



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2664/17

BEFORE:

S. Peckover: Vice-Chair

HEARING:

September 5, 2017 at Toronto
Written

DATE OF DECISION:

September 19, 2017

NEUTRAL CITATION:

2017 ONWSIAT 2867

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated
May 26, 2016

APPEARANCES:

For the worker:

Not participating

For the employer:

R. Fink, Lawyer

Interpreter:

Not Required

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

(i) Introduction

[1] The employer appeals a decision of the ARO dated May 26, 2016, which concluded that it was not entitled to cost relief under the Second Injury and Enhancement Fund (SIEF).

(ii) Issues

[2] The issue before me is the employer's entitlement to SIEF relief with respect to the costs of this claim.

(iii) Background

[3] The following are the basic facts.

[4] The worker, a recycling truck driver born in 1975, began working for the accident employer in August of 2011. On March 13, 2012, while driving the recycling truck on his route, he ran over a woman in a wheel chair as he turned a corner. The woman died at the scene as a result of her injuries. The worker attempted to work on his next scheduled work day, but began to experience anxiety and flash-backs of the accident.

[5] Entitlement was allowed for post-traumatic stress disorder. He suffered a depressive episode following the accident. The Case Record also indicates that the worker had had an alcohol dependency problem since childhood, which resurfaced in 2009 when he left a relationship, and had escalated to binge drinking on a daily basis by 2011. He had managed to reduce his drinking to weekends for a period of a few months at the time of the accident, but he had relapsed after the accident. He had begun using cannabis at age 17, and used it daily for a year. As of psychologist Dr. Bourque's report dated July 13, 2012, he reported his cannabis usage as several times a month.

[6] The worker's alcohol usage increased dramatically following the workplace accident. Dr. Bourque opined, in her report dated October 18, 2012, that the worker had a pre-existing alcohol dependence problem that had been exacerbated primarily by the workplace accident, but also by personal life stressors (raising children as a single father and a recent breakup). He was experiencing a relapse in his drinking, depression, and PTSD symptoms. The worker was in need of intensive treatment, for which she recommended Homewood. The Board agreed to fund the program.

[7] The worker was at Homewood from January 10, 2013 to February 14, 2013. In a report dated January 31, 2013, clinical psychological associate W. Woo reported on the worker's chaotic childhood and on the familial history of addiction. She concluded that, in addition to the substance use disorder, findings from the assessment included significant symptoms of posttraumatic stress disorder, as well as depression. While depression was often an associated feature of PTSD, from the worker's self-report, the depressive symptoms had been present since his teen years, and while they were exacerbated by the PTSD, they were likely a separate, stand-alone problem. PTSD-focused psychotherapy concurrent with addiction recovery aftercare post-discharge was recommended.

[8] The worker attempted to return to work on three separate occasions, but each time, his depressive and PTSD symptoms increased. In her report dated May 27, 2013, Dr. Bourque recommended a permanent restriction on driving or being a passenger in a garbage truck. She felt that the worker could return to some form of work, but not with that employer or in any form of work involving driving.

[9] The worker was granted a 20% Non-Economic Loss for the permanent impairment resulting from his psychotraumatic disability. He was sponsored in a Work Transitions Plan which began in September 2013, to assist him in returning to work as a manufacturing assembler, a field in which he had prior experience. He obtained employment on September 27, 2013, and thereafter received partial Loss of Earnings (LOE) benefits.

[10] In a letter dated April 19, 2013, the employer's former representative wrote to the Board to request a review with respect to SIEF relief. They contended that the worker's participation in the Homewood program was due to his alcohol dependency, which, they understood, predated the claim, and was delaying his recovery.

[11] In a decision letter dated June 6, 2013, the Case Manager stated that a Board psychological consultant had reviewed the file, and confirmed that the worker had a minor pre-existing condition. The accident was major in severity, as it would result in a permanent disabling psychological injury. No cost relief therefore was applicable.

[12] At the Appeals Services Division, in a decision dated May 26, 2016, the ARO found that, while the worker's pre-existing depression, likely masked by drugs and/or alcohol, made him more vulnerable pre-injury than the average person, the worker still was able to function in his work life. He had nevertheless been able to maintain employment for a number of years. Following treatment at Homewood, and while maintaining his sobriety, he continued to experience flashbacks, nightmares, and triggers in his work environment which were determined to be directly related to his accepted claim and not to any pre-existing condition. The overall severity of his pre-existing depression was minor in nature. In terms of the severity of the accident, the wheelchair-bound female victim passed away as a result of being struck by a recycling truck, with the worker witnessing the victim trapped underneath the truck until help arrived. The worker also underwent court proceedings related to the victim's death, which contributed to his ongoing PTSD. The accident therefore was major in severity, from a psychological perspective. The employer therefore was not entitled to SIEF relief.

[13] The employer appeals from this decision.

(iv) Law and policy

[14] Since the worker was injured in 2012, 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.

[15] The Board's authority to establish the Second Injury and Enhancement Fund derives from section 98 of the WSIA, which states:

98 (1) The Board may establish a special reserve fund to meet losses that may arise from a disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class.

[16] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280*.

[17] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #9, would apply to the subject matter of this appeal:

- Package No. 181 – NEER Adjustments – DOA as of January 1, 2008;
- Package No. 247 – SIEF; and
- Package No. 299 – Decision Making / Merits and Justice.

[18] I have considered these policies as necessary in deciding the issues in this appeal, including *Operational Policy Manual (OPM) Document No. 14-05-03*, entitled “Second Injury and Enhancement Fund”. This policy provides in part:

Policy

If a prior disability caused or contributed to the compensable accident, or if the period resulting from an accident becomes prolonged or enhanced due to a pre-existing condition, all or part of the compensation and health care costs may be transferred from the accident employer in Schedule 1 to the SIEF.

Both physical and psychological disabilities are included.

Guidelines

There is no provision in the Act for the Fund to apply to Schedule II employers.

In situations where alcoholism plays a role in the causation of an accident, it is not considered to be a pre-existing condition with regard to the application of SIEF relief.

The objectives of this policy are to provide employers with financial relief when a pre-existing condition enhances or prolongs a work-related disability. It thereby encourages employers to hire workers with disabilities.

Definitions

Pre-accident disability is defined as a condition which has produced periods of disability in the past requiring treatment and disrupting employment.

Pre-existing condition is defined as an underlying or asymptomatic condition which only becomes manifest post-accident.

(...)

SIEF-application to employer costs

Medical significance of pre-existing condition*	Severity of accident**	Percentage of cost transfer***
Minor	Minor	50%
	Moderate	25%
	Major	0%
Moderate	Minor	75%
	Moderate	50%
	Major	25%

Medical significance of pre-existing condition*	Severity of accident**	Percentage of cost transfer***
Major	Minor	90%-100%
	Moderate	75%
	Major	50%

NOTES

* The medical significance of a condition is assessed in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person. An associated pre-accident disability may not exist.

With psychological conditions, the possibility of prior psychic trauma resulting from life experience could be considered as evidence of vulnerability, and justify recommending relief to the employer, even in the absence of pre-existing psychological impairment.

** The severity of the accident is evaluated in terms of the accident history and approved definitions.

Accident History Components

- mechanics (lift, push, pull, fall, blow, etc.)
- position (kneeling, standing, sitting, squatting, bending, etc.)
- environment (lighting, temperature, weather conditions, terrain, etc.)

Definition – “Severity of Accident”

Minor: expected to cause non-disabling or minor disabling injury

Moderate: expected to cause disabling injury

Major: expected to cause serious disability probable permanent disability

*** The percentage of the total cost of the claim transferred to the SIEF.

(v) Analysis

[19] In my view, in reviewing this file, the employer has been granted SIEF relief, but that relief is rated at 0%, since the accident was listed as major and the pre-existing condition as minor. Thus, only the quantum of SIEF relief is before me.

[20] As can be seen from the table of relief found in the Board’s SIEF policy, the amount of SIEF relief granted is dependent on two variables: the severity of the accident and the severity of the pre-existing condition.

[21] Board policy requires that accidents be characterized as either “minor” (expected to cause non-disabling or minor disabling injury), “moderate” (expected to cause disabling injury) or “major” (expected to cause serious disability, probable permanent disability). In addition to these definitions, the policy suggests that the severity of the accident is to be evaluated in terms of the “accident history components,” which include “mechanics” (lift, push, pull, fall, blow, etc.), “position” (kneeling, standing, sitting, squatting, bending, etc.) and “environment” (lighting, temperature, weather conditions, terrain, etc.). In determining the severity of accident *Decision No. 1021/12* confirmed that the actual injuries are not considered but rather the extent of disability the mechanics of the accident would reasonably be expected to cause.

[22] With respect to the matter of the pre-existing condition, Board policy requires that it be characterized as minor, moderate or major. The policy does not define these terms and indicates only that the medical significance of a condition is assessed “in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person”. These provisions were interpreted as follows in *Decision No. 1582/07*:

I interpret the policy to mean that the medical significance of a pre-existing condition should be considered to be “minor” if it made the worker slightly more liable to develop a disability of greater severity than a normal person, and that it should be considered “major” if it made the worker extremely liable to develop a disability of greater severity than a normal person. If the extent to which the pre-existing condition made the worker more liable to develop a disability of greater severity than a normal person was more than slight, but less than extreme, the medical significance of the pre-existing condition could be considered moderate.

[23] In addition to the medical reports summarized above, the following documentation is relevant to this issue.

[24] In preparation for the ARO hearing, Mr. Fink asked psychiatrist Dr. Jeffries to review the worker’s medical file, and to comment with respect to the severity of the pre-existing condition/disability (if any) and the severity of the accident, given the definitions in the SIEF Document. In the resulting report dated April 12, 2016, Dr. Jeffries found as follows:

You ask if the work accident was minor, moderate, or major?

I am guided, of course, by the definitions. Minor would be expected to cause non-disabling or minor disabling injuries. Moderate would be expected to cause disabling injury and major would be expected to cause serious disability and probable permanent disability.

It appears to me that this is certainly not of major severity. One would expect that a person would not be permanently disabled from such an accident. Many people are involved in motor vehicle accidents where they are responsible for the death of others. They are typically, with treatment, able to return to driving and to their previous employment. However, in his case the job he had was as a driver. One can understand that he might be limited in that kind of work but he should well be able to do almost every other kind of work in the normal course of things. As you had pointed out, his alcoholism and cannabis use intervened with the typical course of recovery.

...

You asked me to comment on the severity of the accident.

From a psychological point of view, it would be quite a severe trauma for anybody but not the most severe. For a simple example, it would have a less severe impact than if one were a close relative of the deceased. You wanted me to comment on the degree of the pre-existing condition. I believe I have done that in saying that it was of moderate degree, but that he was continuously vulnerable and will remain so should other things go wrong in his life.

[Emphasis added]

[25] With respect to the pre-existing condition/disability, Dr. Jeffries responded as follows:

If I understand the Guidelines correctly alcoholism is not considered to be a pre-existing condition. I would presume that a cannabis dependence is not considered to be a pre-existing condition also if one thinks about it logically. What then, is his pre-existing condition? It seems clear to me that **he had a vulnerability which might be best**

defined as a personality disorder, one in which he was particularly vulnerable to emotional turmoil stemming from an unhappy childhood, the loss of his father at an early age, being a victim of sexual abuse. It is clear that this vulnerability manifested in very disturbed behavior in his youth. To his credit, he had settled down after having a child, but it seems that that did not last which indicates ongoing vulnerability. One can see the alcoholism and cannabis dependence as attempts to self-treat his mood disorder. Later, by Dr. Bourque, it was described as a major depressive disorder, but **one would not expect an accident to precipitate a major depressive disorder in somebody who did not have vulnerability.** My own reading of this case is that in fact, **he had a persistent depressive disorder that was usually masked by drugs or alcohol and that there was a serious exacerbation quite understandable after the accident and its sequelae.** One would expect that he would return to his baseline after a while, a baseline which would be of ongoing vulnerability to mood disorder and most likely depressive symptomatology. **I would not consider this pre-existing condition to be minor. It contributed to drug abuse, alcohol abuse, significant relationship problems and job difficulties as well as serious misbehavior in his youth. I would therefore consider it to be a moderate condition and affecting the outcome of his disability.**

[Emphasis added]

[26] I agree with Dr. Jeffries' observation that alcoholism is not considered a pre-existing condition/disability, and thus, by extension, neither would cannabis abuse be a pre-existing condition/disability. I am of the view that the worker's pre-existing depression, and his unhappy childhood, resulted in a pre-existing vulnerability, masked by his alcohol and cannabis abuse, which was exacerbated as a result of the workplace accident. This pre-existing vulnerability resulted in a prolongation of the worker's symptoms, and in his treatment at Homewood. I agree with Dr. Jeffries that the pre-existing vulnerability would be likely to render the worker something more than 'slightly' likely to develop a disability of greater severity than the average person without that pre-existing vulnerability. However, I am not persuaded that it rendered him 'extremely' so. The pre-existing vulnerability therefore is moderate in severity.

[27] In terms of the accident itself, and its psychological impact, Dr. Jeffries is well placed, as a psychiatrist, to respond to this query. He indicates that this would be a severe accident, but not the most severe, in terms of its psychological impact. With treatment, the vast majority of people who are involved in similar at-fault accidents are able to return to driving at some point after the accident. He was of the opinion that the accident was moderate in severity. I accept that opinion, and therefore find that the workplace accident was moderate in severity.

[28] A moderate accident and a moderate pre-existing condition lead to 50% SIEF relief.

DISPOSITION

[29] The appeal is allowed as follows:

1. The employer is entitled to 50 % SIEF relief.

DATED: September 19, 2017

SIGNED: S. Peckover