WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 214/08

BEFORE: M. Kenny : Vice-Chair

HEARING: November 6, 2008, at Ottawa
Oral

DATE OF DECISION: December 16, 2008

NEUTRAL CITATION: 2008 ONWSIAT 3276

DECISION(S) UNDER APPEAL: WSIB ARO decision dated November 29, 2006

APPEARANCES:

For the worker: The worker's husband.

For the employer: S. Hellsten, Lawyer

Interpreter: None

REASONS

(i) Introduction

[1] The worker lost several days from work beginning March 29, 2005, and subsequently from April 7 to May 10, 2005. She began physiotherapy for back and right leg pain on April 18, 2005.

[2] The worker's representative argued that the worker was entitled to benefits for that back condition because it resulted from an accident that happened at work on March 16, 2005. He did not pursue the argument that the worker sustained a back injury by "disablement" from the general nature of her work as a department store sales associate.

[3] The Board Appeals Resolution Officer ("ARO") decided that the worker was not entitled to benefits for a low back injury from a March 16, 2005 work accident. In reaching her conclusion, the ARO noted the worker's delay in reporting an accident, the alternative explanations for the worker's back condition described in reports from doctors who examined the worker at the time, and medical evidence about the nature of the worker's back condition. The ARO also concluded that the worker was not entitled to benefits for a low back "disablement" arising out of and in the course of her employment because she was performing her regular job as a department store sales associate and the nature of those duties was not likely to cause a gradual onset low back injury.

(ii) The issue

[4] The issue in this appeal is whether the worker is entitled to benefits for a low back impairment that caused her to lose time from work for certain days between March 29 and May 10, 2005, and for which she received medical attention (including physiotherapy treatments).

(iii) The law and Board policy

[5] Section 13 of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") describes when a worker will be entitled to benefits. It states:

> **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.

[6] Thus, to be entitled to benefits under the WSIA, a worker must sustain a "personal injury." The personal injury must be "by accident." And the personal injury by accident must "arise out of and in the course of" the worker's employment.

[7] Section 2(1) of the WSIA describes what constitutes an "accident." It states:

> **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;

[8] Section 13(2) of the WSIA states that, if an accident occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown. Likewise, if an accident arises out of a worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. This presumption does not apply in the case of a "disablement" because the section 13(2) presumption does not apply until it has been established that an "accident" has occurred.

[9] Board *Operational Policy Manual* Document No. 15-02-01 (referred to in this decision as "the Board's policy on the definition of accident" provides the following guidelines about the "chance event" and "disablement" definitions of accident under the WSIA:

> **Guidelines**
>
> **Chance event:** A chance event is defined as an identifiable unintended event which causes an injury. An injury itself is not a chance event.
>
> **Disablement:** The definition of disablement includes
>
> - a condition that emerges gradually over time
> - an unexpected result of working duties.

[10] Section 43 of the WSIA describes when a worker will be entitled to be paid benefits for loss of earnings ("LOE" benefits). It states that a worker who has a loss of earnings "as a result of the [compensable] injury" is entitled to LOE benefits for the time period and in the amounts described in that section of the Act.

[11] Section 33 of the WSIA states that a worker who sustains a compensable injury is entitled to "such health care as may be necessary, appropriate and sufficient as a result of the injury."

[12] Thus, to decide whether the worker was entitled to LOE benefits and health care (such as physiotherapy) for the periods claimed, it is necessary to decide whether the worker sustained a compensable injury (i.e., a personal injury by accident arising out of and in the course of her employment). If she sustained a compensable injury, it is then necessary to decide whether her loss of earnings resulted from that injury, and whether the health care she received was received "as a result of" the injury.

(iv) The worker's evidence about March 16, 2005

[13] The worker's written Report of Injury states that, when she bent forward to pick up a small item, she felt a vein burst in the back of her right knee and a pinched nerve from her right lower back. There was no medical evidence that the worker actually burst a vein in the back of her right knee. Also, because the worker completed this Report of Injury more than a month after March 16 (after she had discussed the matter with her family doctor), the worker's written description of the injury included what she understood the diagnosis for her condition could be (i.e., a pinched nerve). In order to clarify the details of the March 16th events that were within the worker's personal knowledge, at the Tribunal hearing the worker was asked to testify about those events.

[14] The worker testified that, on March 16, 2005, she was doing her regular job as a department store sales associate. She squatted down and started to reach to open the door to a cupboard that was just above ground level because she planned to get some china out of that

cupboard. When she was in this position, she suddenly felt pain in her right leg (that felt as though a vein were bursting) and this pain travelled up her right leg to her back. She fell to the floor (from the squatted position). She testified that she yelled for help because of the pain, and she could not get up. She recalled that her co-worker in the department came to help her get up, and she went to sit in an office in the department where she worked. The worker could not recall whether she stayed until the end of her shift. However, she testified that she did recall that, after work that day, her son took her to the clinic of her family doctor (Dr. Robillard). The worker testified that the family doctor could not see her that day, so the worker scheduled an appointment to see her later. The worker thought she scheduled the appointment for March 28, 2005 – but the first note signed by the family doctor was signed on March 31, 2005.

[15] A Board claims adjudicator interviewed the co-worker with whom the worker was working on March 16, 2005. According to the adjudicator's notes, the co-worker was working in a different area than the worker before she heard the worker yell for help (so she did not see what the worker was doing). When the co-worker went to see what happened, she saw the worker "on the floor in pain. The worker told her there was something wrong with her leg and she couldn't walk…" According to the co-worker, the worker "eased herself afterwards" and she worked the next day "in pain" because they were short staffed and it was a busy season for this department. The co-worker described two other incidents before March 16 when the worker had experienced pain but continued to work.

[16] The worker did not lose time from work until 12 or 13 days later. The employer's records say her first day off work was March 29, 2005; the family doctor's March 31st note says the worker was absent from work beginning March 28, 2005.

[17] The worker did not report an accident to the employer until mid-April.

(v) Medical treatment

(a) The first medical treatment – March 27, 2005

[18] On March 27, 2005, the worker visited a walk-in clinic with a presenting complaint of "hip pain." The nurse's notes stated:

> No known injuries. Yesterday pain. Right hip – getting worse.

[19] The doctor's notes included the following:

> Bought new shoes 1 week ago…++ standing at work.
>
> [Observations on Examination]:… Right hip normal exam. Min[imal] tenderness right SI [sacroiliac] area. Full ROM [range of motion]…
>
> [Diagnosis]: STI [soft tissue injury] right hip.

[20] Thus, when the worker first saw a doctor, she did not describe any event that occurred on March 16. To the contrary, she described "no known injuries," and an onset of right hip pain the day before (i.e., on March 26, 2005). She also suggested alternative causes for the pain – such as "new shoes" and "++ standing at work."

[21] According to the walk-in clinic doctor's notes, the worker had full range of motion when the doctor examined her hip/sacroiliac area on March 27, 2005.

(b) Subsequent medical reports

[22] On March 31, 2005, the worker's family doctor wrote a note in which she stated that the worker would be "absent from work March 28th through April 3rd inclusive due to medical reasons." The family doctor did not file a Report of Injury with the Board at this time.

[23] The worker was off work from March 29 to April 1, 2005. According to the employer, the worker was paid under the employer's sick benefit plan for these days.

[24] On April 7, 2005, the worker's family doctor completed another medical note that stated that the worker was "unable to work April 7th through 15th inclusive due to medical reasons." The doctor did not file a Report of Injury with the Board at this time.

[25] On April 9, 2005, the worker was treated at a hospital Emergency Department. The hospital notes indicate that the worker said that she had right flank pain for a week, and she had seen her doctor "one week ago" and the doctor had diagnosed "pinched nerve." She said that she had developed a "new" pain (on April 9) and she described this new pain as a severe abdominal pain that radiated to her back and had been associated with an episode of right leg paresthesia. She subsequently underwent testing for an abdominal condition.

[26] On April 11, 2005, the worker's family doctor assessed the worker and submitted a report to the Board. In this report, the doctor provided a diagnosis of "muscular strain lower back/sacroiliac joint dysfunction. R/O [rule out] herniated disc." The latter notation suggests that the doctor was going to investigate whether the worker had a herniated disc. The doctor noted "abnormal signs…[for]…active ROM" and indicated that the worker was incapable of standing/sitting periods longer than 15 minutes and she was unable to walk more than 50 metres without pain. The doctor described her understanding of how this injury occurred as follows:

> [What is your understanding as to how this injury/illness or re-injury occurred?]:
>
> Gradual onset of low back pain during week of March 15-19th/05. Had been lifting heavy boxes at work weekend of March 11-13th/05.

[27] Thus, the worker's family doctor's first report to the Board makes no mention of any March 16 work accident. To the contrary, the doctor understood that the worker described a "gradual onset" of low back pain and related it to heavy lifting over a weekend before March 16.

[28] The family doctor referred the worker for physiotherapy.

[29] On April 18, 2005, the worker was assessed at the Canadian Back Institute ("CBI"). She completed a form in which she said that her current episode of back pain was caused by a work accident and that her pain started gradually. The spinal assessment form that was completed at that time stated that there was no event that caused this episode of back pain.

[30] On the basis of the April 18 assessment, the CBI physiotherapist concluded that the worker "presented with signs and symptoms consistent with mechanical back pain. There was no evidence of nerve root irritation or conduction deficit."

[31] On April 26, 2005, the worker had a CT scan of her lumbosacral spine. The report of the CT scan described the findings as follows:

> …IMPRESSION: Mild circumferential disc bulges at L3-4 and L4-5. Mild degenerative disc disease at both these levels. No significant impact centrally or on any of the existing nerve roots at the imaged levels…

[32] Thus, the CT scan did not report findings of disc herniation or significant nerve root compression. It reported the types of findings that can be described as mild "age-related" changes.[1]

[33] The worker returned to work in May 2005. She continued physiotherapy treatments until June 2005 when the physiotherapist concluded that she had recovered and was able to return to her regular work.

(vi) Reporting of an accident

[34] As indicated above, according to the medical reports, the worker did not describe the events of March 16 when she received medical treatment at the walk-in clinic or when she visited her family doctor in March and April 2005.

[35] The accident employer advised the Board that the worker did not report an injury to the employer until April 12, 2005 (three days after she went to the hospital Emergency Department, and the day after her April 11th appointment with her family doctor). According to a memorandum from the human resources manager, the worker did not notify the employer of her injury "until she had seen her doctor and the doctor prompted her to try to remember any incident that might have led to her injury" at which time she "thought she might have hurt it at work sometime during the week of March."

[36] In answer to a question about why she delayed reporting a work accident, the Report of Injury that the worker signed on April 21, 2005 states that, at the time, the worker did not realize that it was an accident – that she did not realize this until she discussed the issue with her family doctor. However, the history that is related in the family doctor's report is a history of the gradual onset of back pain after a weekend when the worker had been lifting heavy boxes at work.

[37] The employer forwarded a copy of a "Disablement Statement Questionnaire" signed by the worker (on April 19, 2005), which stated that she first noted her symptoms "approximately week of March 14, 2005." It described the physical aspects of her job as a sales associate, and indicated that she had done this job full-time for about 10 years.

[38] In answer to a question on the Disablement Statement Questionnaire about any changes in her work duties, the worker wrote that "at times due to lack of staff my work load is increased by approximately 50%." The human resources manager provided a "clarification" of this statement. She indicated that any changes in work were not due to lack of staff but rather because of "busy days" (because the store's stock loads had not increased). She noted that, on busy days, the workload that increases is mostly that of helping customers – "not physical work."

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[1] Medical Discussion Paper on "Back Pain" prepared for the Tribunal by orthopaedic surgeon Dr. W.R. Harris, and neurosurgeon Dr. J.F.R. Fleming, March 1997, Revised February 2003. www.wsiat.on.ca

(vii) The submissions

[39] The worker's representative argued that the worker provided an honest account of how she injured her back at work on March 16, and that the worker's account is supported by the information provided by her co-worker. He argued that this was a work accident, and it was the reason why she had physiotherapy, and she should be compensated accordingly.

[40] The employer's representative noted the delay in the worker seeking medical attention, the discrepancy between the March 16th date and the date of the time lost from work, the differing explanations given by the worker for her back pain, and the absence of any injuring activity in the worker's description of the March 16th events. He argued that the ARO's decision that there was no back injury due to a specific accident at work on March 16 was correct.

(viii) The findings

[41] I accept that the worker testified honestly and to the best of her recollection.

[42] I accept the worker's testimony that she experienced right leg and low back pain at work on March 16 when she started to reach forward as she squatted near a cupboard at work.

[43] However, this is not sufficient to establish that the worker was entitled to LOE for time she later lost from work, or to health care benefits for medical care she later received.

[44] Although I accept that the worker experienced pain when she was at work in the position that she described, in order to be a compensable injury, there must be an "injury." It is therefore important to know whether the pain the worker experienced was a symptom of a pre-existing back condition, or whether it resulted from an "injury" that occurred as a result of a work accident.

[45] In this case, the ARO's decision focused on the question of whether there was a "chance event" accident on March 16th. This raised the question of whether anything the worker described as having occurred on March 16th could be described as a "chance event." There was little in the worker's description that suggested an "identifiable unintended event." The employer's representative also questioned whether leaning forward from a squatted position could be a "chance event" accident when it simply involved a normal everyday activity.[2]

[46] But, in my view, the important question in this case is one of causation. Even if there was a "chance event" on March 16th, there must be an "injury" that resulted from that event. This is required by the "injury by accident" wording of section 13 of the WSIA. That wording requires not only a finding that there was an "accident" that arose out of and in the course of employment, but also a finding that the worker sustained an injury as a result of that accident.

[47] The Board policy on the definition of accident incorporates the requirement for this causal connection between an event and an injury in its definition of "chance event" accident. In

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[2] See, for example, Tribunal *Decision No. 900/06* which found that a normal everyday activity of turning on stairs was not an identifiable unintended event, and therefore it was not something that was a "chance event" accident.

addition to requiring an "identifiable unintended event," the Board policy requires that the event "causes an injury. An injury itself is not a chance event."

[48] Thus, even if leaning forward from a squatted position and starting to reach is a "chance event" under the WSIA, did it cause the injury for which the worker is claiming benefits?

[49] There is no medical evidence relating the mechanics of the March 16 work incident to the back condition that was causing the worker's pain. To the contrary, when the worker first received medical care some 11 days after she experienced pain at work on March 16, the doctor diagnosed a soft tissue injury of the right hip – and the worker described a recent onset of hip pain as well as other possible reasons for the pain (i.e., wearing new shoes, prolonged standing). Neither the nurse nor the doctor recorded any account of a March 16th event that the worker associated with her back/hip pain.

[50] Likewise, when the family doctor subsequently submitted a report to the Board on April 11, she diagnosed "muscular strain" and she understood that the worker had a gradual onset of this pain that developed after a weekend when the worker lifted heavy boxes at work. There is no description of the March 16th incident – or any suggestion that the doctor's diagnosis related to a specific incident when the worker reached forward as she squatted at work. In addition to diagnosing "muscular strain," the family doctor's April 11th report also indicates that she wanted to rule out disc herniation. Her report noted abnormal signs on ROM testing. However, such abnormal signs on ROM testing were not observed closer in time to March 16, (i.e., the March 27th medical examination found "full ROM") and the CT scan did not report any disc herniation. Thus, there was no medical evidence of any discogenic injury – especially any injury related to the earlier date of March 16.

[51] The CT scan reported findings of "mild degenerative disc disease" at two vertebral levels. It did not report any disc herniation or significant nerve root compression. As indicated in the paper on "Back Pain" prepared for the Tribunal, the term "degenerative disc disease" usually describes a normal aging change, and aging (with or without findings such as the worker's CT scan findings) can result in back pain. Such back pain could occur at work – with or without a specific event or work activity causing any injury to the underlying back condition. Thus, the fact that the worker experienced back pain at work does not necessarily mean that she injured her back at work.

[52] In view of the nature of the March 16 incident described by the worker, and the lack of any medical evidence that that incident injured her back, I find that the worker did not sustain a back injury by accident arising out of her employment on March 16. She is therefore not entitled to benefits.

[53] Furthermore, even if initial entitlement were granted for March 16th (which it is not), the evidence did not establish that the worker's later periods of absence "resulted from" any March 16 back injury. To the contrary, although the worker may (as indicated by her co-worker) have worked in pain on March 17, she continued to work until March 27 or 28, and, when she had pain that then prevented her from working, she attributed that pain to something other than a March 16 injury. This suggests that what occurred on March 16, was simply an episode of leg/back pain that resolved (as had previous episodes).

[54] Although I accept that the worker testified honestly and to the best of her recollection, she also candidly admitted that she had difficulty remembering some things now, more than three years after the times at issue in this appeal. To the extent that her present recollection differs from matters described in the 2005 medical records, I find that the medical records are more reliable than the worker's present testimony. The records were made by professionals in the regular course of those professionals providing medical services, and the records were made closer in time to the periods at issue. The history and timing of symptoms recorded by the nurse and doctor who saw the worker on March 27, and recorded later by the family doctor, suggest that the worker, when she later required time off work and health care, attempted to think of things that could have caused her back pain. But the fact that she described mechanisms other than a specific injury or event that occurred on March 16, suggests that it is unlikely her later condition resulted from anything that occurred on March 16.

[55] Although the Board considered the question of whether the worker suffered a back injury by "disablement" related to the general nature of her work, the worker's representative advised that the worker was not claiming entitlement on this basis. Instead, he relied on evidence about a March 16th work accident. In view of his submissions as well as the evidence on file and adduced at the hearing, I find that the evidence did not establish an injury by disablement related to the general nature of the worker's work duties.

DISPOSITION

[56] The worker's appeal is denied.

DATED: December 16, 2008

SIGNED: M. Kenny