2018 ONWSIAT 890
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 2649/17

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DECISION NO. 2649/17

M.F. Keil V-Chair

Heard: August 31, 2017
Judgment: March 15, 2018
Docket: 2649/17

Counsel: T. Zwiebel, for Worker
No one for Employer

Subject: Employment; Occupational Health and Safety; Public
Headnote
Labour and employment law

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decisions dated July 27, 2016, October 11, 2016, and January 6, 2017

***M.F. Keil V-Chair*:**

(i) Introduction to the appeal proceedings

1 The now 59 year old worker was hired in 2006 as an aircraft maintenance engineer. On October 30, 2012, he injured his low back while moving heavy barrels. The Board allowed entitlement for a strain on an aggravation basis and paid benefits until December 10, 2012. An MRI demonstrated degenerative changes and spinal stenosis which the Board found to be non-compensable and pre-existing. The worker was found to have reached maximum medical rehabilitation (for his back strain) as of March 2013.

2 The worker now appeals three ARO decisions. In a decision from July of 2016, the ARO denied the worker entitlement for the L3-4 and L4-5 stenosis and denied loss of earnings (LOE) benefits beyond December 10, 2012. In an October 2016 decision the ARO denied the worker entitlement for a permanent impairment award and entitlement to a Non-Economic Loss (NEL) award. It also denied entitlement for ongoing entitlement beyond October 2015. Lastly, the 2017 ARO decision denied the worker entitlement for chronic pain disability.

3 The above constitute the issues before me for determination.

(ii) Law and policy

4 Since the worker was injured in 2102, 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.

5 Specifically, sections 13, 43, 44 and 46 of the WSIA govern the worker's entitlement in this case.

6 Pursuant to section 126 of the WSIA, the Board provided the relevant policy packages, Revision #9, applicable to the subject matter of this appeal. I have considered these policies as necessary in deciding the issues in this appeal.

(iii) Analysis

7 This appeal was referred to me as a proposed settlement through the Early Intervention (EI) process. After a review of the file information and in consideration of the relevant law and policy, I agree that the appeal can be allowed in part as follows:

• The worker is entitled to full LOE benefits from December 10, 2012 until February 11, 2013, and partial LOE benefits thereafter until the worker returned to full hours performing modified duties. The worker is allowed ongoing entitlement for the low back injury of October 30, 2012 on the basis that his back did not return to its pre-accident state. The worker withdraws all other aspects of his appeal, mindful of the statutory time limits set out in the WSIA.

8 In agreeing to the proposed resolution I have been mindful of the following:

1. I acknowledge the worker had a pre-existing condition in that low back pain, massage therapy, back support and orthotic insert are noted in the years from 2006 until August of 2012. Of note, there was no lost time and the worker continued performing full duties throughout this six year period. Also of note, back problems are mentioned sporadically pre-accident: there is one mention in June of 2006, another in June of 2011, and in August of 2012, low back pain is noted as the worker's fourth concern. In my view this does not attest to a consistently problematic pre-existing condition.

2. The Board granted entitlement on an aggravation basis. This denotes a minor incident that would not be expected to cause a disabling injury on its own. The records show the worker was pulling 80 pound barrels filled with fuel. The mechanics of injury appears to me to involve force and some awkward movement, such that could be expected to cause injury. I also note that the worker sought medical treatment and was diagnosed with a back strain. His family physician authorized him off work. A visit to the Rothbart Centre on November 8, 2012, resulted in the physician recommending facet diagnostic nerve blocks, lumbar epidural steroid injections, sacroiliac injections, trigger point injections and therapeutic interventions. The family physician thought the worker's symptoms would improve in 6-8 weeks, this as of November 11, 2012. The above chronology suggests more than a minor or insignificant injury. Rather, it demonstrates a condition requiring active treatment and time off work.

3. As mentioned earlier, the November 16th MRI demonstrated "disc and facet degenerative changes at L4-L5, resulting in severe lateral recess stenosis, moderate central canal stenosis and left eccentric neuroforaminal stenosis." While this MRI points to significant underlying changes, I also note the worker had not been sent for an MRI prior to the workplace injury; consequently, these conditions, while present had not been of a significance to trigger clinical investigations.

4. It is the case that the physiotherapist from the WSIB Regional Evaluation Centre at Sunnybrook Hospital did suggest, in a report dated December 3, 2012, that the worker could return to modified duties with sitting restrictions of 30 minutes at a time, with frequent changes of position, there was to be no heavy lifting, repetitive bending or prolonged postures. It is also the case that the family physician provided a note dated December 10, 2012, indicating the worker had not finished all his treatment and would be off work until January 4, 2013. On January 15, 2013, the worker's treating physiotherapist requested treatment extension to help increase the worker's weight bearing, walking and back strength. The worker was seen for a consultation by physiatrist Dr. T. Gyenes. He noted improvement in the worker's back condition, but advised that restrictions should stay in place.

5. The family physician, Dr. N. Khotianov, authorized a return to modified work on February 11, 2013, an instruction with which the worker complied, beginning graduated hours and progressing to full time modified duties. Dr. Khotianov's note from March of 2013 indicated the worker would need permanent restrictions at work and this is the first indication that the worker would have an ongoing and permanent impairment affecting his ability

to perform regular duties. Reports from later in 2013 demonstrate the worker was complaining of ongoing pain, albeit milder in nature.

9 In considering the above, I am persuaded that the worker was following medical advice from December of 2012 until February 11, 2013, and was also participating in treatment, thereby cooperating in a safe and early return to work. I do not necessarily find the worker to have been totally disabled but, I do find that he was cooperating in rehabilitative on an active basis and that his return to work on February 11, 2013,was appropriate.

10 With respect to whether the worker fully recovered from the effects of his workplace injury, I have considered the relevant policy. Board *Operational Policy Manual*, Document No. 15-02-04, entitled "Aggravation Basis" explains how such benefits apply:

Policy

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

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

Guidelines

...This policy applies where a minor accident aggravates a pre-accident impairment. The intent is to limit entitlement to the injury/disease that is work-related. If a claim is allowed on an aggravation basis, the claim is paid for the acute episode only (temporary period of time) and entitlement ends when the worker's condition returns to the pre-accident state.

. . . . .

Definitions

A**ggravation:** is the effect that a work-related injury/illness has on the pre-accident impairment requiring health care and/or leading to a loss of earning capacity.

Minor accident: is one that, in the absence of a pre-accident impairment would be expected to cause a non-disabling or minor disabling injury/disease.

Pre-accident impairment: is a condition that has produced periods of impairment/disease requiring health care and has caused a disruption in employment (lost time and/or modified work). Although the period of time cannot be defined, the decision-maker may use a one to two year timeframe as a guide.

Pre-accident state: is the worker's level of impairment and work capacity prior to the work related injury/disease.

Determining entitlement for aggravation of a pre-accident impairment

Entitlement for aggravation of a pre-accident impairment is accepted when the clinical evidence demonstrates a relationship between the pre-accident impairment and the degree of impairment resulting from the accident, and the impairment after the accident is greater than would be expected owing to the pre-accident impairment.

When it is accepted that a minor work-related accident aggravated a pre-accident impairment benefits are paid until the worker returns to the pre-accident state.

Determining pre-accident impairment

Before entitlement for an aggravation is considered, decision-makers must determine if a pre-accident impairment exists. Evidence of this includes but is not limited to, a worker having

- a previously identified and symptomatic medical condition/impairment,
- medical precautions/restrictions and performing modified work prior to the accident,
- received regular health care treatment prior to the accident,
- lost time from work prior to the accident.

. . . . .

Ongoing entitlement

Decision-makers are responsible for limiting entitlement in claims allowed on an aggravation basis. The worker's clinical status is monitored to determine if the worker has reached the pre-accident state. If a worker remains off work after reaching the pre-accident state, the decision-maker discontinued benefits and advised the worker.

Because entitlement is limited to the acute episode only and ends when the worker returns to the pre-accident state, the WSIB generally does not consider recurrence entitlement or permanent impairment entitlement in cases where the claim was allowed on an aggravations basis

Permanent impairment

In some cases, workers never return to the pre-accident state. If there is a permanent worsening of the pre-accident impairment, the decision-maker may determine that the work-related injury/illness has permanently aggravated the pre-accident impairment. If clinical evidence confirms that the work-related injury/illness permanently increased the worker's pre-accident impairment, the worker may be entitled to a Non-Economic Loss benefit.

11 The worker's case does not fit squarely within the policy on aggravation. In the first place, when it comes to the pre-accident state, there was only one instance of treatment in the two years prior to the workplace injury. Second, there were no job modifications and there was no lost time. When it comes to the nature of the workplace injury, the awkward pulling and twisting of 80 pound barrels does not seem insignificant. In considering the worker's entitlement on an aggravation basis, there are sufficient anomalies in this case to find the worker never returned to his pre-accident state and a permanent impairment award is warranted, this was set out in the "permanent worsening of the pre-accident state" in policy. I reach this conclusion primarily because the pre-existing condition was not disabling in terms of employment and the workplace injury was more than minor. The worker's complaints were consistent and persistent following the work injury, as opposed to intermittent and not disabling prior to October of 2012.

12 It is possible that the worker's compensable accident, on its own would not have resulted in a permanent impairment. It is also possible that, minus the workplace injury, the underlying degenerative changes would not have become symptomatic and permanent in their active presence. I need to consider what did happen. In that context, I must assess whether the work injury made a significant contribution to the worker's ongoing condition and whether he ever returned to his pre-accident state. I start from the fact that his pre-existing condition was mostly quiescent prior to the injury, this in conjunction with the workplace injury being of some significance. In that treatment was ongoing following the injury and permanent restrictions were instituted only after the compensable accident, I find the worker never returned to his pre-accident state. I find, therefore he has ongoing entitlement for his October 2012 injury. The nature and extent of benefits are remitted to the Board for its determination, subject to the usual rights of appeal.

13 I am satisfied the above conclusions are in line with applicable law and policy.

14 Finally, the worker withdraws all other aspects of his appeal.

DISPOSITION

15 The appeal is allowed in part. The worker is entitled to full LOE benefits from December 10, 2012 until February 11, 2013, and partial LOE benefits thereafter until the worker returned to full hours performing modified duties. The worker is allowed ongoing entitlement for the low back injury of October 30, 2012 on the basis that his back did not return to its pre-accident state. The nature and extent of benefits flowing from this decision are remitted to the Board for its adjudication, subject to the usual rights of appeal.

16 The worker withdraws all other aspects of his appeal. I am satisfied that he and his representative are cognizant of the statutory time limits set out in the WSIA.