



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2307/06

BEFORE: J.P. Moore : Vice-Chair

HEARING: November 14, 2006 at Thunder Bay
Oral
Post-hearing activity completed on March 9, 2007

DATE OF DECISION: April 12, 2007

NEUTRAL CITATION: 2007 ONWSIAT 972

DECISION UNDER APPEAL: WSIB ARO decision dated June 3, 2005

APPEARANCES:

For the worker: P. Lang, a Consultant

For the employer: Not participating

Interpreter: None

REASONS

(i) Introduction

[1] On March 8, 1999, the worker sustained an injury to his neck. The injury was diagnosed by his family physician, Dr. D. Hartford, as a cervical strain. Dr. Hartford filed a "Form 8" with the Board on March 17, 1999, in which he indicated that the worker had no prior history of a similar medical condition.

[2] The Board allowed the worker entitlement for this injury, although the worker did not lose any time from work.

[3] On August 22, 2002, the worker was again injured at work. He was seen at the hospital four days later, on August 26, 2002, where he complained of an injury to his neck and upper back. On that same date, Dr. Hartford filed a Form 8 with the Board indicating that the worker had suffered a cervical and thoracic spine injury as a result of the injury of August 22, 2002.

[4] The worker returned to work, performing modified duties. He was laid off on November 15, 2002 for reasons unrelated to his injury. He sought entitlement to benefits subsequent to that date on the ground that he had a continuing disability following the accident of August 22, 2002. The Board denied the worker's request for benefits on the basis that the worker had recovered from the injury of August 22, 2002. That decision was confirmed by the ARO in the decision of June 3, 2005. The ARO's decision was based on findings that the injury of August 22, 2002 was a minor strain injury and that the worker had significant degeneration of the spine. The decision implies that any ongoing symptoms the worker had after November 15, 2002 were related to the underlying degenerative changes and not to the injury of 2002.

[5] The worker appeals that decision to the Tribunal.

(ii) The issue

[6] The issue in this appeal is whether compensable injuries suffered by the worker in 1999 and 2002 resulted in a disabling impairment that limited the worker's ability to work after he was laid off on November 15, 2002.

(iii) The decision

[7] Having reviewed the evidence and submissions presented to me in this appeal, I am persuaded on a balance of probabilities that the combined effect of the workplace injuries of March 1999 and August 2002 resulted in an impairment affecting the worker's neck and upper back, an impairment that disabled the worker from performing his trade as a plumber.

(iv) Analysis

(a) Jurisdiction

[8] The decision of the ARO in this appeal concluded that the worker recovered from the injury of August 22, 2002. The decision appears not to have considered the impact of the injury of March 8, 1999. However, in his submissions on behalf of the worker, Mr. Lang argued that

he had, in fact, asked the ARO to consider both injuries. In a letter dated April 21, 2004, Mr. Lang wrote to the ARO. That letter contained the following paragraph:

With regard to [the worker's] issues, you agreed to determine entitlements for his neck, thoracic back, left shoulder and low back. As well, you agreed that [the 1999 claim], a prior neck claim, was relevant to your considerations.

[9] That letter was accompanied by clinical notes from the worker's family physician, notes that included a period of time prior to the accident of August 2002.

[10] In an undated memorandum, the ARO reviewed the small body of evidence that pertained to the 1999 claim. The ARO's memorandum implies a determination by the ARO that the 1999 injury was not significant and was not a factor to be considered in determining the compensability of the worker's disability subsequent to November 15, 2002.

[11] For that reason, in my view, the ARO limited her findings, in the decision under appeal, to the August 2002 injury, and its sequelae. She did, however, in that decision, refer to the March 1999 injury, and simply stated that there was "no lost time from work associated with" the 1999 injury.

[12] However, in my opinion, the ARO did address the causal significance of both the 1999 injury and the 2002 injury, albeit by way of memorandum with respect to the 1999 injury. I am persuaded that the ARO made a "final decision" regarding the causal significance of each of those injuries so as to confer jurisdiction on the Tribunal to consider the worker's entitlement under both the 1999 claim and the 2002 claim, in accordance with section 123 of the *Workplace Safety and Insurance Act*.

(b) The worker's testimony

[13] In his testimony, the worker stated that he was a unionized plumber but that he worked primarily as a pipe fitter. He testified that he had suffered low back injuries in 1979 and 1980 but had no prior problems with his neck until March 1999.

[14] According to the worker, he suffered a strain to his neck and right shoulder when a heavy item slipped out of his hands. He testified that he missed no time from work because of this injury but did receive chiropractic treatment. He also stated that he began taking pain medication after this accident, medication that he continued to take on an ongoing basis. He stated that he continued to experience pain in his neck on an occasional basis and sought chiropractic treatment when that occurred.

[15] According to the worker, the injury of August 22, 2002 resulted from a fall onto his left shoulder. He stated that he was carrying a box of valves when he fell. He said that, because of this fact, he was unable to block the fall with his left arm and fell onto his left side. According to the worker, he was given modified duties by the accident employer, a fact that has been confirmed by witness statements provided by several co-workers.

[16] The worker testified that he continued to perform modified duties until the completion of the job on November 15, 2002.

[17] According to the worker, he initially experienced pain in his neck after the 2002 injury. However, the pain gradually worsened and began to affect his upper back. He stated that, after he was laid off from November 15, 2002, he did not believe that he was capable of returning to work as a plumber/pipe fitter. For this reason, he sought compensation benefits. He testified that he was subsequently granted Canada Pension Disability Benefits. He stated that he has not worked since November 15, 2002.

(c) The medical evidence

[18] As the ARO noted in her memorandum regarding the 1999 injury, there is little medical evidence subsequent to that injury. The Form 8 filed by Dr. Hartford indicated that the worker suffered a strain to his neck and right upper extremity and that he had no prior similar history. The material on file included clinical notes from Dr. Hartford commencing in April 2001. Those notes indicate that the worker complained of neck pain and related headaches on a number of occasions prior to the injury of August 22, 2002. The clinical notes also indicate that the worker was regularly prescribed Vioxx and codeine phosphate. As I noted above, the worker received occasional chiropractic treatment between the 1999 injury and the 2002 injury. In a report to Dr. Hartford, dated August 28, 2003, the worker's chiropractor, Dr. J.A. Holmes, indicated that the symptoms the worker experienced after the March 1999 injury appeared to resolve quickly but that, in May 2000, the worker began experiencing more upper back pain than previously. The worker was treated on seven occasions from May 2000 to November 2001. Dr. Holmes also indicated that the worker had an x-ray taken in November 2001 that revealed some degenerative disc disease at the C5-7 level of the spine. Finally, the report noted that the worker underwent further x-rays in April 2002 because he was experiencing:

... a lot of mid-back pain radiating bilaterally to his lateral thorax and right cervical pain radiating into his neck. The x-rays again show degenerative changes at the C5-7 level of the spine.

[19] As I noted above, Dr. Hartford's Form 8 regarding the injury of August 22, 2002 diagnosed a "cervical and thoracic spine strain". Dr. Hartford completed functional abilities forms on September 20, 2002 and October 16, 2002, which indicated that the worker had suffered an injury to his left shoulder, neck, and back. He recommended that the worker continue to work and expected full recovery. However, Dr. Hartford apparently had sufficient concern about the worker's condition that he ordered an MRI assessment. That assessment was done on October 11, 2002, prior to the worker's lay off. The assessment confirmed the presence of degenerative changes at the C5-7 level of the spine, as well as multi-level degenerative changes in other parts of the spine. In November 2002, Dr. Hartford noted that the worker's complaints involved both the neck and "between shoulder blades". His clinical notes thereafter refer to complaints of both neck and thoracic pain.

[20] In a report dated January 12, 2007, Dr. Hartford wrote:

The x-ray and MRI which you mentioned [April and November 2002] were ordered by myself, and both had findings of pre-existing degenerative disease – which at his age would be the norm. That said, he did have two work injuries in 1999 and 2002, specifically related to his neck.

While [the worker] did have various musculoskeletal complaints over the years, until after his second work accident he was always able to maintain his rather heavy work as

an industrial pipe fitter and plumber. Thus, temporarily, it would seem that the incidence of the work injuries significantly aggravated his pre-existing DDD.

In fact, from a review of his medical chart it was after the '1999 accident I began to regularly prescribe 30 mg codeine for the pain he experienced in his neck.

In 2002 he had another work accident which further aggravated his neck, but also involved his mid, or thoracic back. After that accident within a few months it became clear that the pain from these two injuries would not allow him to continue in his trade.

Thus, I find it reasonable to believe that the neck injury of 1999, coupled with the neck and thoracic injury of 2002 were significant in the permanent aggravation of his neck and thoracic back.

[21] The Board's decision to deny the worker entitlement subsequent to November 15, 2002 was based in part on a medical opinion provided by a Board Medical Consultant, Dr. M. Bridge. In a memorandum dated February 20, 2003, Dr. Bridge noted the evidence of degenerative changes in the worker's spine. Dr. Bridge felt that Dr. Hartford's clinical notes showed "no abnormal objective medical findings" until after the worker's layoff in November 2002. He also stated that the worker "had returned to full work no restrictions". He then referred to the "multi level significant degenerative changes" in the worker's spine and concluded that the worker's injury of August 22, 2002 was not a causal factor in the worker's inability to work subsequent to November 15, 2002.

[22] With respect to that opinion, I note, first of all, that, while the functional abilities forms that Dr. Hartford completed in September and October 2002 indicated that the worker could return to work, Dr. Hartford's clinical notes suggest he had continuing concerns about the worker's condition. I note, in particular, Dr. Hartford's decision to refer the worker for an MRI assessment. In my view, Dr. Hartford would not have made such a recommendation unless he had concerns about the worker's ongoing presentation. I am not persuaded that Dr. Hartford considered the worker to have recovered from the effects of the injury of August 22, 2002.

[23] Dr. Bridges' opinion also assumed that the worker had returned to full duties following the injury of August 22, 2002. I am persuaded by the worker's testimony, as well as by evidence provided by co-workers in written statements, that the worker, in fact, performed modified duties until he stopped work on November 15, 2002.

[24] The worker acknowledged that the job he was doing for the accident employer at the time of his injury was relatively light in comparison to the usual work done by a plumber/pipe fitter. However, according to the worker, and to the statements of his co-workers, the worker still required some assistance in performing even this light work.

[25] I am not persuaded, therefore, that the worker was performing the "regular duties" of a plumber/pipe fitter after the injury of August 22, 2002.

[26] I certainly agree with Dr. Bridge that the worker had a significant pre-existing condition. There is no question that the worker had extensive degenerative changes in his lumbar spine. However, in my opinion, those degenerative changes can not be seen as the exclusive cause of the worker's disability, subsequent to November 15, 2002. What the evidence establishes, to my satisfaction, is that, after each of the worker's injuries, in 1999 and 2002, the worker experienced what was likely an aggravation of the underlying degenerative condition. In 1999, he injured his

neck. Subsequent to this injury, he experienced pain on an occasional but ongoing basis, affecting his neck and his upper back. The worker received periodic chiropractic treatments for this condition and, as Dr. Hartford noted, began taking pain medication on a continuing basis.

[27] Notwithstanding his ongoing symptoms after the 1999 injury, the worker was able to continue working. However, after the second injury, in 2002, the worker appears to have further aggravated the underlying condition resulting, on this occasion, in a permanent impairment.

[28] I acknowledge that Dr. Hartford appears initially to have expected the worker to make a full recovery from the strain injury he suffered in August 2002 to his cervical and thoracic spine. However, the worker did not do so. In Dr. Hartford's opinion, an opinion with which I agree, the degenerative changes in the worker's spine were not unexpected. On each occasion following workplace injuries, the worker experienced a quantifiable and significant deterioration in his functional abilities. After the 1999 injury, the worker was able to work, but he experienced ongoing pain requiring medication and medical treatment. After the 2002 injury, the worker was able to continue working, but only performed modified work, and experienced worsening pain and functional loss. As Dr. Hartford stated in his report of January 12, 2007:

Thus, I find it reasonable to believe that the neck injury of 1999, coupled with the neck and thoracic injury of 2002, was significant in the permanent aggravation of his neck and thoracic back.

[29] I am persuaded on a balance of probabilities that this is an accurate assessment of the evidence in this case and that the worker is entitled to benefits on the basis that he suffered a permanent aggravation of an underlying but asymptomatic condition as a result of workplace injuries that occurred in March 1999 and August 2002.

(d) The worker's entitlement

[30] I am persuaded that the effect of the injuries suffered by the worker in 1999 and 2002 was to leave the worker with an impairment that was both permanent and disabling. I am persuaded that this impairment consists of injuries to the neck and thoracic spine. I am persuaded that the worker is entitled to permanent benefits subsequent to November 15, 2002. I am also persuaded that, subsequent to that date, the worker was unable to return to his employment as a plumber/pipe fitter because of this permanent impairment. The Board is directed to assess the worker for non-economic loss entitlement for cervical and thoracic spine impairments.

[31] The Board is also directed to assess the worker's entitlement to loss of earnings benefits subsequent to November 15, 2002 on the basis that the worker is incapable of returning to his pre-injury employment as a plumber/pipe fitter and has been since November 15, 2002. I leave to the Board the determination of whether the worker should also be granted labour market re-entry services.

DISPOSITION

[32] The worker's appeal is allowed.

1. The worker has an ongoing entitlement to benefits for injuries he sustained in the workplace on March 8, 1999 and August 22, 2002.
2. The worker has been left with a permanent impairment affecting his cervical and thoracic spine.
3. The worker is entitled to a non-economic loss assessment for this permanent impairment.
4. The worker is entitled to loss of earnings benefits subsequent to November 15, 2002, the nature, duration, and amount of which is left to be determined by the Board subject to the parties' usual rights of appeal.
5. Entitlement to labour market re-entry services is left to be determined by the Board subject to the parties' usual rights of appeal.

DATED: April 12, 2007

SIGNED: J.P. Moore