



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 194/12

BEFORE:

R. McClellan : Vice-Chair
B. M. Young : Member Representative of Employers
K. Hoskin : Member Representative of Workers

HEARING:

January 31, 2012 at Toronto
Oral
No post-hearing activity

DATE OF DECISION:

April 4, 2012

NEUTRAL CITATION:

2012 ONWSIAT 728

DECISION UNDER APPEAL:

WSIB ARO decision dated February 28, 2010

APPEARANCES:

For the worker:

G. Majesky, IBEW Local 353

For the employer:

C. Crisostomo, Paralegal

REASONS

(i) The appeal

[1] The worker appeals the decision of the Appeals Resolution Officer dated February 28, 2010. That decision concluded that the worker did not have entitlement for a permanent impairment assessment and award for a permanent impairment in the low back under the August 28, 2006 accident claim.

[2] The issue before the Panel is whether the worker has entitlement for a permanent impairment assessment and award for a permanent impairment in the low back under the August 28, 2006 accident claim.

(ii) Background

[3] The worker, now age 51, was employed as a construction electrician. On April 17, 2006 the worker sustained a compensable injury to his low back in the course of installing 500 MCM electric cable in a junction box. The Health Professional's Report Form 8 dated April 18, 2006 gave a diagnosis of low back strain. A subsequent Form 8 report from the physiotherapist dated April 24, 2006 diagnosed disc derangement/lumbar strain.

[4] In a letter dated May 5, 2006, treating family physician Dr. Cytowski stated that the worker had made a very good response to treatment from a back strain injury and was ready to return to full duties the following week. The worker received three days of loss of earnings (LOE) benefits.

[5] In a letter dated July 27, 2006, the worker was advised by the claims adjudicator that, based on the report from Dr. Cytowski, maximum medical recovery was May 8, 2006 and the worker was fit to return to regular duties with no entitlement to permanent impairment recognized under this claim.

[6] The worker sustained a second back injury at work on August 24, 2006. (The Board set the date of this accident as August 28, 2006, based on the first medical reports.) The clinical notes from family physician Dr. Cytowski are contained in the Case Record. The entry for August 28, 2006 recorded the incident at work as follows:

Four days ago pulling cable-a little sore, could easily work. Woke next day, worse than yesterday, now new shooting down left leg. Has had pain often and on not as bad since April and has been able to work easily. To hospital CVH yesterday-question herniated disc.

[7] The Chiropractor's First Report from the treating chiropractor Dr. Mayer recorded first treatment August 28, 2006 for back pain and left sciatica resulting from pulling thick electrical cable on August 24, 2006.

[8] Board Memo #7, dated September 26, 2006 in the April 2006 claim file, recorded that the Board was attempting to verify a possible reoccurrence, evidently based on the chiropractor's First Report. The case continued to be adjudicated under the April 2006 accident claim and was not adjudicated under the August 28, 2006 accident claim until after the ARO decision of September 15, 2009.

[9] Entitlement to a permanent impairment under the April 2006 claim was denied. The worker objected to this decision but the appeal was not heard until 2009. In an ARO decision

dated September 15, 2009, the ARO ruled that the worker had not sustained a permanent impairment as a result of the accident of April 17, 2006. He ruled that the worker's left sciatica and disc herniation symptoms as of August 2006 were not a continuation of the April 17, 2006 low back strain injury and there had been no neurological symptoms or findings of left sciatica as a result of the April 2006 accident.

[10] The ARO ruled that the question whether or not the subsequently diagnosed left sciatica and disc herniation were causally related to a new accident in August 2006, and whether there was any consequent permanent impairment, would be remitted to the operations area for determination. At the same time, SIEF cost relief was denied to the accident employer on the grounds that the worker had fully recovered by May 8, 2006 and there was no evidence of a pre-existing condition having prolonged or enhanced the worker's impairment.

[11] Following this decision, the case was referred back to the operating area for a determination with respect to possible relationship between the August 2006 injury and the worker's left sciatica and disc herniation.

[12] A claims investigation report dated November 20, 2009 described the worker's accident history from the April 2006 incident and that the worker stated that he felt he had recovered from the April incident. The worker reported a second accident of work in August 2006 when he experienced immediate low back pain in the course of lifting and pulling on heavy electrical cables. This accident was reported to the employer, he sought immediate treatment from his family physician Dr. Cytowski and he was placed on modified duties for approximately nine weeks in the fall of 2006.

[13] In Board Memo #5, dated December 3, 2009, the case manager ruled that the chiropractor's report of August 28, 2006, confirmed proof of accident and he wrote:

It is also reasonable to conclude [the worker] may have herniated his disc pulling the cable. Case manager recommends to allow claim as proof of accident has been confirmed.

[14] In Board Memo #6, dated January 8, 2010, the adjudicator accepted that there had been an accident by chance event August 28, 2006 and established a separate claim under a separate claim number with a decision still pending whether or not the accident resulted in a permanent impairment.

[15] Following this decision, the file was referred to Board medical consultant Dr. Germansky for an opinion as to whether or not the worker had sustained a permanent impairment under the August 28, 2006 accident claim. In Board Memo #9 dated February 9, 2010, Dr. Germansky wrote:

I see no PI/Nell under this claim.

The L4-5 disc herniation on CT scan in October 2006 could have been compatible with including suggestion of element of left foot drop at that time. The medical however suggests the symptoms related to that resolved without residual PI.

[16] On the basis of this advice, entitlement for a permanent impairment under the August 28 accident claim was denied.

[17] The worker again appealed and in the decision of February 28, 2010, the ARO ruled that the worker had reached maximum medical recovery following the August 2006 injury as of November 2006, based on the assessment from Dr. Schutz. There was then a gap with no

medical treatment until April 2008. He accepted Dr. Germansky's advice that there was no permanent impairment resulting from the August 2006 injury and no entitlement for a permanent impairment award.

(iii) Additional medical evidence

[18] As noted above, a CT scan of the lumbar spine taken October 3, 2006 identified a small right-sided disc herniation or asymmetric disc bulge at L5/S-1 compressing the thecal sac, and, a herniated disc fragment at L4/5, as well as disc bulge at L3/4. This was reported to the Board by Dr. Cytowski on October 10, 2006.

[19] Dr. Cytowski's report of an incident at work four days prior to August 28, 2006 is noted above.

[20] The Chiropractor's First Report dated August 28, 2006 recorded that a back injury occurred as a result of pulling thick electrical cable on August 24, 2006, and was preceded by the accident of April 2006. The current diagnosis was possible sciatica.

[21] On October 10, 2006, Dr. Cytowski submitted a Progress Report, with a diagnosis of L4/5 left disc herniation, continuous weakness of dorsiflexion of the left foot and paraesthesia of the left foot. She wrote, "likely to have long-term restrictions."

[22] The Functional Abilities Form from Dr. Cytowski dated November 13, 2006, issued medical restrictions against lifting above 25 kg, and limitations were issued until December 1, 2006 against bending, twisting or repetitive motions of the low back. Complete recovery was not expected because of the herniated disc at L4/5.

[23] In a letter dated July 15, 2009, family physician Dr. Cytowski provided a history of treatment of the worker. She stated that there was no evidence of radiculopathy in the two incidents in August 2000 and April 2001. She stated that the diagnosis in April 2006 was mechanical low back strain and that disc herniation was not determined until 2006. She concluded as follows:

Disc herniation occurrence:

I do not have any way of knowing when the disc herniation occurred. Based on the clinical notes for the four incidents, the only one that has clearly documented radicular symptomatology was the injury in August 2006. As noted above the two incidents in August 2000 and April 2001 did not appear to have any signs of radiculopathy.

Based on the type of work that [the worker] does, and the work injuries that he has experienced, I believe that there is a high likelihood that the disc herniation is work related.

[24] In a note dated December 28, 2009, Dr. Cytowski reported that the worker was still experiencing muscle spasm and that he had developed his own way of dealing with it through an exercise consisting of a type of traction, by hanging down three or four minutes when the back was acting up. Dr. Cytowski recorded that the spasms came at any time, sometimes in the morning and sometimes at work. The diagnosis was chronic mechanical back pain with intermittent spasms related to previous work injury. The worker was using his own techniques to resolve flare-ups. The worker should continue with appropriate work modification and lifting techniques to manage and prevent further back pain an injury.

[25] In a report dated November 8, 2006, Dr. Schutz at the Trillium health assessed the worker, and noted the CT scan showing disc herniation at L4/5. He stated functional inquiry is now negative. There was some functional weakness but much improvement. Straight leg raising was almost 60° and back movements were 60% of normal. Surgery was not indicated but ongoing symptomatic treatment was necessary, and he recommended that the worker continue at physiotherapy and modified work for another six weeks.

[26] The Case Record contains a Physician's First Report dated April 3, 2001, reporting a low back strain caused by bending at work on April 2, 2001. Clinical notes in the Case Record also record treatment or back strain August 28, 2000, and again on April 3, 2001, and April 17, 2001.

(iv) The worker's testimony

[27] The worker described his job duties as a construction electrician between 1985 and 2002, and his work in the Industrial/Commercial sector from 2002 to the present date, where he continues to work.

[28] He described the accident of April 2006 which occurred in the course of pulling a heavy (500 MCM) electrical cable and experienced pain in the low back on the left side then pain in the groin, without radiation into the legs. He stated that by May 2006 following the physiotherapy, and massage therapy, he was feeling much better and returned to modified work for about three weeks and then to regular electrician work.

[29] He stated that he had some back pain after April 2006 and saw Dr. Cytowski on August 8, 2006 for back pain and stated that he had no sciatica prior to the August injury.

[30] The worker described the accident of August 24, 2006 (dated August 28, 2006 by the Board apparently based on the chiropractor's first report). He stated they were working on installing a raised data floor, described as being about 2½ feet above the subfloor. He stated that he was working in a kneeling position on top of the raised floor placing cables into the space below and in the course of pulling on the cables, he experienced an immediate pain in his low back. He stated that the next day he had excruciating low-back pain with left leg sciatica and he reported the injury that day. He then sought treatment from the chiropractor and from Dr. Cytowski.

[31] The worker stated that Dr. Mayer's chiropractic treatment helped a great deal and he returned to work at modified duties, apparently in November 2006, and worked in the office for 10 or 11 weeks after which he returned to work as an ICI electrician.

[32] The worker stated that since the accident of August 2006 he experiences periodic back problems but has learned to cope and manage based on exercises he performs at home usually three times a week, more frequently if necessary. He stated that his main method of managing his back is a home-stretch device which he set up in his garage when his "back goes in the wrong direction" he hangs and stretches from an overhead bar and that eases his back pain. He stated that he also does this from time to time at work. The worker stated that it has been necessary since the August 2006 injury to use the stretch device at least once a month and sometimes more frequently. He stated in this way he is been able to continue working as an electrician with no loss time. He also stated that he has not had leg pains since Dr. Mayer's treatments in 2006.

(v) Submissions of the worker's representative

[33] Mr. Majesky reviewed the medical evidence in detail, including the clinical notes and reports from Dr. Cytowski, the chiropractor's reports, the reports from specialist Dr. Schutz and from the Board medical consultant. He also reviewed the complicated history of the claims adjudication. He submitted that the medical evidence established that the worker had sustained a disc herniation as a result of the accident of August 2006 and there was no evidence of prior radicular symptoms. He stated that the medical evidence together with the evidence of the worker's testimony established that the worker's disc herniation had not completely resolved as of November 2006, as claimed by Board decision makers. He also submitted Tribunal *Decision Nos. 1175/08, 152/99 and 1584/00* which each held that the existence of a disc lesion/herniation resulting from a compensable accident entitled workers to a permanent impairment assessment and award whether or not there was also functional impairment measured as abnormal motion in the spine.

(vi) Submissions of the employer's representative

[34] Ms Crisostomo also reviewed the medical file in detail, in particular the clinical note dated August 8, 2006 recording back treatment prior to the August 28, 2006 back injury as well as the physiotherapist's report dated April 24, 2006, indicating disc derangement as well as lumbar strain. She argued from this evidence that it was more probable that the worker's disc herniation had existed prior to the accident of August 2006. She submitted that if the first ARO in September 2009 had been aware of this medical evidence, he would not have ruled against the existence of a disc herniation and left sciatica prior to August 2006. She also submitted that the Board's interpretation of Dr. Schutz and Dr. Cytowski's reports, the worker's August injury had fully recovered as of November 2006 and the worker had been fully capable of returning to regular work, was a correct interpretation and ruled out the existence of permanent impairment.

(vii) Law and policy

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

[36] Provisions for Payments for Loss of Earnings are set out in section 43.

[37] 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,

- (a) the day on which the worker's loss of earnings ceases;
- (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;
- (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.

(2) Subject to subsections (3) and (4), the amount of the payments is 85 per cent of the difference between,

- (a) the worker's net average earnings before the injury; and

- (b) the net average earnings that he or she earns or is able to earn in suitable and available employment or business after the injury.

However, the minimum amount of the payments for full loss of earnings is the lesser of \$15,312.51 or the worker's net average earnings before the injury.

[38] Compensation for Non-economic Loss is set out in section 46:

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).

[39] Impairment is defined in the WSIA as follows:

2. Definitions (1) in this Act "impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

(viii) The Panel's conclusions

[40] The worker in this case is seeking entitlement for a permanent impairment assessment and award for a permanent impairment in the low back under the August 28, 2006 accident claim.

[41] The Panel finds the worker to be a credible witness whose testimony was given in a straightforward manner without exaggeration and which was corroborated by the documentary evidence in the Case Record.

[42] As noted above, the adjudication of this claim has been somewhat complicated. An ARO decision in September 2009 upheld the denial of a permanent impairment entitlement under the April 17, 2006 back injury claims on the grounds that there was no evidence of a disc herniation or left sciatica prior to the back injury of August 2006, and the injury had been a soft tissue injury only. The ARO directed the operations branch to first determine whether the worker's left sciatica and disc herniation could be causally related to the accident of August 2006 and second, whether there was any consequent permanent impairment.

[43] In Board Memo #5, dated December 3, 2009, the claims manager confirmed proof of accident in August 2006 based on the chiropractor's report dated August 28, 2006 and also stated that it was reasonable to conclude that the worker may have herniated his disc pulling a cable. The August 2006 claim was allowed.

[44] The file was then referred to a Board Medical consultant Dr. Germansky who advised in Board Memo #9, dated February 9, 2010, that the worker's L4/5 disc herniation could have been compatible with the accident history of August 2006 and the clinical findings including left leg sciatica and left foot drop. However, Dr. Germansky advised that the symptoms relating to that condition had resolved without residual permanent impairment. On the basis of this advice, entitlement for a permanent impairment was denied.

[45] However, neither the Act nor Board policy contains a requirement that a diagnosed condition, such as a herniated disc, must cause functional impairment in order to qualify for a permanent impairment award. There is settled Tribunal jurisprudence on this point. In *Decision No. 1175/98*, the Vice-Chair awarded entitlement to a NEL assessment on the basis that the worker had sustained structural abnormalities in the lumbar spine notwithstanding the fact that there was normal range of motion in the lumbar spine. The Vice-Chair pointed to the *AMA*

Guides to the Evaluation of Permanent Impairment, which provides for discrete awards for diagnosis-related factors such as structural abnormalities under Table 53 of the *Guides*, and separate awards under the heading Abnormal Motion which comprises musculoskeletal or neurologic factors that require physiological measurements. This precise position has been held in Tribunal *Decision Nos. 456/96, 1175/98, 152/99, and 1584/00.*

[46] In the case before us, if it is found that the worker's disc herniation and left sciatica as diagnosed in the fall of 2006 was causally related to the compensable accident under the August 28, 2006 accident claim, then the worker would be entitled to a permanent impairment assessment and award, whether or not the condition remained symptomatic.

[47] In our view, the medical evidence does establish, on the balance of probabilities, that the worker's disc herniation at L4/5 as diagnosed by the CT scan in October 2006 was causally related to the compensable accident under the August 28, 2008 accident claim. The worker's physically demanding job duties as an industrial electrician are fully compatible with the nature of the injury. There is no objective medical evidence that the worker had clinical symptoms of disc herniation with left leg sciatica prior to the accident of August 2006. The clinical notes from the treating family physician Dr. Cytowski dated August 28, 2006, established clinical symptoms of disc herniation and left leg sciatica four days following the accident, which involved "pulling cable." That is the first evidence of radicular symptoms consistent with the right L4/5 disc herniation. On the same day, treating chiropractor Dr. Mayer also reported low back pain radiating into the left leg as a result of pulling a thick electrical cable on August 24, 2008. Disc herniation at L4/5 was confirmed by a CT scan in October 2006.

[48] Based upon the medical evidence before us, the Panel concludes that the worker's disc herniation at L4/5 with left leg sciatica was causally related to the accident by chance event under the August 28, 2006 accident claim. The worker is therefore entitled to a permanent assessment and award based on the provisions of the AMA Guides, at Table 53.

[49] With respect to the issue of ongoing functional symptoms, Board decision makers concluded that the worker's symptoms had fully resolved based on a report from Dr. Schutz dated November 8, 2008. However, a review of this report leads us to a different conclusion: at the time of this examination, straight leg raising was only 60% of normal and back movements were also only 60% of normal. Dr. Schutz gave a positive prognosis but full recovery had obviously not been achieved as of November 8, 2008. Further, in his note dated December 28, 2006, Dr. Cytowski stated that the worker was still experiencing muscle spasms at home and at work and that the worker had developed a kind of traction technique, which the worker described in his testimony as enabling him to manage his ongoing back pain and to continue to be able to work as an electrician. These facts bring into question the conclusion that the worker's compensable injury was asymptomatic subsequent to November 2006. The Panel accepts the testimony of the worker, as corroborated by Dr. Cytowski, that the worker's back condition has remained symptomatic since 2006 and has been successfully managed by the worker with a home traction technique which the worker uses on at least a monthly basis. The worker is therefore entitled to a permanent impairment assessment to determine the extent of ongoing functional impairment, if any.

DISPOSITION

[50] The appeal is allowed.

[51] The worker's disc herniation at L4/5 and left leg sciatica was causally related to the accident by chance event under the August 28, 2006 accident claim. The worker is entitled to a permanent assessment and award based on the provisions of the AMA Guides, at Table 53.

[52] The worker is also entitled to a permanent impairment assessment to determine the extent of ongoing functional impairment in the lumbar spine, if any.

DATED: April 4, 2012

SIGNED: R. McClellan, B. M. Young, K. Hoskin