WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2276/09

BEFORE: R. McClellan : Vice-Chair
B. M. Young : Member Representative of Employers
J. A. Crocker : Member Representative of Workers

HEARING: November 23, 2009 at Toronto
Oral
No post-hearing activity

DATE OF DECISION: January 21, 2010

NEUTRAL CITATION: 2010 ONWSIAT 211

DECISION(S) UNDER APPEAL: WSIB ARO decision dated August 31, 2006

APPEARANCES:

For the worker: Self-represented

For the employer: Not participating

REASONS

(i) The appeal

[1] The worker appeals the decision of the Appeals Resolution Officer S. McKinnon, dated August 31, 2006. That decision concluded that the worker did not have entitlement for a permanent impairment in the low back arising from the accident of October 1996. The issue before the Panel is whether the worker has entitlement for a permanent impairment in the low back arising from the accident of October 1996.

(ii) Background

[2] The worker, now age 35, was employed as a receptionist at a car dealership. In October 1996, she reported a gradual onset of low back pain which she attributed to sitting in an ergonomically unsuitable chair. The initial diagnosis was lumbar strain. Initial entitlement was denied in November 1996, based on the advice from Unit Medical Advisor, Dr. Shapiro. Following interventions from the worker's physician, Dr. Woodrow, who advised that he thought the worker's chair and the ergonomic setup of her workstation had caused her back injury, the decision was overturned by an ARO's decision of September 17, 1997. Initial entitlement was granted, specifically for lumbar strain. The ARO found that the worker's chair at the time of the injury had inadequate lumbar support, that she was required to sit most of the day without the ability to alternate her positions, that there was a history of complaints and no other possible injury or aggravation. The ARO accepted that the worker's symptoms included severe low back pain, with nausea and vomiting. Lost time benefits were paid from October 3, 1996, until November 11, 1996. The ARO also noted that the worker had returned to work at a reconfigured workstation in January 1997, without new problems in her back.

[3] There was no activity on the worker's WSIB file between September 22, 1997 and July 26, 2004. Board Memo #18, dated July 26, 2004, recorded that the worker claimed a recurrence of low back pain since the accident of October 1996, and that the pain had never completely resolved. Board Memo #19, dated November 17, 2004, recorded the worker's assertion that a gardening incident at home that spring was a recurrence of the October 1996 work-related incident. The worker stated she had no diagnostic investigations for her low back since December 1996 but had received intermittent treatment for periodic flareups of back pain since 1996.

[4] A claims investigator was assigned to the file, and reported on January 19, 2005, that the worker claimed everyday activities at work and home aggravated her original back injury symptoms. There was a gardening incident in April 2004 with an onset of acute pain after light gardening for two hours. The claims investigator recorded the worker's job history: she stayed with the accident employer until March 1999 working in accounts payable, worked for another car dealer until September 2000 as a business manager, worked as a dental receptionist from May 2001 until December 2002, collected EI, then assisted in her husband's fishing charter business. The worker described daily discomfort in the low back with periodic acute flareups brought on by prolonged activity.

[5] In Board Memo #29, Dr. Shapiro advised that the clinical findings noted in 1996 suggested the worker did not have an ongoing assessable residual organic impairment relating to the accident of October 1996 and there was insufficient medical continuity to relate her ongoing

back condition to the compensable injury of October 1996. Dr. Shapiro reviewed additional medical records from Dr. Woodrow in April 2005 and confirmed his previous advice. This advice was accepted by the Claims Adjudicator and entitlement for a permanent impairment was denied. The claims decision was upheld by the ARO on the grounds that there was insufficient continuity between 1996 and 2004, and that the original entitlement was for a lumbar strain which had fully resolved.

(iii) The medical evidence

[6] The Physician's First Report from family physician Dr. Woodrow is dated October 3, 1996, and gave a diagnosis of moderate lumbar strain arising on a slow onset basis over two to three weeks, and which resulted from using a chair with poor back support at work. There was no prior history of low back pain.

[7] The worker was assessed at the Canadian Back Institute on October 10, 1996, with current complaints of intermittent bilateral low back and mid-back pain, starting one month earlier as a result of prolonged sitting at work. The diagnosis was mechanical low back pain as a result of postural stresses, with no evidence of acute discogenic, ligamentous or posterior element irritation. The worker was discharged with therapeutic exercises and advice that there should be no need for ongoing treatment.

[8] Dr. Roger Green, general practitioner, assessed the worker on November 5, 1996, and reported only slight, if any, improvement in the worker's condition following treatment at the Canadian Back Institute and from the chiropractor. He wrote that the physical examination was completely normal apart from some slight tenderness in the lumbar area. He wrote:

> This is a classical presentation for "mechanical back pain." The best treatment would be continuing active back care exercises and routine. I think she needs to have the ergonomics of her work situation addressed. She could probably start back to work next week if the ergonomics were improved…. In addition, I think when she gets back to work she should be allowed five minutes each hour to get up and stretch and do the back care exercises she has been taught.

[9] On July 8, 1997, Chiropractor Dr. Teschi reported treating the worker on October 21, 1996, for low back pain of two months' duration, with significant improvement after one month of treatment. However, the worker returned to work and experienced an immediate re-aggravation of pain, following which her chair was replaced at work and after further treatment she was 80% to 90% improved. There was an acute episode of symptoms in June 1997, which resolved after three treatment visits. He attributed the worker's ongoing problems to the use of inadequate seating at work.

[10] In a letter dated August 14, 1997, Dr. Woodrow advised the Board that the worker was still experiencing lumbar pain since September 1996, and that the cause of her back impairment was the ergonomics of her workstation chair and desk.

[11] On August 18, 2004, Dr. Woodrow submitted a Form 8 Report stating the worker had intermittent bilateral pain since the original injury of October 1996, exacerbated on April 26, 2004, while doing heavy work in her garden. The diagnosis was lumbar strain. In a note date-stamped January 13, 2005, Dr. Woodrow advised that the worker had made complaints

of back pain since her original injury of October 1996 and that on most visits to his office, she complained of her pain.

[12] On April 4, 2005, Dr. Woodrow advised the Board that he had treated the worker once between 1998 and 1999, and then she was treated every two months during 2004 for persisting back pain. He stated the back pain had remained stable until April 2004, when the worker developed an exacerbation of her lumbar pain while bending over in her yard. The pain radiated to the mid-thoracic spine, extending to the T6-12 region. He treated the worker again in August and October 2005, and four times in January 2005. In a subsequent note dated April 14, 2005, Dr. Woodrow advised that he saw the worker in November 2000, December 2000, November 2001, December 2002, March 2004, always with reference to ongoing back pain. On July 20, 2005, Dr. Woodrow advised that the worker had a high tolerance to pain, was a stoic individual who avoids complaining, and that he had advised her prior to her return to work in 1996 that her back pain was something she was very likely going to have to deal with for the rest of her life, and that the long distance from the doctor's office explained her infrequent visits.

[13] In a subsequent letter dated April 14, 2005, Dr. Woodrow clarified his previous letter of April 4, 2005, and provided the dates of treatment for "persistence of her back pain" between 1999 and 2004, as follows: November 27, 2000; December 2000; November 2001; December 12, 2002; and March 9, 2004.

[14] The worker was assessed by physiatrist Dr. Prutis on July 10, 2006, who reported ongoing low back pain of 10 years' duration, with decreased lumbar lordosis and limited range of motion in the lumbar spine and full range of motion in the cervical spine without pain. An MRI was recommended but there are no records in the file. Dr. Prutis wrote:

> In summary, [the worker] sustained moderately severe myofascial lumbar strain, as a result of her accident at work. As the consequence of this accident, she is suffering from chronic low back pain.

[15] On July 20, 2005, Dr. Woodrow advised that he had treated the worker since 1991 and reiterated that she had a high tolerance to pain and would call them only when absolutely necessary. He reiterated that he had advised the worker prior to her return to work that her back pain was something she would have to live with for the rest of her life, and that the worker had not wanted to bother this busy physician constantly with something that there was not any particular treatment for. The diagnosis was mechanical back pain with para-vertebrae muscle spasms.

(iv) The worker's testimony

[16] The worker testified and described the gradual onset of a back injury over a number of weeks prior to October 1996. The worker stated that she had never had any prior back problems or symptoms, and no prior or intervening injuries to the low back. She stated that at first she did not think the back problem was going to be severe but the pain became more and more acute accompanied by nausea.

[17] The worker stated that she was working as a receptionist, beginning part time in June 1995 and moving to full time after six months. She stated that her office chair had no support for the low back and the backrest only supported the upper back and was not adjustable.

[18] The worker stated that the pain was centred in her low back at the belt line and that there was a constant swelling or puffiness at that area.

[19] The worker reviewed her medical treatment with Dr. Woodrow at the Canadian Back Institute, Dr. Green and Dr. Prutis. She stated that she had a high tolerance for pain medication and that it was largely unhelpful. She testified that her back pain had never resolved with treatment and was a constant presence, with periodic flareups/acute episodes. She stated that Dr. Woodrow had told her in 1995 that the condition was permanent and she would just have to live with it, so she did not see any point in frequent medical appointments. She stated that she tried various prescription medications including Tylenol #3 and Celebrex but they did not help.

[20] The worker stated that she returned to work with the accident employer in November 1996, was promoted to Accounts Receivable and in January 1997 was promoted to Accounts Payable, and was provided with a new workstation and an Obus Forme chair. She stated that with the new workstation her back pain was tolerable, but that it never resolved entirely and on some days was acute, radiating up to the shoulder and down her legs.

[21] The worker described her employment history: she moved to another car dealer as a business manager, a position which permitted physical flexibility, but that she still had daily back pain. In 1999, she obtained employment in another community as a receptionist in a dental office, where she worked for about a year and a half. She stated that after that, she became the business administrator for her husband's auction business, working out of her home, which she continues to do.

[22] The worker testified that she had seen the family physician at least once a year between 1999 and 2002, and had always advised him of unresolved back pain symptoms. She stated that the only gap in the record of medical treatment was between December 2002 and March 2004, but she was certain that she had seen the doctor at some point in 2003. She stated that she resumed regular medical treatment after the acute episode in 2004.

[23] She described the onset of an acute episode of back pain in April 2004 as resulting from slow-paced weeding in her gardening, working at 10 or 15-minute intervals then resting, but that the next day she could barely move.

(v) Testimony of the worker's witness, Mr. RO

[24] Mr. RO testified that he was retired from the military police and employed as a security chief at a Resort. He stated that he had known the worker socially, as he has been a friend of her spouse, since 1998. Mr. RO stated that between July 2002 and January 2003, while going through a marriage separation, he lived with the worker and her spouse. He stated that at that time he became aware of her difficulties with back pain. He stated that her back pain caused her to be limited in daily chores such as carrying heavy laundry or vacuuming and that she was unable to endure prolonged postures. Mr. RO stated that a year or so later, the worker was still having serious back pain and he advised her to reopen her compensation claim.

(vi) Law and policy

[25] On January 1, 1998, the *Workplace Safety and Insurance Act, 1997* ("WSIA") took effect. However, pursuant to section 102 of the WSIA, the *Workers' Compensation Act* continues

to apply to pre-1998 injuries. Thus the pre-1997 Act continues to apply, as amended by the WSIA.

[26] The relevant section relating to NEL awards states as follows:

> **42(1)** A worker who suffers permanent impairment as a result of an injury is entitled to receive compensation for non-economic loss in addition to any other benefit receivable under this Act.
>
> …
>
> **(3)** If the compensation for non-economic loss is greater than $10,000, it shall be paid as a monthly payment for the life of the worker unless the worker elects to receive the compensation as a lump sum.
>
> **(4)** If the compensation for non-economic loss is less than or equal to $10,000, it shall be paid as a lump sum.
>
> **(5)** The Board shall determine in accordance with the prescribed rating schedule and having regard to medical assessments conducted under this section the degree of a worker's permanent impairment expressed as a percentage of total permanent impairment.
>
> **(6)** A medical practitioner who conducts a medical assessment under this section shall,
>
> (a) examine the worker; and
>
> (b) assess the extent of the worker's permanent impairment, having regard to the existing and anticipated likely future consequences of the injury.

[27] Pursuant to sections 112 and 126 of WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. Pursuant to WSIA section 126, the Board has identified certain policies applicable to this appeal. We have considered these policies as necessary in deciding this appeal. In particular, we have considered Board Policy packages : 35; 300.

[28] There is no statutory mention of how one determines whether a second injury is related to the original work accident. Board's OPM Document #15-03-01 on "Recurrences" addresses the procedure to follow in making such a determination. The policy states that a decision maker will recognize a recurrence when there is obvious medical compatibility or an appropriate combination of medical compatibility and continuity, and an absence of a new accident. It also goes on to set out in part, the following:

> **Policy**
>
> A worker is entitled to benefits for a recurrence of a work-related injury or disease.
>
> A recurrence may result from an insignificant new accident, or may arise when there is no new accident. To identify a recurrence, the WSIB must confirm that there is clinical compatibility between the original injury or disease and the current condition, or a combination of clinical compatibility and continuity.
>
> If a significant new work-related accident occurs, the WSIB establishes a new claim.

Guidelines

Recognizing a recurrence

Clinical compatibility

To establish clinical compatibility, a decision-maker compares the worker's current clinical condition to that following the initial accident. The decision-maker considers:

whether the parts of the body affected now are the same as, or related to, those affected initially

whether the body functions affected now are the same as those affected initially, and

the degree to which body functions are affected now (as compared to the effect of the initial condition).

Similar clinical conditions indicate that the current problem or problems may be a result of the original injury, whereas dissimilar or unrelated clinical conditions indicate that there is no compatibility, and therefore no recurrence.

Continuity

To establish continuity (i.e., a connection between the original clinical condition and the most recent problem or problems), the decision-maker considers whether the worker has:

complained to supervisors, co-workers, or health care practitioners on an ongoing basis since the original injury

demonstrated ongoing symptoms since the original injury

required work restrictions or job modifications

had ongoing treatment for the original condition, or

experienced a lifestyle change since the original accident (e.g., has the worker become unable to participate in household duties, or social or recreational activities?).

[29] Board's OPM Document No. 11-01-15, *Aggravation*, deals with entailment for an aggravation injury:

Policy

In cases where the worker has a **pre-accident impairment** and suffers a minor work-related injury or illness to the same body part or system, the WSIB considers entitlement to benefits on an **aggravation basis**.

Generally, entitlement is considered for the acute episode only and benefits continue until the worker returns to the **pre-accident state**.

…

New accident vs. recurrence

If the pre-accident impairment is due to a work-related injury/illness, further entitlement may be allowed as a recurrence. This would occur where it is difficult to identify a specific incident or action that has increased the worker's impairment. Otherwise, a claim that is allowed on an aggravation basis should have a clearly defined new accident (incident). Decision-makers must establish that the work-related injury/illness would have caused the additional

> impairment, despite the pre-accident impairment. When determining whether a worker has suffered a new accident or a recurrence of a prior accident, the decision-maker has to consider the following:
>
> the nature of the subsequent occurrence
>
> medical evidence/medical compatibility
>
> evidence of continuity between the two injuries
>
> the time lapse between the two injuries.
>
> …
>
> **Permanent impairment**
>
> In some cases, workers never return to the pre-accident state. If there is a permanent worsening of the pre-accident impairment, the decision-maker may determine that the work-related injury/illness has permanently aggravated the pre-accident impairment. If medical evidence confirms that the work-related injury/illness permanently increased the worker's pre-accident impairment, the worker may be entitled to a Non Economic Loss benefit.

(vii) The Panel's conclusions

[30] The worker in this case is claiming entitlement for a permanent impairment in the low back arising from the compensable accident of October 1996. Initial entitlement is not an issue in this appeal. Entitlement to compensation for a back injury arising out of and in the course of employment on a disablement basis was recognized by the ARO's decision of September 17, 1997. Temporary total disability benefits were paid from October 3 to November 11, 1996. The ARO ruled that the worker's back impairment was related to her ergonomically inadequate workstation. None of these facts are in dispute.

[31] The worker's claim to entitlement for a permanent impairment award for the low back, which she initiated in 2004, was denied on the basis of advice from Board Medical Consultant Dr. Shapiro, stated in Board Memo #29, dated April 12, 2005, that there was no assessable residual organic impairment from the October 1996 back injury and there was insufficient medical continuity to establish a relationship between the 1996 injury and her current impairment. This advice was accepted by Board decision makers up to and including the ARO's decision of August 31, 2006, based on the assumption that there was no medical treatment between 1999 and March 2004, and that the worker's condition was lumbar strain, which had entirely resolved.

[32] However, in the view of the majority of the Panel, it is evident, based on the medical evidence in the Case Record that both these assumptions were incorrect.

[33] Firstly, the actual diagnosis of the worker's low back condition, as provided by the Canadian Back Institute in October 1996 and by orthopedic specialist Dr. Green in November 1996, is mechanical low back pain. In other words, the worker's problem was and is discogenic, and not a simple soft tissue injury. It is also evident that she had no prior back

symptoms or complaints and that the worker had sustained an aggravation of an asymptomatic pre-existing condition as of October 1996.

[34] Second, there is no a gap in continuity of medical treatment between 1999 and 2004, nor is there a gap in continuity of complaint. Dr. Woodrow advised the Board in April 2005 that he had recorded complaints of ongoing back pain in November and December 2000, November 2001, and December 2002. The Panel majority has no reason to reject Dr. Woodrow's evidence.

[35] The witness Mr. RO has testified that, between July 2002 and January 2003, when he lived with the worker and her spouse, he was aware that the worker had an ongoing back impairment which had limited her ability to do heavy housework. Finally, there is the testimony of the worker herself that the compensable back impairment of October 1996 never resolved.

[36] The majority of the Panel finds the worker to be a credible witness, as was Mr. RO.

[37] Based on the testimony of Mr. RO and the testimony of the worker, which is corroborated by the medical evidence in the Case Record, the majority of the Panel finds that continuity of both medical treatment and complaint between 1996 and 2004 has been established. The majority of the Panel finds that the worker's compensable impairment in the low back, properly diagnosed as symptomatic mechanical low back pain, did not resolve after 1996.

[38] The majority of the Panel also finds that the worker sustained an acute recurrence of her 1996 compensable impairment in the spring of 2004.

[39] Entitlement for a recurrence injury under Board's OPM Document #15-03-01, cited above, is granted when there is clinical compatibility between the original injury and the recurrence injury, or a combination of compatibility and continuity. In the majority of the Panel view, clinical compatibility is precisely the situation in the case before us. There is a combination of both compatibility and continuity, and therefore, the worker meets the criteria for entitlement under Board policy.

[40] The worker's low back impairment has not affected her ability to work, but it has limited her activities of daily living. The existence of permanent functional impairments entitles the worker to a permanent impairment assessment and award under section 42 of the pre-1997 Act.

[41] The majority of the Panel finds that the worker is entitled to receive a permanent impairment assessment and a permanent impairment award for a permanent impairment in the lumbar spine under the October 1996 accident claim. The issue of the appropriate quantum of her award is remitted to the Board for determination.

[42] The dissenting opinion of the Panel Member Representative of Employers is attached.

DISPOSITION

[43] The appeal is allowed.

[44] The worker is entitled to receive a permanent impairment assessment and permanent impairment award for a permanent impairment in the lumbar spine, under the October 1996 accident claim. The issue of the appropriate quantum of her award is remitted to the Board for determination.

DATED: January 21, 2010

SIGNED: R. McClellan, J. A. Crocker

DECISION NO. 2276/09
DISSENT

[45] With all due respect to my colleagues, I cannot agree with the majority decision to allow a permanent impairment assessment for the low back related to DOI.

[46] The OWA representative ceased to represent this worker after her ARO hearing of June 7, 2006. The worker came to her WSIAT hearing unrepresented.

(i) Evidence

- Since her ARO hearing, the worker has seen Dr. Prutis, a psychiatrist, (July 06) who ordered the MRI. This MRI was not done until October 22, 2007, and showed mild DDD in the lumbar spine.
- The worker is not on any medication, does not wear a back brace, nor has she had any treatment for her back between November 1997 and July 2000, when she returned for one treatment at her chiropractor, Dr. Teschl. This chiropractor noted her to have a mild to moderate convex right lumbar scoliosis with spinal rotations to the concavity; chronic and progressive.
- Another doctor seen by the worker is a Dr. Green. He is a general practitioner. This doctor ordered a CBI assessment and an x-ray. We have no x-ray in the Case Record and CBI only gave the worker instructions on home exercises.
- Dr. Woodrow is the worker's family medical doctor for many years. After a longstanding request, the doctor replies with dates that the worker was seen. In two of his letters, the dates of visits are conflicting. The worker testifies that she had regular visits to have her birth control prescription refilled and that they would discuss her back. This is not treatment for the back. Regular visit dates are not noted.
- There are large gaps when she did not seek medical advice. Her FMD has referred to her pregnancies but did not say they were problematic due to her back.

[47] The worker's original accident caused an L.T. of 38 days. She then went on to numerous other office-type positions until she and her husband opened their own business. There is no contact with the WSIB from September 1997 until July 2004, when she appealed to re-open her case. There is no evidence of lost time due to back pain during these years, nor is there a doctor's note, putting her off work. In July 2004, she was working in a law office and did not mention the gardening incident, but she claims that prolonged sitting in an office causes her back pain. WSIB sent out RE 06 and 08. These are returned with no mention of the gardening incident. During a November 17, 2004 conversation, she finally talks about the gardening incident in April of 2004. (I find this date very early for gardening.)

[48] I agree with SMC Dr. Shapiro's comments: "there is insufficient medical continuity to conclude that the ongoing low back condition is related to the compensable injury of 2 Oct. 96."

[49] For all of the above reasons, I would deny the worker's appeal and confirm the ARO's decision.

DATED: January 21, 2010

SIGNED: B. M. Young