitated the worker's neck complaints.

[37] The employer finds it significant that Dr. Guindon, when first treating the worker for his complaints in the fall of 1999, referred him to a neurologist and an ear, nose and throat specialist, but not to an orthopaedic surgeon. In the employer's view, it is reasonable to assume that had the worker been complaining about neck pain at that time, an orthopaedic assessment would have been a logical step for Dr. Guindon to take, and the fact that he didn't make this referral

supports the employer's position that neck pain was not present during the period between August 9, 1999 and at least February 22, 2000 when the worker underwent the MRI test.

[38] The employer points out that the worker has cervical degenerative disc disease, as confirmed by medical testing, and takes the position that his job duties as a fork lift driver were not significant contributing factors causing this condition. In the employer's view, the balance of probabilities favours a finding that the worker's condition was caused by the natural ageing process, which is not compensable, rather than his work duties.

[39] The employer also argues that the worker's neck injuries did not result from an aggravation of his pre-existing cervical degenerative disc disease. The employer points to Board policy #11-01-15 in support of this position. Although technically only applicable to Board decisions made on or after January 1, 2005, the employer encourages the Panel to take account of this policy in determining the aggravation issue.

[40] In the employer's view, in order to qualify for entitlement to benefits on an aggravation basis where a pre-existing condition exists, policy #11-01-15 states that a worker must have: (1) a previously identified and symptomatic medical condition; (2) been given medical restrictions and required to perform modified work prior to the accident; (3) received regular health care treatments prior to the accident; and (4) lost time from work prior to the accident. The employer argues that none of these conditions exist as far as the worker's neck injury is concerned, and he should therefore be denied benefits based on an aggravation of his pre-existing cervical degenerative disc disease.

(viii) Analysis

[41] Having carefully considered the evidence and the helpful submissions provided by both representatives, the Panel has concluded that the appeal should be allowed.

[42] We will first deal with entitlement on the basis of aggravation, since if the requirements of an aggravation-based claim are met, it is not necessary to determine whether the workplace injury actually caused the worker's cervical degenerative disk disease.

[43] Dealing first with the employer's submission on the application of Board policy #11-01-15, we cannot accept the employer's argument in the circumstances of this appeal. This policy governs situations where a worker has a pre-existing impairment that is aggravated by a minor work-related injury or illness to the same body part or system. It provides for an additional entitlement "for the acute episode only and benefits continue until the worker returns to the pre-accident state", provided the conditions outlined in the policy have been met. A "pre-accident impairment" is defined under the policy as "a condition, which has produced periods of impairment/illness requiring health care and has caused a disruption in employment". The guidelines supporting the policy clarify that entitlement is not limited in cases where there is no pre-accident impairment.

[44] Applying this definition to the circumstances of the present appeal, it is clear that the worker was not suffering from a pre-accident impairment when he began to experience the neck pain and headaches that ultimately led to his claim. Prior to August 1999, it would appear that the worker had no periods where his ability to do his work was impaired, and clearly nothing that

required health care or caused a disruption in employment. The Panel is convinced, on the basis of the worker's evidence, that he was and continues to be a hard-working and dedicated employee, with a stellar attendance record. The first time the worker sought medical care for neck and headache pain was when he visited his family doctor on August 9, 1999, as evidenced by Dr. Guindon's treatment notes describing this visit. His health care began at that point, not before. As far as any "disruption in employment" is concerned, it could be argued that there has never been a disruption, since the worker has not lost a single day's work for reasons relating to his neck injury. And even if the accommodation provided by the employer beginning in April 2001 can accurately be characterized as a "disruption", which is questionable at best, this event did not take place until after the injury that is the subject of the worker's claim began to manifest itself.

[45] Stated simply, the employer has mischaracterized the worker's health status. He had a pre-existing condition, asymptomatic cervical degenerative disc disease, not a pre-existing impairment. Accordingly, we find that Board policy #11-01-15 does not apply in the circumstances of this appeal, and the worker's claim should not be dismissed on a policy basis, as argued by the employer.

[46] Tribunal jurisprudence clearly establishes that initial entitlement to benefits can be based on aggravation of a pre-existing condition, and specifically aggravation of pre-existing cervical degenerative disk disease (See, for example, Decision Nos. 623/05, 1027/04, 216/05 and 175/06).

[47] The test for entitlement is whether, on the facts and evidence, the worker's job was a significant contributing factor aggravating his pre-existing condition. In the Panel's view, it was.

[48] The employer is correct when he states that Dr. Guindon's treatment notes, beginning in August 1999 and continuing to February 2000, make no specific mention of neck pain. However, the worker has testified that he complained of neck pain from the beginning, and offered a reasonable explanation for why Dr. Guindon may have neglected to note this specific complaint. The worker testified that his main concern at the beginning of treatment was whether or not he had a serious brain-related illness. Dr. Guindon's referral to a neurologist, rather than an orthopaedic surgeon, is consistent with this focus. Up until February 2000, when serious neurological problems were eliminated as causing the worker's pain, he viewed the neck pain as stemming from the headaches. It was only much later that the worker began to consider that the opposite might be the case, and that the primary source of pain was the neck and not the head. In the Panel's view, this is a credible explanation, and we accept the worker's evidence that he raised neck pain with Dr. Guindon at the first stages of his treatment on August 9, 1999.

[49] As far as cervical degenerative disc disease is concerned, the Panel has no difficulty in accepting the employer's position that this medical condition is present in a large proportion of people in their 40s, like the worker in this case, and that this condition is typically a natural part of the ageing process. However, we do not accept that symptomatic cervical degenerative disc disease is anywhere near as common at such a relatively young age.

[50] In the worker's case, the first indication of degenerative disc disease was in the MRI he received in February 2000. As recently as March 19, 1998, he had received an X-ray of his

cervical spine in the context of an unrelated injury that showed a normal spine alignment and no abnormalities, so the development of disc disease in his case was not longstanding, and only became symptomatic in the context of what he later identified as his troublesome fork lift driving job duties.

[51] The worker testified that he began to experience neck and headache pain in 1997, at a time when he was working long hours in a job that required him to drive the fork lift between 90-95% of the time, much of it with his neck turned while driving backwards. The pain became more serious over the ensuing months as he continued with the same job. By the time the worker sought treatment from Dr. Guindon in August 1999, he was experiencing neck and head pain on a regular basis, as much as once per week and lasting for several days. Pain medication was largely ineffective in treating the problem, and it was only when the worker was away from the fork lift job on an extended basis that he experienced any notable improvement in his condition.

[52] In the Panel's view, pain of the magnitude cannot reasonably be attributed to the ordinary ageing process for a man in his mid-to-late 40s, and we do not accept the employer's argument that the work duties did not contribute to the symptoms. While it is possible that age-related changes played a part in the worker's disc deterioration, the worker is nevertheless entitled to compensation benefits if it can be established that his employment played a significant contribution role in rendering the disc disease symptomatic (See Decision No. 216/05). We find that it did, for the following reasons:

- There is no evidence to suggest that any other non-compensable accidents or incidents might be responsible for the worker's neck and head pain. Although the worker had six prior workplace injuries during the course of his employment, in the Panel's view, none of them relate to or could reasonably contribute to the neck and head pain that is the subject of the present appeal.
- The act of turning his head to either the left or right and holding it there for the 30-45 seconds required to back up from the warehouse to the loading dock, and then again in backing out of the tractor-trailer after dropping off the load, creates a strain on the neck that is not experienced in day-to-day life. The fact that this activity was repeated in excess of 50 times per shift, 6 shifts per week, over several years, unavoidably increases the impact of this strain, and it is reasonable to conclude that this in itself would aggravate any pre-existing cervical degenerative disc condition.
- The jarring that took place on 8 separate occasions for each load, as the wheels of the fork lift crossed the two ramps, could reasonably be expected to compound the neck strain, particularly at times when the neck was already turned for backwards driving.
- The evidence of Mr. M. and Mr. B., fellow employees performing essentially the same job as the worker, supports the claim. Each of them experienced similar neck strain symptoms while doing the job and, of equal relevance, they both testified that the pain disappeared as soon as they were moved to other jobs that did not require fork lift driving.

- The actions taken by the accident employer by immediately accommodating the worker (as well as Mr. M. and Mr. B.) as soon as he complained of neck pain suggest to us that the particular type of fork lift driving required to load finished milling products on transport trucks in the warehouse was potentially creating health problems that needed to be addressed. We also note that the employer upgraded the floor treatment in this area and reduced the height differential between the loading dock and truck beds, which is consistent with accepting some responsibility for reducing an unhealthy work condition.
- Dr. Cousineau, in his June 20, 2001 report concerning the worker's state of health, confirmed through X-rays that the worker was suffering from "moderate degenerative joint disease with associated cervicogenic headache". The chiropractor assessed the worker's prognosis at that time as "poor to fair", based in part by "continuous exposure to the mechanism of injury", specifically the fork lift job duties with the accident employer. In his updated report on September 5, 2003, more than two years after the worker had been accommodated with other job duties, Dr. Cousineau stated that the "frequency, intensity and duration of the symptoms have all improved 50% to 70%", and he goes on to say that "[t]he major reason for the improvement has been the fact that [the worker] is not driving a lift truck with the same frequency. Another reason is that the workplace has been improved." In assessing the job duties that led to the worker's neck and head pain complaints, Dr. Cousineau states:

Constant pounding over a bump and rotation of the head will stress the upper cervical spine. Since 80% of head rotation takes place in the upper three cervical joints, there is no question that there is a tremendous amount of stress to that area. With physical stress comes degeneration and muscular dysfunction.

In the Panel's view, Dr. Cousineau's professional assessment of the root causes of the worker's neck and head pain are consistent with our conclusion that the fork lift job duties were a significant contributing factor aggravating his pre-existing cervical degenerative disc condition.

[53]

For all of these reasons, the Panel is satisfied that the nature of the worker's job duties and his long-term position as a fork lift driver with the accident employer aggravated any underlying cervical degenerative disc condition he may have had and made it symptomatic. As such, the worker is entitled to be assessed for benefits by the Board. The effective date of entitlement is August 9, 1999, when the worker first raised his neck pain with his family doctor.

DISPOSITION

[54] The appeal is allowed.

[55] The worker is awarded initial entitlement for neck injury, effective August 9, 1999. The issue of the type and quantum of benefits that might flow from this entitlement is returned to the Board for further determination.

DATED: November 3, 2006

SIGNED: T. Mitchinson, E. Tracey, R.J. Lebert