WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 319/11

BEFORE: S. Darvish: Vice-Chair

HEARING: February 16, 2011, at Toronto
Oral

DATE OF DECISION: March 7, 2011

NEUTRAL CITATION: 2011 ONWSIAT 562

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) dated October 14, 2008

APPEARANCES:

For the worker: Mr. G. Majesky, Union representative

For the respondent: Ms. C. Crisostomo, Paralegal

Interpreter: None

Workplace Safety and Insurance Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2

Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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REASONS

(i) Introduction to the appeal proceedings

[1] The worker appeals a decision of the ARO, T. Chalmers, dated October 14, 2008 which concluded that the worker did not have initial entitlement for bilateral carpal tunnel syndrome ("CTS"). The ARO rendered a decision based upon the written record without an oral hearing.

[2] At the Tribunal hearing, Mr. Majesky represented the worker. Ms. Crisostomo represented the respondent (Employer 1), which was one of the former employers of the worker.

(ii) Pre-hearing matter – other employers

[3] This appeal was originally scheduled to be heard by a Panel on July 20, 2010. On July 16, 2010, the Tribunal received a letter from the respondent objecting to their designation as the accident employer. The Panel that was originally scheduled to hear the appeal adjourned the appeal and directed that the other four former employers of the worker also be given notice of the hearing. Those other four employers were listed in the worker's union records at page 324 of the Case Record. In accordance with the Panel's instructions, on August 11, 2010 the Tribunal provided notice of the appeal to three of the four employers. Those three employers all responded that they did not wish to participate in the appeal. Notice was not provided to Employer 2 as the Board notified the Tribunal by letter dated August 11, 2010 that Employer 2 has not had an active account with the Board since December 2005. Once the responses from the other employers were received, the appeal was rescheduled to be heard before this Vice-Chair on February 16, 2011.

(iii) Preliminary matters

1. Additional document

[4] Ms. Crisostomo requested that an additional document be entered into evidence. The additional document was a letter from the Board dated February 10, 2011 which confirmed that the Board had incorrectly filed medical reports that it had received regarding the worker and his claim for bilateral CTS. Attached to this letter was a fax cover sheet from Ms. Crisostomo whereby she had faxed the letter from the Board to Mr. Majesky. Ms. Crisostomo submitted that the letter from the Board was relevant to establishing the date of the injury and to show that the respondent was not the accident employer of the worker on the date of the injury. Mr. Majesky submitted that although allowing this document into evidence would not prejudice the worker, the document was not relevant to the issues on appeal. The Vice-Chair allowed the document into evidence as it was not prejudicial to the worker and it appeared relevant to the issue of the date of injury. However, the Vice-Chair indicated to Ms. Crisostomo that she should provide submissions regarding the weight that should be given to the document.

2. Finding on who is the accident employer

[5] Ms. Crisostomo asked the Vice-Chair that if initial entitlement is granted, then a finding should be made that the respondent is not the accident employer with respect to the worker's claim. Mr. Majesky submitted that the only issues on appeal are initial entitlement and the date

of the injury. A finding on who is the accident employer is not relevant to the issues on appeal. This matter should be remitted to the Board for determination.

[6] The Vice-Chair determined that if initial entitlement is granted, it would be appropriate, in this case, to determine whether or not the respondent is the accident employer. The determination of who is the accident employer is tied to the issue of the date of the injury. If the date of the injury falls on a date that the worker was working for the respondent (Employer 1) and the latter made a significant contribution to the worker's condition, then it follows that the respondent would be the accident employer for the claim. On the contrary, if the date of injury is a date during which the worker was not working for the respondent and the latter did not make a significant contribution to the worker's condition, then the latter would not be the accident employer for the claim.

(iv) Issues

[7] The issues to be determined are whether the worker has initial entitlement for bilateral CTS and if so, what is the appropriate date of injury.

(v) Background

[8] The following are the basic facts.

[9] The now 64 year old worker has worked as an electrician since 1968. Since that time, he was been employed by five different employers. The worker claims to have developed bilateral CTS as a result of his repetitive job duties as an electrician spanning over 35 years.

[10] The worker was diagnosed with bilateral CTS. He had left carpal tunnel decompression on December 6, 2005. The worker had right carpal tunnel decompression on February 10, 2006.

[11] On April 20, 2007, the Claims Adjudicator denied the worker's claim on the basis that the injury did not arise out of and in the course of the worker's employment. The ARO confirmed the denial on October 14, 2008. The worker has appealed this matter to the Tribunal.

(vi) The worker's testimony

[12] The worker testified that he began working as an electrician apprentice in 1966. He started work through the union in 1968 and became a certified electrician in 1970. In 1968, the worker began working with the respondent (Employer 1). He worked with Employer 1 until April 2000. He was laid off due to shortage of work. In May 2000, he found work with Employer 2. The worker worked with Employer 2 until September 2003 when he was laid off due to shortage of work. Between September 24, 2003 and January 9, 2004, the worker worked with Employer 3. He stopped working on January 9, 2004 due to shortage of work. The worker did not work for approximately 18 months, between January 9, 2004 and June 27, 2005. On or about June 27, 2005, the worker found work with Employer 4. He worked with Employer 4 for approximately two weeks, until July 10, 2005. He then found work for one week in July 2005 with Employer 5. The worker returned to work again with Employer 1 as of August 2005. He worked with Employer 1 from August 2005 until his retirement in February 2011.

[13] The worker explained that his job duties as an electrician since 1966 have been essentially the same. The worker used both of his hands in performing his job duties. Those duties consisted of working with hand tools such as screwdrivers, hammers, and drills, pulling and shaping wires and cables of various sizes, installing fixtures, pulling pipes, building racks, making connections, installing electrical panels, and installing anchors in ceilings. The work was repetitive and at times, he would be performing the same task for up to one week's time. For example, if he was working with a crew pulling wires, he would be required to feed, pull, and shape wires for days at a time. The worker was working with both of his hands all day. Although the worker is right hand dominant, he used his left hand for all of his job duties. In fact, the worker explained that he would often switch hands if one hand was tired. For example, if he was drilling with the right hand and his hand became tired, he would switch and drill with his left hand. This alternation between the right and left hand occurred several times throughout a working day.

[14] The worker testified that between 1966 and 2000 he did not have any problems with his hands. In 2000, shortly before he stopped working with Employer 1, the worker began developing symptoms of numbness and tingling in his hands and fingers in the evenings. The symptoms were primarily in the left hand. At the time, the worker was employed with the respondent (Employer 1). He was working on "tenant work" where he was required to pull wires and install four inch cables. The symptoms did not interfere with the worker's ability to continue working. The worker did not seek medical attention since he only experienced symptoms occasionally at this time.

[15] In 2000, the worker's family doctor was Dr. Kennedy. Dr. Kennedy was his family doctor between 1991 and 2004. In 2005, Dr. P. Lombardi became the worker's family physician. Dr. Lombardi has the worker's previous medical records from Dr. Kennedy. The worker testified that he did not see Dr. Kennedy regarding the symptoms that he described above.

[16] On May 2, 2000, the worker began working with Employer 2. His job duties were similar to those he had with Employer 1. The worker worked with Employer 2 for approximately three years, until September 24, 2003. During those three years, the worker stated that his left hand symptoms became more regular. He had numbness in his left hand once or twice a week, while the right hand only had occasional numbness related to activity. The worker continued to perform his regular work duties during this time period.

[17] Between September 24, 2003 and January 9, 2004, the worker worked with Employer 4. The worker had to work primarily outside in cold weather. Although the worker was able to perform his duties, his left hand began to ache more consistently and at times, his thumb would lock into place. The worker indicated that the pain was around the palm of his left hand. Shortly prior to his lay off from work with Employer 4 in 2004, the worker noticed a change in his left hand grip as well as constant numbness in the first three fingers. The worker had difficulty gripping objects as he could not move his thumb. When he attempted to pick up a glass, his thumb would lock. Instead of grabbing the glass, he would only push it away.

[18] During the next 18 months, the worker did not work as there was a shortage of work. During this time period, the worker's left hand symptoms continued. He sought medical attention from his family doctor, Dr. Lombardi, in April 2005.

[19] The worker began working with Employer 4 on or about June 27, 2005. He worked with this employer until July 10, 2005. The worker was able to perform his duties, but he stated that this job was also difficult on his hands as he had to pull cables all day long.

[20] Between July 14 and July 20, 2005, the worker worked for Employer 5. The worker performed his job duties which included pulling on fixtures and working with power tools such as drills, but he had some difficulty as his thumb would lock into place once in a while.

[21] In August 2005, the worker returned to work with the respondent (Employer 1). He worked with Employer 1 for over five years, until his retirement in February 2011. During this time period, the worker took some time off for the left and right carpal tunnel surgeries which were done in 2005 and 2006, respectively. Following surgery, there was a significant improvement in the numbness and tingling of the hands. The range of motion in the thumb had also improved. The worker still had some trouble with his grip. The worker returned to work with Employer 1 following both surgeries.

[22] The worker testified that he never complained of his hand problems to anyone because he is not the type of person to complain unless a problem is severe. The worker's past medical history is unremarkable except that he has arthritis in his knees. He has never been diagnosed with diabetes or a thyroid condition. The worker has not been involved in any other activity outside work which he believed could have contributed to the bilateral CTS.

[23] In cross-questioning, the worker testified that he did not have a family history of CTS. Ms. Crisostomo referred the worker to a medical report dated July 8, 2005 from Dr. S. Baryshnik, a neurologist, which stated that the worker's sister had previously been treated for CTS. The worker responded that his sister had complained of pain in her hand in the past, but as far he was aware, she did not have CTS. The worker did not know why Dr. Baryshnik had indicated that his sister had been treated for CTS. The worker also stated that during his visit with Dr. Baryshnik, the latter discussed surgery with him.

(vii) The relevant documentary evidence

[24] A document entitled "General Assessment" was included in the file. It appeared to contain the results of a physical examination of the worker by Dr. Lombardi on April 6, 2005. Dr. Lombardi noted that the worker had a problem with the "left hand thenar". He noted a diagnosis of CTS.

[25] A report from Dr. Baryshnik on July 8, 2005 indicated that while the worker had symptoms intermittently, over the last year, the worker had noticed a constant numbness in the left thumb, second and third fingers, as well as increased numbness when gripping objects. At that time, the worker had occasional symptoms in the right hand. Dr. Baryshnik noted that the worker's job as an electrician entailed "continuous hand work using his left hand primarily for grasping and gripping". Dr. Baryshnik performed an EMG study for the left hand on that day. Examination of the right upper extremity showed no evidence of muscle weakness. Dr. Baryshnik concluded that the worker had severe CTS in the left hand.

[26] In a referral dated July 27, 2005, Dr. Lombardi referred the worker for a CTS release.

[27] In a report dated October 26, 2005, Dr. D. van Viet, a plastic and reconstructive surgeon, indicated that she had seen the worker for severe left hand CTS. She noted that the worker's symptoms had become progressively more severe over the past one and a half year. At that time, in October 26, 2005, the worker had persistent symptoms of dysesthesia and paresthesia in the median nerve distribution of the left hand. Dr. van Viet recommended surgery to prevent further damage to the nerve and further hand dysfunction.

[28] In a Physician's First Report (Form 8) dated November 29, 2005, Dr. Lombardi indicated that the worker had severe bilateral CTS, with the right hand being more severe than the left hand. Dr. Lombardi also noted that the worker was to have a carpal tunnel operation on the right hand on December 6, 2005. Dr. Lombardi provided an accident or injury date of April 6, 2005 and noted that the worker's symptoms had begun a year prior to that, in April 2004. Dr. Lombardi indicated that the worker had symptoms of tingling and weakness in both the right and the left hand.

[29] The worker underwent left carpal tunnel decompression on December 12, 2005 with Dr. van Viet. In a follow-up report dated December 21, 2005, Dr. van Viet noted that the worker had no residual paresthesia or dysesthesia in the median nerve distribution of the left hand. However, the worker was now complaining of symptoms in the right hand. Dr. van Viet observed that the worker did not have any previous EMGs or nerve conduction studies for the right hand. She asked Dr. Lombardi for further input regarding the worker's right hand.

[30] A nerve conduction study for the worker's right hand was performed on February 10, 2006. In a report dated February 13, 2006, Dr. Baryshnik confirmed that he had first seen the worker for left hand symptoms in July 2005. The worker was now complaining of right hand symptoms. The worker had reported intermittent numbness and tingling in the right hand over the last 12 months with a constant feeling of numbness in the thumb, second, third and fourth fingers over the last three months. Dr. Baryshnik concluded that the worker had evidence of sensory dysfunction in the right median nerve distribution. He noted that electrophysiologic testing done on that day demonstrated evidence of severe CTS in the worker's right hand. The worker was again referred to Dr. van Viet for further management. Dr. Baryshnik opined that the worker's condition was work-related given the worker's job as an electrician.

[31] On March 24, 2006, Dr. van Viet recommended right hand CTS surgery for the worker. The worker underwent right carpal tunnel decompression with Dr. van Viet on May 18, 2006.

[32] The clinical notes of Dr. Lombardi from April 25, 2005 to June 1, 2006 were included in the Case Record. The clinical notes revealed that the worker saw Dr. Lombardi on April 25, 2005 regarding left hand CTS symptoms. Notations were made regarding Dr. Baryshnik and an EMG. There did not appear to be any indication regarding complaints of right hand symptoms on that date. The visits of May 5, July 19, and August 24, 2005 had corresponding notations of "severe CTS", "Dr. Baryshnik", "Dr. van Viet", "surgery" and "[left] index finger". The handwriting was difficult to read, but there did not appear to be any reference to right hand CTS symptoms during those visits. The first mention of right hand symptoms appeared in Dr. Lombardi's clinical note of December 21, 2005 where a reference was made to an EMG and nerve conduction study for the right side.

[33] In a report dated March 29, 2007, Dr. Lombardi provided the following history:

> [The worker] was seen by me for his carpal tunnel syndrome first on April 6, 2005 for pain in his left hand that was diagnosed as carpal tunnel syndrome. Left hand showed thenar wasting, a sign of severe carpal tunnel syndrome.
>
> …I had no visitation with him previously pertaining to any conditions.
>
> After his left first carpal tunnel release, he was sent for EMG studies on his [right] hand that showed severe carpal tunnel syndrome on the right as well…
>
> Prior to January 12, 2005, I had wrote on a form 8 to WSIB that [the worker] stated his symptoms had started a year prior to addressing the carpal tunnel syndrome with me.\

[34] A letter from the worker's union dated March 28, 2007 summarized the worker's work history as follows:

- September 4, 1968 to 2000 – working with Employer 1;
- May 2, 2000 to September 24, 2003 – working with Employer 2;
- September 24, 2003 to January 9, 2004 – working with Employer 3;
- July 2, 2005 to July 12, 2005 – working with Employer 4;
- July 14, 2005 to July 20, 2005 – working with Employer 5; and
- From August 2, 2005 - working with Employer 1 again.

[35] The worker's own record of his employment history (at page 332 of the Case Record) provided the following information:

- February 21, 1968 to April 8, 2000 – working with Employer 1;
- May 2000 to August 2003 – working with Employer 2;
- September 2003 to January 2004 – working with Employer 3;
- June 27, 2005 to July 10, 2005 – working with Employer 4;
- July 14, 2005 to July 27, 2005 – working with Employer 5; and
- From August 2005 – working with Employer 1 again.

[36] On September 26, 2007, Dr. Baryshnik opined that the pathogenesis of the worker's bilateral CTS was the result of his work activities. He provided the following opinion:

> 1. It is probable that the underlying pathology was long-standing.
>
> 2. The pathogenesis of [the worker's] carpal tunnel syndrome, both left and right, was work related activities.
>
> 3. The timing of [the worker's] involvement with the healthcare system does not negate the work related etiology of his symptoms.
>
> 4. [The worker's] occupation as a construction electrician for 35 years is the main factor in his development of bilateral carpal tunnel syndrome.
>
> 5. I am not aware of other factors that would have contributed to his development of carpal tunnel syndrome.

[37] A letter from the Board to the respondent's representative dated February 10, 2011 stated the following:

> …please be advised that there were two medical reports received by [the Board] on July 8th or 18th, 2005 and August 18, 2005 in relation to [the worker].
>
> As these reports were sent in by Dr. Baryshnik without a claim number on them, they were incorrectly filed in [the worker's] 2002 claim.
>
> You are correct in your assertion that, had these documents not been misfiled at the time of receipt, they could have been reviewed to establish potential entitlement under a new claim number.

[38] There were no reports from Dr. Baryshnik dated July 18 or August 18, 2005 in the file, as referenced in the Board's letter.

(viii) The submissions

[39] On behalf of the worker, Mr. Majesky submitted that the worker's bilateral CTS was caused by his repetitive work duties as a construction electrician, spanning over 40 years. Except for a short period of lay off of approximately 18 months between 2004 and 2005, the worker had been consistently employed as an electrician. The worker developed bilateral CTS as a result of his job duties, where he used both of his hands to, among other things, pull wires, bend cables, install fixtures, and drill. These were the only activities that could have caused the worker's condition. The worker did not have any other significant health concerns and he was not involved in any other activities that could have led to the development of bilateral CTS. The worker did not seek medical attention earlier because he was a stoic individual who was committed to working hard. He was not the type of person who would have complained unless his condition was severe. With respect to the date of injury, Mr. Majesky provided submissions on three possible dates: sometime in 2000 - the time when symptoms first began, July 8, 2005 – the date of the worker's EMG for the left hand, or August 2005 - the date of the worker's left hand CTS surgery. Mr. Majesky provided several Tribunal decisions in support of his arguments that an electrician's job can lead to CTS and to establish the date of injury.

[40] On behalf of Employer 1, the respondent, Ms. Crisostomo submitted that the worker's condition was not work-related because the worker had a family history of CTS and the worker was therefore pre-disposed to develop this condition regardless of his work duties. In addition, since the worker's symptoms became severe during the period that he was not working, the worker's condition was not work-related.

[41] With respect to the date of injury, Ms. Crisostomo submitted that OPM Document No. 11-01-04, entitled "Determining the Date of Injury" provides that the date of injury should be the date that the worker experiences a disabling physical or functional abnormality or loss due to a disablement date. Therefore, the date of injury in this case is July 8, 2005, which is the date of diagnosis as confirmed by the EMG study. At that time, the worker was employed by Employer 4 and therefore Employer 1 was not the accident employer for this claim. During the submissions regarding the date of injury, Ms. Crisostomo appeared to reverse her position on the issue of causation. She stated that the worker's injury arose from his job duties with Employer 4 since the worker had to pull cable for a continuous two weeks while he was employed with Employer 4. The Vice-Chair then asked Ms. Crisostomo whether she agreed with Mr. Majesky

that the worker had a gradual onset disablement. Ms. Crisostomo conceeded that the worker had a gradual onset disablement, but that his condition was not caused by his employment duties with Employer 1.

(ix) Law and policy

[42] Since the worker claimed to have suffered a disablement in 2005 and the possible dates of injury were all post January 1, 1998, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[43] Specifically, sections 2 and 13 of the WSIA govern the worker's entitlement in this case.

[44] Subsection 2(1) defines an accident to include a disablement arising out of and in the course of employment. Subsection 13(2) provides a rebuttable presumption as follows:

> If the accident arises out of the worker's employment, it is presumed to have occurred in the course of employment unless the contrary is shown. If it occurs in the course of employment, it is presumed to have arisen out of the employment unless the contrary is shown.

[45] The presumption in subsection 13(2) does not apply to disablement cases because the causation requirement of "arising out of and in the course of" is in the definition of "disablement" itself in section 2(1). Since both elements are required under section 2(1), there is no 'shortcut' to the proof of claim for a disablement.[1]

[46] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #8, would apply to the subject matter of this appeal:

- Package #1 – Initial Entitlement;
- Package #107 – Aggravation Basis/SIEF; and
- Package #300 – Decision Making/Benefit of Doubt/Merits and Justice.

[47] I have considered these policies as necessary in deciding the issues in this appeal, in particular:

- *Operational Policy Manual* ("OPM") Document No. 11-01-01, entitled "Adjudicative Process";
- OPM Document No. 15-02-01, entitled "Definition of Accident"; and
- OPM Document No. 11-01-04, entitled "Determining the Date of Injury".

[48] According to OPM Document No. 11-01-01, an allowable claim must have the following five points:

- an employer;

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[1] See *Decision No. 268*.

- a worker;
- personal work-related injury;
- proof of accident; and
- compatibility of diagnosis to accident or disablement history.

[49] When examining proof of accident, adjudicators consider the following:

- Does an accident or disablement situation exist?
- Are there any witnesses?
- Are there discrepancies in the date of accident and the date the worker stopped working?
- Was there any delay in the onset of symptoms or in seeking health care attention?

[50] OPM Document No. 15-02-01 provides that an accident includes a disablement arising out of and in the course of employment. It goes on to state that the definition of disablement includes a condition that emerges gradually over time and an unexpected result of working duties.

[51] OPM Document No. 11-01-04 was not in the policy packages provided by the Board. However, this policy was relevant to the issues in this appeal as it dealt with how to determine the date of injury in a gradual onset disablement claim. Both parties agreed that this policy was relevant to the issues in this appeal. In her closing submissions, Ms. Crisostomo provided the Vice-Chair and Mr. Majesky with a copy of this policy. I asked Ms. Crisostomo if this was the correct version of the policy which applied to this appeal. Ms. Crisostomo stated that it was the correct version of the policy. However, the version of the policy provided by Ms. Crisostomo only applied to decisions made on or after January 1, 2009 for all injuries on or after January 1, 2009.

[52] Since all of the potential dates of injury for this disablement claim were prior to January 1, 2009, the current version of the policy provided by Ms. Crisostomo did not apply to this appeal. Rather, the previous version of this policy, OPM Document No. 11-01-04 was relevant to this appeal. This previous version of the policy applied to all decisions made on or after January 1, 1998 for all accidents. According to this policy, the date of injury is the date that the worker experiences a disabling physical or functional abnormality or loss due to a disablement, occupational disease, or trauma. The policy provides that for a disablement or occupational disease, the date of injury is the date that the worker suffers the impairment (i.e., the date on which the worker experiences the disabling physical or functional abnormality or loss). Both parties agreed that this was the proper test for determining the date of the injury.

(x) Analysis

1. Does the worker have initial entitlement for bilateral CTS?

[53] There was no dispute in this case that the worker was diagnosed with bilateral CTS. The medical evidence was clear that the worker's hand symptoms were the result of CTS. I also note that the carpal tunnel surgeries apparently relieved the majority of the worker's condition bilaterally. The question that I must determine is whether, on a balance of probabilities, the

worker's duties as an electrician for over 35 years made a significant contribution to the worker's bilateral CTS?

[54] In considering whether the worker's bilateral CTS was related to his work duties as an electrician, I rely on Dr. Baryshnik's opinions of July 8, 2005 and September 26, 2007 that the worker's condition was related to his occupation as a construction electrician for 35 years. I observe that at the time the worker was first diagnosed with left hand CTS, he had been working as an electrician for 37 years. The worker's duties with the various employers over this time span were similar and they involved significant work with both hands. The worker testified that the work was strenuous as he was often required to use both of his hands repetitively to drill, hammer, pull and shape wires and cables of various sizes, install fixtures and panels, and use a screwdriver. This work was also repetitive as the worker would often performed these duties for days at a time. For example, while working with Employer 4, the worker testified that he had to pull cables all day. While working for Employer 1, the worker testified that he would perform a certain task, such as pulling wires, for up to a week.

[55] Furthermore, there was no suggestion in the evidence of any alternate cause for the worker's condition. The worker did not have diabetes or a thyroid condition. Although Ms. Crisostomo submitted that the worker had a family history of CTS and therefore was genetically predisposed to developing this condition, there was no persuasive evidence presented of this family history or of any genetic predisposition to the development of CTS. While Dr. Baryshnik noted that the worker's sister was treated for CTS, I accept the worker's testimony that his sister was not diagnosed with CTS. In any event, even if the worker's sister was diagnosed with CTS, I do not find that this is persuasive evidence of a family history of CTS. I also do not find that there was any medical evidence to suggest that CTS is a genetic condition that is passed down in families as suggested by Ms. Crisostomo. Furthermore, I observe that there was no suggestion of a genetic component to the CTS condition in the Medical Discussion Paper entitled "Carpal Tunnel Syndrome" by Dr. B. Graham, an orthopaedic surgeon, revised May 2001.

[56] I find that the worker's symptoms actually began during a period of time that he was employed. The worker testified that he first noticed occasional symptoms of tingling and numbness primarily in the left hand in the year 2000, shortly before his lay off from work with Employer 1. The worker stated that these symptoms gradually increased in frequency and severity over the course of several years, culminating in 2005 when he sought medical attention. The evidence supports the conclusion that the worker developed bilateral CTS over the course of several years as a result of his repetitive job duties as an electrician. I am persuaded, on a balance of probabilities, that the worker's employment as a construction electrician likely introduced a significant injuring process that caused organic damage to the worker's hands. In arriving at this conclusion, I am persuaded by the fact that for over 35 years, the worker engaged in employment activities that required him to use both of his hands repetitively to hammer, to pull wires, pipes, and cables, to bend wires and cables into shape, to drill, to screw, and to install fixtures, panels, and anchors.

[57] Ms. Crisostomo argued that although the worker's condition was a gradual onset disablement, it was not caused by his work duties with Employer 1. In particular, Ms. Crisostomo submitted that the worker's condition was caused by his job duties with

Employer 4. I find that there was no evidence of significance to distinguish between the worker's job duties with Employer 1 and Employer 4. Although the worker testified that while working with Employer 4 he had to pull cables all day long, I note that the worker had to pull cables in his duties with the other employers as well over the years. In fact, the worker stated that while working with Employer 1, he would have had to pull cables or wires for days at a time depending on the particular task. The worker also stated that he had to pull cables working outside in the cold while working with Employer 3. Furthermore, at the time that the worker first sought medical attention for his left hand symptoms, he was not yet working with Employer 4. The worker testified that his symptoms increased in severity in 2004. All of this evidence negates Ms. Crisostomo's argument that the worker's job duties with Employer 4 were the main culprit in the development of the worker's bilateral CTS. Therefore, I was not persuaded that the worker's duties with Employer 4 in particular more significantly contributed to the bilateral CTS than his similar duties with the other employers. In arriving at this conclusion I also rely on the opinion of Dr. Baryshnik which attributed the worker's condition to his overall job duties as an electrician over the last 35 years.

[58] On the basis of the foregoing reasons, I find that the worker does have initial entitlement for bilateral CTS. The matter will be referred back to the Board to determine the benefits flowing from this decision.

2. What is the date of injury?

[59] There was some confusion in this case regarding the date of injury and who was the appropriate accident employer since it appeared that the Board received Dr. Baryshnik's report of July 8, 2005 but incorrectly filed it in the worker's previous 2002 claim. The ARO noted that the claim was established by the doctor's first report (Form 8) dated November 29, 2005. Since the worker was working for Employer 1 at that time, the Board determined that Employer 1 was the accident employer. Ms. Crisostomo submitted that if the Board had not incorrectly filed Dr. Baryshnik's report of July 8, 2005, then the worker's claim would have been established on July 8, 2005 and Employer 1 would not have been the accident employer since the worker was not working for Employer 1 on July 8, 2005. While I acknowledge that the Board misfiled Dr. Baryshnik's report of July 8, 2005, I have to apply Board policy and the evidence before me in making a finding of fact as to the date of injury.

[60] With regard to the date of injury, I have found that there was no specific incident that significantly contributed to the worker's bilateral CTS. Rather, the worker's condition emerged gradually over time. As outlined above, the version of OPM Document No. 11-01-04 that applies to this appeal provides that the date of injury for a disablement is the date that the worker suffers the impairment; it is the date on which the worker experiences the disabling physical or functional abnormality or loss. In contrast, the current version of this policy provides that the date of injury in a gradual onset disablement claim is the date of first medical attention which led to the diagnosis, or the date of diagnosis, whichever is earlier. I note that the current version of the policy is more specific as to how the date of injury should be specified. On the other hand, the older version of the policy, which applies to the present appeal, does not provide such clear guidance. According to the older policy, the date of injury could be the date of first medical attention, or first diagnosis, or another date so long as that is the date that the worker experienced the disabling physical or functional abnormality or loss. The difficulty, in this case, in

determining when the disabling physical or functional abnormality occurred, is that despite having severe symptoms, the worker continued to work as an electrician until such time that he underwent surgery. In fact, except for the 18 months of no work between 2004 and 2005 and some time off following the two surgeries, the worker was consistently employed and working as an electrician from 1968 until retirement in 2011.

[61] Both Mr. Majesky and Ms. Crisostomo submitted that there was one date of injury for the worker's bilateral CTS. While the worker ultimately developed bilateral CTS attributable to his repetitive job duties as an electrician, the preponderance of evidence demonstrated that the worker did not develop bilateral CTS simultaneously on the same date. Having said that, I find that there were two different dates of injury: one for the worker's right hand CTS and one for the worker's left hand CTS. I also note that in *Decision No. 1786/08* the Panel found two different dates of injury, five years apart, in a case where the worker had bilateral CTS.

[62] In arriving at the conclusion that the worker's left hand and right hand CTS did not develop at the same time, I rely on the worker's testimony and the medical evidence. I found the worker's evidence was credible and it was corroborated by the medical evidence. The worker testified that when he began having symptoms in the year 2000, the symptoms of tingling and numbness were primarily in his left hand and to a lesser extent, in the right hand. The worker stated that although the symptoms in his left hand progressed between 2000 and 2003, he only experienced the right hand symptoms occasionally. By January 2004, the worker indicated that the palm of his left hand would ache and his left thumb would lock into place. The worker further testified that at about the same time, he noticed a change in the grip of his left hand and numbness in his first three fingers, which became unbearable by 2005 when he saw Dr. Lombardi. The medical evidence also showed a similar development of CTS, first in the left hand, and then in the right hand. The worker's first assessment by Dr. Lombardi noted problems with the worker's left hand thenar nerve. The worker then saw Dr. Baryshnik on July 8, 2005 with respect to numbness and tingling in the left hand. It is instructive that on examination, Dr. Baryshnik actually observed no muscle weakness in the right upper extremity. The worker's subsequent assessment with Dr. van Viet on October 26, 2005 was again limited to the left hand. The right hand symptoms did not appear to be significant until sometime in December 2005. Dr. van Viet indicated that the worker had complained of right hand problems during a consultation on December 21, 2005, although she did not arrive at any conclusions regarding the right hand since there were no EMG or nerve conduction studies conducted for the right hand. Furthermore, Dr. Lombardi's clinical notes did not appear to refer to the right hand symptoms until December 21, 2005. Dr. Baryshnik confirmed the diagnosis of right hand CTS on February 13, 2006.

[63] I will take a moment here to address the Form 8 completed by Dr. Lombardi on November 29, 2005 which referred to the worker's right hand CTS. There appeared to be an error in this Form 8 in that Dr. Lombardi diagnosed the worker with severe CTS, the right hand being more severe than the left hand. He then indicated that the worker was to have CTS surgery for the right hand on December 6, 2005. However, the medical evidence up to that point indicated that the worker's left hand symptoms were more severe than the right hand. For example, both Dr. Baryshnik's report of July 8, 2005 and Dr. van Viet's report of October 26, 2005, noted that the worker had severe left hand CTS. In addition, the worker had CTS decompression surgery on his left hand, not on his right hand, on December 6, 2005. I also

observe that Dr. Lombardi's corresponding clinical note for November 29, 2005 did not appear to mention any right hand CTS symptoms experienced by the worker. Therefore, I rely on the Form 8 only in so far as it confirms that the worker had severe CTS in his left hand, not in the right hand, as of November 29, 2005. I am therefore of the view that the worker's date of injury for right hand CTS was different from the date of injury for left hand CTS.

[64] I now turn to establishing the dates of injury. Previous tribunal cases that have held that the date when the worker experiences a disabling physical or functional abnormality or loss can be the date of initial medical treatment or the date that the worker stops working. In *Decision Nos. 210/01* and *1368/01*, the Vice-Chairs found that the date of injury was the date that the worker stopped working as that was the date that the worker's condition became disabling.

[65] In *Decision No. 151/02*, the Vice-Chair granted the worker, who was an electrician, initial entitlement for bilateral CTS. In determining the date of the injury, the Vice-Chair held that the day that the worker sought initial medical attention was the date that the worker experienced a disabling physical or functional abnormality or loss. This was also the date that the worker was treated with night splints for his condition. Although the worker had developed symptoms four months prior to seeking medical attention, the Vice-Chair found that the symptoms four months earlier were not disabling, but only bothersome to the worker. Similarly, in *Decision Nos. 856/09* and *1786/09* the Panel determined the date of injury to be the date that the worker began wearing a wrist brace. In *Decision No. 795/02*, the Panel granted entitlement to a worker who had developed a latex allergy. In determining the date of injury, the Panel found that in a case of cumulative exposure, it was not entirely clear that the worker's earlier symptoms were the same as the later and more serious condition. The Panel found that the date of accident was the date that the worker first sought medical attention.

[66] In my view, the wording of OPM Document No. 11-01-04 is broad enough to allow another date to be chosen as the date of injury so long as that is when the worker experienced a disabling physical or functional abnormality or loss. As noted in *Decision No. 500/06*, there are circumstances in which it would be appropriate to consider initial medical treatment as the date of injury. In other circumstances, the result of doing so may lead to a result that is inconsistent with the Act. For example, in *Decision No. 2123/04*[2], the Panel found that the date on which the worker first suffered a disabling physical or functional abnormality was the date that she had an anaphylactic reaction.

[67] Use of the term "disabling" in Board policy is not intended to impose an additional requirement involving the ability to work, as disability was defined under earlier legislation. Entitlement to benefits for an injury does not require disability in this sense, hence it would be illogical to require this in order to establish a date for that compensable injury (see *Decision Nos. 841/08* and *1786/08*). The Vice-Chair's comments in *Decision No. 841/08* are instructive in their interpretation of the words "any physical or functional abnormality or loss":

> However, the Act appears to recognize the existence of impairment where there is physical or functional abnormality or loss that is not disabling. In the pre-1989 Act, impairment is defined as "any physical or functional abnormality or loss…" (ss. 1(1)).

[2] A request for reconsideration of this decision was denied (see *Decision No. 2123/04R*).

> The definition does not require that the impairment be disabling. Disability is a different concept. A "disability" is defined in the pre-1989 Act as "loss of earning capacity" as a result of the injury (ss. 1(1)). It may, therefore, be necessary for a worker to have a "disability" before he/she can be eligible for a pension, which requires a loss of earning capacity under the pre-1989 Act. But disability is not part of the definition of impairment; an injury can exist without disability. As I interpret the legislation, it is not necessary for the worker to have a loss of earning capacity in order to have an impairment. A worker who suffers an impairment without any loss of earning capacity could be entitled to health care benefits.
>
> I am persuaded, therefore, that, under the applicable legislation, a worker sustains an injury by accident where he/she experiences a physical or functional abnormality or loss. The date of injury is the date on which that physical or functional abnormality or loss becomes apparent. In my view, the Act does not require that a physical or functional abnormality or loss be disabling to establish the presence of an injury. In my view, the word "disabling" in the Board's policy is not a modifier for the type of physical or functional abnormality or loss that would be considered an injury. Rather, I interpret the word "disabling" as a reference back to the word disablement in the policy. It cannot, in my view, be interpreted as a threshold requirement for the existence of an injury.

[68] In this case, the worker did not stop working at any time due to his CTS. Therefore, the date of when the worker stopped working cannot be used as the date of injury in this case.

[69] I also find the Vice-Chair's analysis in *Decision No. 73/08* useful in establishing the date of injury. In that case, the Board had determined that the worker was entitled to benefits for noise-induced hearing loss as a result of 32 years of employment as a heavy machine operator. Although the worker had stopped working in January 1989, the claim was assigned an accident date of July 9, 2004, the date of the audiogram. However, the Vice-Chair found that the date of accident was January 1989 since the worker's hearing loss must have occurred prior to when he stopped working rather than the date that the hearing loss was first documented. The Vice-Chair stated the following:

> I assume that the accident date of July 9, 2004 was selected because this was the date of the earliest audiogram that was received by the Board, and was, therefore the date of "documented evidence for the hearing loss." However, since the worker's work-related hearing loss must have occurred before he stopped working in January 1989, the worker's injury must have occurred before January 1989…

[70] The preponderance of Tribunal decisions in this area support the reasoning advanced in *Decision No. 841/08*, that the inability to work is not a necessary requirement for establishing a date of accident in a disablement claim. Rather, the date of injury in a disablement claim is a question of fact that turns on the particular circumstances in the claim; namely, the date on which the worker experiences the disabling physical or functional abnormality or loss (see also *Decision No. 2341/08I*). In this regard, the date of injury could be later than the date of the first medical treatment. For example, in *Decision No. 1352/09I*, the worker stopped working in March 2003. The Board granted entitlement for CTS to the worker with an accident date of March 2003, but later changed the accident date to June 2001, the date of first medical attention. The Panel held that board policies imply that the date of an injury could be later than the date of first medical treatment. While there may have been an injury evident in June 2001, the injury was not disabling, nor did it prevent the worker from performing her regular job and did not cause a loss of earnings. Over time, however, there was a further injuring process, eventually

resulting in a disabling functional abnormality or loss in March 2003. The Panel therefore found that March 2003 was the accident date.

[71] With respect to the worker's left hand, I find that the date of injury was January 1, 2004 as this was the date that the worker's left hand CTS condition developed into a disabling physical or functional abnormality. The worker indicated that he began experiencing occasional symptoms in the year 2000. The symptoms became more consistent and severe in 2004 shortly before the worker was laid off work with Employer 3. The worker sought medical attention for the left hand symptoms for the first time on April 6, 2005, at which point in time, Dr. Lombardi diagnosed him with left hand CTS. This timeline is fairly consistent with the information contained in medical reports. For example, Dr. Lombardi indicated that the worker's symptoms began a year prior to April 6, 2005 (that is, sometime in April 2004). On July 8, 2005, Dr. Baryshnik noted that the worker's symptoms had become constant in the last year (that is, sometime in July 2004). On October 26, 2005, Dr. van Viet indicated that the worker's left hand symptoms became more severe over the past one and a half year (that is, as of May 2004).

[72] Therefore, I conclude that the worker began having symptoms occasionally in the year 2000, shortly before his lay off from with Employer 1. The tingling and numbness symptoms gradually increased between 2000 and 2003 and became more severe in 2004 while the worker was working with Employer 3. The worker testified that shortly before his lay off from work with Employer 3, the palm of his hand would ache and his left thumb would lock into place. At that time, the worker also noticed a change in the grip of his left hand as well as constant numbness in the first three fingers. The worker also developed problems with gripping objects. He explained that when he attempted to grab a cup, his thumb would lock into place and instead of grabbing the cup, his hand would push it away. I find that it was at this time that the worker's condition became disabling. It was clear from the worker's testimony that he began experiencing a disabling physical condition which interfered with his ability to use his left hand to grip objects, he had numbness in the first three fingers, and his thumb would lock. Had the worker sought medical attention at this time, he would have likely been diagnosed with CTS.

[73] I acknowledge that the worker did not seek medical attention for his condition until April 6, 2005. The worker's delay in seeking medical attention does not mean that the worker's condition was not disabling prior to seeking medical attention. I accept the worker's testimony that he was not the type of person to complain about a problem unless it was severe. I accept that the worker waited as long as he could prior to seeking medical attention. The worker's testimony was corroborated by the medical evidence since the worker was diagnosed with "severe" CTS. This suggests that by the time the worker sought medical attention in April 2005, his condition had already progressed to such an extent that it was characterized as severe. In the present circumstances, the date of diagnosis of left hand CTS (April 6, 2005) is not the date of injury as that diagnosis only confirmed the already established disablement process which began in 2000 but became disabling in January 2004.

[74] I do not find that July 8, 2005 was the appropriate date of injury as it was neither the date of first medical attention nor the date of when the worker's condition became disabling. July 8, 2005 was only significant in that the worker's diagnosis of severe CTS was confirmed by the specialist, Dr. Baryshnik, and the worker underwent an EMG. The worker had already been diagnosed with CTS on April 6, 2005 when Dr. Lombardi assessed him. The worker had

previously begun to experience a disabling physical or functional abnormality or loss in his left hand a year earlier, in 2004. I also do not accept 2000 as the date of injury since the worker had only begun to experience occasional symptoms at this time. While the symptoms may have been bothersome to the worker in 2000, they were not disabling.

[75] Although the worker was still able to continue with his employment, I find that the worker did experience a disabling physical or functional abnormality or loss in January 2004, shortly before his lay off from work with Employer 3. The appropriate date of injury is therefore January 1, 2004. Since the worker was working for Employer 3 at that time, I find that the respondent was not the accident employer for the purposes of the worker's left hand CTS claim.

[76] With respect to the worker's right hand CTS, I find that the date of injury was December 21, 2005. Although the worker had occasional symptoms in the right hand, the preponderance of evidence suggested that the worker's right hand CTS condition did not become disabling until December 21, 2005. In this regard, I rely on the worker's testimony that between 2000 and 2005, his left hand symptoms were always more severe than his right hand symptoms. The worker also stated that while the left hand symptoms progressed between 2003 and 2004, the right hand symptoms remained only occasional. I also rely on the medical evidence described earlier which indicated that the worker initially sought medical attention only for his left hand symptoms. As noted above, Dr. Lombardi's clinical notes were silent about the worker's right hand until December 21, 2005. In addition, Dr. Baryshnik's examination of the worker's right upper extremity on July 8, 2005 showed no muscle weakness in comparison to the left upper extremity which had significant muscle wasting. The worker sought medical treatment regarding left hand CTS symptoms as of April 6, 2005. Had the worker's right hand been disabling at that time, the worker would have likely mentioned it to his treating health care professionals. However, there was no such reporting of right hand symptoms until December 2005. I also find it instructive that on February 10, 2006 Dr. Baryshnik indicated that the worker's symptoms in the right hand became severe three months prior (as of December 2005) as follows:

> Over the last 12 months he has noticed intermittent numbness and tingling in his right hand and over the last three months a constant feeling of numbness in his thumb, second, third, and fourth fingers…

[77] Therefore, I am persuaded that the preponderance of evidence showed that the worker did not have a disabling physical or functional abnormality or loss with his right hand prior to December 21, 2005. On December 21, 2005, Dr. van Viet noted that the worker had complained of right hand symptoms which were in keeping with carpal tunnel compression. The worker was then referred back to Dr. Baryshnik for further testing and confirmation of the CTS diagnosis of the right hand.

[78] Since the worker was working with the respondent (Employer 1) at the time of the injury in the right hand, Employer 1 is the accident employer with respect to the worker's claim for right hand CTS.

DISPOSITION

[79] The appeal is allowed as follows:

1. The worker has initial entitlement for bilateral CTS as related to his repetitive job duties as an electrician.
2. The date of injury for the worker's left hand CTS was January 1, 2004. The worker was working for Employer 3 on the date of the injury. The respondent is therefore not the accident employer for the purpose of the worker's left hand CTS claim.
3. The date of injury for the worker's right hand CTS was December 21, 2005. The worker was working for the respondent, Employer 1, on the date of the injury. The respondent is the accident employer for the purpose of the worker's right hand CTS claim.
4. The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication, subject to the usual rights of appeal.

DATED: March 7, 2011

SIGNED: S. Darvish