

2017 ONWSIAT 2032  
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 920/17

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**DECISION NO. 920/17**

S. Shime V-Chair

Heard: March 17, 2017

Judgment: July 11, 2017

Docket: 920/17

Counsel: T. Zwiebel, for Worker

No one for Employer

Subject: Employment; Occupational Health and Safety; Public

**Headnote**

**Labour and employment law**

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated October 28, 2014

**S. Shime V-Chair:**

**(i) Introduction**

1 The worker was employed in the lounge of a major airline as a supervisor since 1995. On January 29, 2005, the worker received initial entitlement for a lower back strain arising out of her job duties. The worker was paid Loss of Earnings (LOE) benefits from January 31, 2005 to May 12, 2005 at which time she returned to modified work. On April 27, 2009, the worker injured her upper back, right arm and right shoulder while lifting a case of wine bottles. The worker received LOE benefits from April 29, 2009 to July 25, 2009, which included full LOE benefits initially and partial LOE benefits upon her graduated return to work. The worker attended the Functional Restoration Program (FRP) in December 2009 and she returned to work for one day in February 2010. The worker has not returned to work since that time. The worker was subsequently awarded entitlement to a permanent impairment award for her right shoulder and bicep. The worker's Non-economic Loss (NEL) award was rated at 11% in June 2010.

2 The worker sought entitlement for Chronic Pain Disability (CPD) benefits arising out of either of her workplace accidents. The worker also seeks LOE benefits as of February 22, 2010. All other aspects of the appeal have been withdrawn. I am satisfied that the worker and her representative understand the consequences of this withdrawal, particularly in light of the time limit provisions contained in the *Workplace Safety and Insurance Act, 1997* (the "WSIA").

**(ii) Analysis**

3 This file was referred to me for determination by the Tribunal's Early Intervention Assessment project. After reviewing the file documentation in context with the applicable law and policy, I am satisfied that the worker has entitlement to Chronic Pain Disability arising out of her compensable accident which occurred on April 27, 2009, which resulted in a permanent impairment award. I find that while there was some evidence of a pre-existing condition, the April

2009 accident significantly contributed to the pain condition. There is evidence that the April 2009 caused a permanent aggravation of the pre-existing pain condition.

4 *Operational Policy Manual (OPM)* Document No. 15-04-03 "Chronic Pain Disability" sets out five criteria to assist adjudicators in determining entitlement for CPD. For a worker to qualify for compensation for CPD, all of the following conditions must exist, and must be supported by the evidence:

**Condition**

A work-related injury occurred.

Chronic pain is caused by the injury.

The pain persists 6 or more months beyond the usual healing time of the injury.

The degree of pain is inconsistent with organic findings.  
The chronic pain impairs earning capacity.

**Evidence**

A claim for compensation for an injury has been submitted and accepted.

Subjective or objective medical or non-medical evidence of the worker's continuous, consistent and genuine pain since the time of the injury,

AND

a medical opinion that the characteristics of the worker's pain (except for its persistence and/or its severity) are compatible with the worker's injury, and are such that the physician concludes that the pain resulted from the injury.

Medical opinion of the usual healing time of the injury, the worker's pre-accident health status, and the treatments received,

AND

subjective or objective medical or non-medical evidence of the worker's continuous, consistent and genuine pain for 6 or more months beyond the usual healing time for the injury.

Medical opinion which indicates the inconsistency.

Subjective evidence supported by medical or other substantial objective evidence that shows the persistent effects of the chronic pain in terms of consistent and marked life disruption.

5 The policy goes on to provide further guidance on the interpretation of terms used in the adjudication of CPD claims:

**Definitions**

**Chronic pain disability (CPD)** is the term used to describe the condition of a person whose chronic pain has resulted in marked life disruption.

**Chronic pain** is pain with characteristics compatible with a work-related injury, except that it persists for 6 or more months beyond the usual healing time for the injury.

**Usual healing time** is defined as the point in time, following an injury, at which the worker should have regained pre-accident functional ability, or reached a plateau in physical recovery.

**Marked life disruption** - Because pain is a subjective phenomenon, marked life disruption is the only useful measure of disability or impairment in chronic pain cases. Marked life disruption indicates the effect of pain experienced by the worker and the effect on the worker's activities of daily living, vocational activity, physical and psychological functioning, as well as family and social relationships.

There must be a clear and distinct disruption to a worker's life, but there is no particular requirement for this disruption to be either major or minor. The disruption in the worker's personal, occupational, social, and home life must be consistent, though the degree of disruption in each need not be identical.

The presence of "and" in the statement "social, occupational, and home life" suggests that all 3 must be present. However, there is no requirement that all 3 aspects of a person's life must be disrupted to the same degree.

Initially, the fact that the worker has not returned to employment may be an indication of marked life disruption, the assumption being that other components of the worker's life are disrupted as well. As the 6 month period progresses, the decision-maker is obliged to obtain evidence of disruption to each part of the worker's life - personal, occupational, social, and home.

A disruption to a worker's occupational life is also considered to exist if a worker has returned to employment that has been modified to accommodate the CPD.

The following list of typical expected disruptions of functional abilities due to chronic pain is to be used when assessing the extent to which a CPD is affecting a worker's life.

#### **Marked life disruption - vocational aspects**

The type and the duration of work may be restricted totally or to a limited degree, i.e., modified duties or part-time work only may be possible.

6 OPM Document No. 15-04-04 "Chronic Pain Disability Rating Schedule," sets out the "no stacking" rule for awards for CPD and an organic condition where both arise from the same accident, causing an injury to the same body part. Where a worker has entitlement on an organic basis, and subsequently is granted entitlement for CPD arising from the same injury, the non-organic CPD award replaces the organic award. The reason for this is that for purposes of rating impairment for CPD, the worker's condition is assessed on a "whole person" basis. As this rating is holistic, any impairment related to the identified organic or psychiatric source will be accounted for in the global impairment rating. CPD entitlement is therefore intended to cover all aspects of the worker's CPD condition. See, for example, *Decision No. 379/05*. The worker's organic NEL will now be replaced by the NEL for CPD.

7 In this case, I am persuaded, on a balance of probabilities, that the worker developed CPD as a result of her compensable workplace accident. There is no question that a workplace accident occurred and that the worker's pain has persisted for longer than six months. On October 8, 2009, Dr. S.I. Halman diagnosed the worker with a tear in the supraspinatus tendon as well as a split tear in the longhead of the biceps. However, he noted that the worker's "clinical presentation does not match her MRI." He opined that the worker may have an organic component to her pain, but that it was "primarily myofascial" in nature. The worker was subsequently seen at the Regional Evaluation Centre (REC) on October 9, 2009, at which time Dr. M. Dziedzic diagnosed the worker with "myofascial strain of the right shoulder" with possible tear and tendonosis. He recommended an injection as well as Lyrica for pain.

8 The worker was diagnosed with a Pain Disorder with both Psychological Factors and a General Medical Condition by the FRP specialists in the Discharge Report, dated January 29, 2010. On February 5, 2010, the worker was diagnosed by Dr. R. Golden, a psychiatrist, with CPD. Dr. Golden stated that the worker had "significant psychological symptoms secondary to her medical condition and problems." Dr. Halman noted in his report, dated March 25, 2010, that the worker's AC joints were normal and that she should be reviewed by a psychiatrist or rheumatologist for any future visits. Dr. Morgenthau, a neurologist, concluded in his report, dated October 28, 2010, that the worker "presents in a classic chronic pain fashion" and he referred her to the pain clinic at a Toronto hospital and discharged her from his care. It is evident that the worker was suffering from some pain issues prior to the April 2009 accident. However, I find that the pain condition appeared to accelerate subsequent to the April 2009 incident.

9 The evidence also shows that the worker's pain is inconsistent with her organic findings. The majority of the doctors have diagnosed the worker with some form of Chronic Pain Disorder as of 2010. The medical evidence supports that the worker's pain levels are inconsistent with the organic findings. While there are some minor physical aspects to the worker's pain complaints, the medical specialist all agree that the worker is suffering from CPD, rather than an organic

issue. Dr. Morgenthau concluded that the worker's condition was best characterized as CPD in his report, dated October 28, 2010.

10 The worker was seen by Dr. A. Deshpande, a doctor at the Comprehensive Pain Program at Toronto Western Hospital, on November 8, 2010. At that time, Dr. Deshpande opined that the worker "presented with a 5-year history of back pain and a 2-year history of shoulder and neck pain after an innocuous work injury." He noted that while there may be some underlying physical components, including a frozen shoulder, her "overwhelming pain behaviors" limited the findings on examination. He concluded that her disability was related to psychological factors and he referred her to the FRP program. Dr. Halman similarly concluded that despite the organic findings, the worker's pain was primarily myofascial in nature in his report dated October 8, 2009.

11 Dr. Blitzer saw the worker on December 1, 2010, at which time he recorded that subsequent to the 2005 incident, the worker started to miss work as a result of her back and neck pain. However, the worker was able to resume modified work in 2007 until her second accident in 2009, when she was unable to maintain a full day schedule in modified work. While I note that the evidence supports some ongoing neck and pain complaints prior to the April 2009 injury, I find that the worker's inability to resume work and her diagnosis of CPD are most pronounced subsequent to the April 2009 accident. I am persuaded that the accident in 2007 significantly contributed to a Chronic Pain Disorder, which was diagnosed by the FRP specialists, Dr. Golden, a psychiatrist, and Dr. Blitzer, a chronic pain specialist.

12 I also find that the worker has suffered a marked life disruption. While she has support from family, she is no longer able to work, care for her home, and she no longer socializes outside the home or attends family activities. I am persuaded that the worker has suffered a marked life disruption in occupational, social and home life as a result of her compensable injury. I find the worker meets the criteria for CPD under the Board's policy and a NEL assessment is in order.

13 In this case, the worker was offered pre-injury accommodated work by the accident employer at the lounge. The representative agreed that this job was suitable for the worker, but he submitted that she could not maintain full-time hours. I agree with the submissions of Mr. Zwiebel and I find that the modified work offered by the employer was suitable, but given the worker's precautions and CPD diagnosis, I find that she is only capable of 20 hours per week in this job. The worker's job restrictions are significant and include:

- Avoid repetitive or prolonged forward, bending, twisting and extension of the lumbar spine
- Avoid prolonged head forward positioning
- The ability to alternate between sitting, standing and walking as needed
- Avoid repetitive or prolonged use of the upper extremity, including at and above shoulder level
- Avoid resisted pushing and pulling activities
- Avoid repetitive or prolonged use of left upper extremity to decrease the incidence of overuse

14 While the worker's modified job was light in nature, I find that it did involve some prolonged walking and use of her upper extremity for computer work. The worker reported to the Case Manager in Board Memorandum # 70, dated March 23, 2010, that the walking increased her pain and that she was having trouble with her left arm after increased use of her right arm at work. I note that the worker attempted a return to work in February 2010, but she was never able to manage more than a four hour shift as noted by the FRP Return to Work - Worksite Visit report, dated February 19, 2010. The worker's family doctor indicated in a clinical note, dated February 22, 2010, that the worker was only capable of managing four hours daily at that time. The worker's occupational therapist stated that the worker had a "decreased tolerance" for return to work activities in her report, dated November 26, 2009. The scope of the worker's limitations for her upper extremity is broad and makes it difficult to sustain a 40 hour workweek. Accordingly, I find that the worker is only capable of employment 20 hours weekly in the modified pre-injury job.

15 Under the facts of this case, I find that the worker has met the criteria for CPD. Having been granted entitlement to CPD and LOE benefits, the worker withdraws her appeal on all other issues. The worker and her representative understand the consequences of this withdrawal, particularly in light of the time limit provisions set out under the WSIA.

## **DISPOSITION**

16 The appeal is resolved as follows:

1. The worker has entitlement to benefits for CPD arising out of the compensable accident on April 27, 2009. The worker is entitled to a NEL assessment for her CPD which will replace her organic upper extremity NEL award of 11%.
2. The modified job offered by the employer was suitable, but the worker was only able to manage 20 hours weekly in this position. The worker's LOE benefits as of February 22, 2010 are to be based upon 20 hours per week at her regular rate. This finding is subject to all statutory reviews.
3. The worker withdraws her appeal on all other issues. I am satisfied that the worker and her representative understand the consequences of this withdrawal, particularly in light of the time limit provisions contained in the *Workplace Safety and Insurance Act, 1997*.