WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2002/17

BEFORE: B. Kalvin: Vice-Chair

HEARING: June 27, 2017, at Toronto
Oral

DATE OF DECISION: August 4, 2017

NEUTRAL CITATION: 2017 ONWSIAT 2351

DECISIONS UNDER APPEAL: WSIB ARO decisions dated July 30, 2014 and March 21, 2017

APPEARANCES:

For the worker: L. Dillon, Lawyer

For the employer: D.G.

Interpreter: N/A

Workplace Safety and Insurance Appeals Tribunal

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

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REASONS

[1] These are the reasons for decision of the Workplace Safety and Insurance Appeals Tribunal with respect to an appeal by a worker from a decision of the Workplace Safety and Insurance Board (the "Board") concerning the worker's entitlement to benefits following a workplace accident.

(i) Background

[2] The background to this appeal is as follows. The worker is 52 years old. On November 21, 2008, he was working for an airline company as a lead station attendant when standing on a belt that was hit by a loader being operated by a co-worker. The worker injured his low back.

[3] As a result of this accident, the worker made a claim to the Board for compensation benefits. The Board accepted that the worker had sustained a personal injury as the result of an accident at work, and, accordingly, approved his benefit claim. The worker was paid loss-of-earnings benefits for various periods of lost time that resulted from his low back injury.

[4] The Board eventually determined that the accident had resulted in a permanent impairment of the worker's low back and therefore that he was entitled to a non-economic loss award as compensation for that impairment. The worker's permanent low back impairment was rated at 6% of his whole body, and his non-economic loss award was based on that rating.

[5] After a period of time off following the accident, the worker returned to modified duties. He had permanent medical restrictions that included no heavy lifting or carrying, no repetitive trunk movements, and no prolonged weight bearing. Subsequently, his family physician reported that the worker also needed to avoid repetitive bending and twisting.

[6] In December 2011, the worker was performing the modified job in cabin services. He was part of a crew whose job it was to clean and groom a plane after it had landed and prepare it for the next flight. The worker was designated the leader of the crew so that he could assign some of the tasks that exceeded his physical restrictions to other members of the crew.

[7] The worker subsequently claimed entitlement for a recurrence of his compensable low back injury. The worker claimed the recurrence occurred while he was grooming a plane on December 11, 2011. This claim was denied by a Board Case Manager in a decision dated January 3, 2012. The worker objected to the Case Manager's decision and his objection was referred to an Appeals Resolution Officer ("ARO") in the Board's internal Appeal Services Division. In a decision dated July 30, 2014, the ARO denied the worker's objection and confirmed the Case Manager's ruling that the worker was not entitled to benefits for a December 11, 2011 recurrence of his compensable 2008 back injury.

[8] In January 2012, the worker stopped working. At the hearing of this appeal the worker testified that he was experiencing significant depression at that time and his treating physician recommended that he stop working. The worker subsequently claimed entitlement to benefits for a psychotraumatic disability which he claimed was causally related to his compensable injury. This claim was denied by a Case Manager on January 29, 2014. Again the worker objected, and again his objection was referred to an ARO. In a decision dated March 21, 2017, the ARO denied the worker's objection.

[9] The worker now appeals the two ARO decisions to this Tribunal.

(ii) Issues

[10] The issues to be resolved on this appeal are as follows:

1. Is the worker entitled to benefits for a December 11, 2011 recurrence of the November 21, 2008 low back injury?

2. Is the worker entitled to benefits for a psychotraumatic disability?

(iii) Analysis

(a) Is the worker entitled to benefits for a December 11, 2011 recurrence of the November 21, 2008 low back injury?

[11] Section 126 of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") requires this Tribunal to apply Board policy. The Board's policy entitled "Recurrences" is set out in *Operational Policy Manual* Document No. 15-03-01. The policy reads as follows:

> **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?).

In complex cases, the decision-maker may consult with WSIB clinical staff to assist in making this determination.

[12] Having considered the evidence and submissions put forward at the hearing of this appeal, I find that the worker is entitled to benefits for a December 11, 2011 recurrence of his 2008 low back injury. My reasons for this conclusion are as follows.

[13] At the hearing of this appeal, the worker testified that while grooming an airplane on December 11, 2011, he felt an increase and exacerbation of his low back pain, and that pain went into his leg. In denying the worker's claim, the ARO stated that "no objective medical evidence was provided to support the worker's condition deteriorated in December 2011." With respect, I do not agree. The Case Record contains medical records which indicate that on December 11, 2011, the worker sought treatment at a medical clinic because of an exacerbation of his low back symptoms as a result of the duties he was performing at work. There is evidence, further, that following that medical assessment, the treating physician reported to the Board that the worker required additional restrictions for "3 – 7" days, after which he was to follow up with his family doctor.

[14] A *Health Professional's Report* dated December 11, 2011, indicates that the worker was treated on that day for low back and lower leg pain. The treating physician provided the following diagnosis: "Aggravation of old back injury, lower back strain." Medication was prescribed, and, as noted, the treating physician indicated that additional restrictions would be in place for three to seven days, and that the worker was to follow up with his family doctor.

[15] The worker did follow up with his family doctor eight days later. The family doctor's clinical note pertaining to a visit on December 19, 2011, confirms the December 11, 2011 recurrence of the worker's low back injury. The note states on December 11, 2011, the worker was "grooming airplanes" when he "aggravated his low back" and also had tingling in the left leg. The note says that the worker had been "off work since December 11, 2011."

[16] Thus, in my opinion, there is medical evidence, namely, the reports and notes of two physicians that confirm the worker was treated for an exacerbation of his low back condition that occurred while he was grooming planes on December 11, 2011. The medical reports indicate the worker sought medical treatment on December 11, 2011, was prescribed medication, and given restrictions that were to remain in place until a further medical assessment was conducted. The reports indicate that the exacerbation of symptoms caused the worker to remain off work.

[17] In my assessment, these facts fall squarely within the Board's entitlement criteria set out in the Board's "Recurrences" policy. It appears that as a result of a minor accident or perhaps no accident at all, the worker experienced an increase in low back symptoms while he was grooming an airplane. The body part that was affected in this incident was the same as that which was injured, and, in fact, permanently impaired, as a result of the 2008 accident, namely, the worker's low back. The evidence also shows that since the 2008 injury, the worker's low back had remained symptomatic periodically, and that had required work restrictions and job modifications.

[18] Accordingly, for the reasons set out above, I find that the criteria set out in the Board's recurrence policy are satisfied in this case, and therefore the worker is entitled to benefits for a December 11, 2011 recurrence of his 2008 low back injury.

(b) Is the worker entitled to benefits for a psychotraumatic disability?

[19] The Board's policy entitled *Psychotraumatic Disability* is set out in *Operational Policy Manual* Document No. 15-04-02 and reads, in part, as follows:

> **Policy**
>
> A worker is entitled to benefits when disability/impairment results from a work-related personal injury by accident. Disability/impairment includes both physical and emotional disability/impairment.
>
> **Guidelines**
>
> **General rule**
>
> If it is evident that a diagnosis of a psychotraumatic disability/impairment is attributable to a work-related injury or a condition resulting from a work-related injury, entitlement is granted providing the psychotraumatic disability/impairment became manifest within 5 years of the injury, or within 5 years of the last surgical procedure.
>
> Psychotraumatic disability/impairment is considered to be a temporary condition. Only in exceptional circumstances is this type of disability/impairment accepted as a permanent condition.
>
> Psychotraumatic disability/impairment resulting from organic brain damage is assessed as a permanent disability/impairment.
>
> **Psychotraumatic disability entitlement**
>
> Entitlement for psychotraumatic disability may be established when the following circumstances exist or develop
>
> - Organic brain syndrome secondary to
>   - traumatic head injury
>   - toxic chemicals including gases
>   - hypoxic conditions, or
>   - conditions related to decompression sickness.
> - As an indirect result of a physical injury
>   - emotional reaction to the accident or injury
>   - severe physical disability/impairment, or
>   - reaction to the treatment process.
> - The psychotraumatic disability is shown to be related to extended disablement and to non-medical, socioeconomic factors, the majority of which can be directly and clearly related to the work-related injury.

[20] For the reasons that follow, I find that the worker is not entitled to benefits for a psychotraumatic disability.

[21] The injury for which the worker was granted entitlement to benefits in this case is a 2008 low back injury that resulted in a permanent impairment. In January 2012, the worker laid off work. At the hearing of this appeal, the worker testified that he stopped working in January 2012, because he was suffering from depression and his physician advised him to remain off work. When asked what had caused the depression which precluded a return to work, the worker testified that there were two factors, first, there was a recent suicide of a nephew, and,

second, there was a toxic environment at work, in which he was being physically and verbally harassed by a co-worker.

[22] Neither of the two factors that the worker identified as causing his depression and precipitating his decision to stop working were caused, or significantly contributed to, by the workplace accident or the resulting impairment of his low back. The worker's depression was not caused by the worker's "emotional reaction to the accident or injury."

[23] The fact that factors unrelated to his low back impairment caused the onset of the worker's depression is confirmed in the medical reports. In a medical report filled out on January 16, 2012, in support of the worker's claim for disability benefits with the employer's private insurer, the worker's family physician, Dr. J. Eisen, stated that the worker was suffering from depression that was precipitated by a "family suicide" and "work harassment in a new department." No mention is made of the worker's low back injury or impairment as a precipitating or contributing factor.

[24] On March 5, 2012, Dr. Eisen wrote a report and sent it to the employer's private disability insurer, in which he stated the following:

> In response to your request, directed to the above noted patient please see below information you have requested.
>
> - Primary Diagnosis is Major Depressive Disorder
> - Patient's depression has been escalating since November 2011 with the suicide of his nephew acting as the catalyst. His situation at work involving, what he feels to be severe harassment, has also increased his anxiety and depression
> - DSM IV Axis I - 296.2x - Major Depressive Disorder-Single episode
>
> Axis II - no personality disorder
>
> Axis III - no medical condition
>
> Axis IV - severe work distress
>
> severe family stress and grieving
>
> Axis V - 55

[25] It is significant that Dr. Eisen's diagnosis and description of the worker's condition makes no reference to the worker's low back injury or impairment. In fact, under Axis III, Dr. Eisen indicates that there is "no medical condition" relevant to the worker's major depressive disorder.

[26] The same is true of the reports prepared by the psychiatrist to whom Dr. Eisen referred the worker. In his report of March 17, 2012, Dr. A. Muhammad, a psychiatrist stated the following:

> *Background History*: The patient has a history of depression of over 2 years' duration … He mentioned that he is working as a superintendent with [the employer]. He was once terminated because of job absenteeism but was reinstated a year ago at a lower position. He was rotated through different departments and he reported harassment that was work-related. One of his nephews committed suicide in November 2011 and he has been terminated from his job again and that has augmented his current stress. He does not feel any support at work.

Dr. Muhammad diagnosed the worker with an “Adjustment disorder with depressed mood.” There is no indication in Dr. Muhammad’s report that the worker’s condition was caused by or was a reaction to his compensable low back impairment. Similarly, in a subsequent report dated August 27, 2012, Dr. Muhammad refers to a number of factors that precipitated the worker’s adjustment disorder and related stress and anger, but the low back impairment is not mentioned among them.

[27] It may well be that the worker was being harassed at work and felt he was working in a toxic environment as he testified at the hearing of this appeal. The worker testified that this was related to a co-worker who had physically assaulted him and verbally harassed him. While this may be true, and appears to have contributed to the worker’s psychological condition, it is a factor that is unrelated to the worker’s compensable low back condition. While it is true that the worker may not have come into contact with the offending co-worker had he not been placed on modified duties following his compensable injury, this does not mean, in my view, that the compensable low back injury significantly contributed to the worker’s psychological condition. In the absence of evidence that he was being harassed specifically because of, or in relation to his compensable injury, which was not the evidence in this case, I am unable to conclude that the compensable injury significantly contributed to the worker’s psychological condition, simply because the modified job resulted in his exposure to the offensive individual.

DISPOSITION

[28] The appeal is allowed, in part:

1. The worker is entitled to benefits for a December 11, 2011 recurrence of the November 21, 2008 low back injury. The quantum and duration of benefits are to be determined by the Board subject to the usual rights of appeal.

2. The worker is not entitled to benefits for a psychotraumatic disability.

DATED: August 4, 2017

SIGNED: B. Kalvin