



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2946/17

BEFORE: E. Kosmidis : Vice-Chair
M.P. Trudeau : Member Representative of Employers
J.A. Crocker : Member Representative of Workers

HEARING: September 28, 2017 at Toronto
Oral

DATE OF DECISION: January 11, 2018

NEUTRAL CITATION: 2018 ONWSIAT 120

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) dated June 2, 2016

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: M. Gulati, Punjabi

REASONS

(i) Introduction

- [1] The worker appeals a decision of the ARO.
[2] The ARO rendered a decision based upon the written record without an oral hearing.
[3] The accident employer is not participating in this appeal.

(ii) Issues

- [4] The issues under appeal are as follows:
1. Ongoing entitlement for a low back injury subsequent to January 30, 2014;
 2. Entitlement for chronic pain disability (CPD), or in the alternative,
 3. Entitlement for Psychotraumatic Disability.

(iii) Background

- [5] According to the October 9, 2013 Form 6, the now 61 year old worker started with the accident employer in 2011. On September 26, 2013, while working as a machine operator, the worker injured her low back while lifting a box weighing approximately 25 pounds. The injury was reported immediately and the worker was treated at the emergency department on the same date.
- [6] The hospital record notes that the worker was complaining of low back pain with bilateral leg pain. The diagnosis was back strain.
- [7] The worker saw her family doctor, Dr. Woo, who completed a Form 8 dated September 30, 2013. His diagnosis was a low back strain. It was his opinion that the worker was unable to return to work at that time.
- [8] In a decision dated October 28, 2013, the Board accepted entitlement for a low back strain. The worker lost time from work and received LOE benefits to October 4, 2013. In a decision dated December 12, 2013, LOE benefits after that date were denied on the basis that the accident employer had offered suitable modified work.
- [9] On November 15, 2013, the workplace parties attended a Return to Work meeting with a Return to Work Specialist (RTWS). According to RTWS Memo dated November 29, 2013, the worker returned to modified duties and graduated hours effective November 20, 2013.
- [10] The Board referred the worker to Dr. Levine, a low back expert, for an assessment. In his report dated November 15, 2013, he noted that the worker's pain was not optimally controlled and that the worker was pain focused. Based on the worker's symptoms and the clinical findings during his assessment, Dr. Levine's diagnosis was acute lumbar strain/mechanical back pain superimposed on prior chronic back pain. He also noted that the worker presented in a pain-focused and movement-avoidant manner. He stated that multiple "yellow flags" were evident, which collectively represent potential barriers to recovery. As such, his prognosis was guarded.

[11] He recommended a referral to a WSIB Back Specialty Clinic. However, he also opined that the worker could return to work on graduated hours and modified duties.

[12] A December 5, 2013 MRI report of the lumbar spine revealed mild multi level degenerative changes without evidence of canal or foraminal stenosis.

[13] The worker was referred for a REC assessment where she was assessed by an orthopaedic surgeon, Dr. Clements. In his report dated January 2, 2014, Dr. Clements' opinion is that the worker sustained a lumbar strain superimposed on a non-occupational diagnosis of degenerative disc disease of the lumbar spine. He recommended a four week exercise based therapy program and that the worker continue to work modified duties until completion of this program. At that point, it was expected that the worker could return to her regular duties.

[14] The worker was laid off effective January 6, 2014 due to the closure of the manufacturing facility.

[15] In a decision dated January 27, 2014, the Board determined that the worker was not entitled to further LOE benefits after her lay off.

[16] The worker requested entitlement to CPD in a letter dated July 9, 2015. Entitlement to CPD and Psychotraumatic Disability were denied by the Board in a decision dated October 14, 2015.

[17] The worker appealed both decisions. In a decision dated June 2, 2016, the ARO allowed the worker's appeal in part. The worker was awarded full LOE benefits from October 4, 2013 to November 20, 2013 on the basis that the worker was not capable of returning to work for that period of time.

[18] The worker was awarded partial LOE benefits from January 6, 2014 up to but not including January 30, 2014, as the ARO found that the worker was performing highly accommodated work that would not have been available in the general labour market. Partial LOE benefits were based on the worker's ability to work full time as a Customer Service Representative, earning minimum wage. LOE benefits beyond that date were denied as the ARO found that the worker had recovered from the effects of the worker related accident.

[19] Entitlement to CPD and Psychotraumatic Disability remained denied.

[20] The worker now appeals this decision.

(iv) Law and policy

[21] Since the worker was injured in 2013, 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.

[22] Specifically, section 13(1) of the WSIA provides:

13 (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

[23] 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*.

[24] The standard of proof in workers' compensation proceedings is the balance of probabilities. Pursuant to subsection 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

[25] Pursuant to section 126 of the WSIA, the Board provided the policies applicable to this appeal. We have considered these policies as necessary in deciding the issues in this appeal, in particular:

- *Operational Policy Manual* (OPM) Document No. 15-04-03 Chronic Pain Disability,
- OPM Document No. 15-04-02 Psychotraumatic Disability,
- OPM Document No. 15-06-01 Entitlement Following Work Disruptions: General,
- OPM Document No. 15-06-03, Entitlement Following Work Disruptions: Permanent Layoffs

(v) **Analysis**

Entitlement for CPD or, alternatively Psychotraumatic Disability

[26] The worker is seeking entitlement for CPD as arising from an organic injury occurring on September 26, 2013 where she injured her low back. In the alternative, the worker is seeking entitlement for a psychotraumatic disability.

[27] The worker's appeal is allowed. The Panel finds that the worker has entitlement for CPD for the following reasons.

[28] Tribunal case law has held that it is necessary to determine the predominant nature of the disability. An injury is characterized as CPD if the nature of the disability is most closely associated with pain which cannot be attributed to organic causes. If, however, the nature of the disability is most closely associated with a psychiatric diagnosis that is distinct from the worker's pain (e.g., depression or conversion disorder) then it is generally compensated as a psychotraumatic disability. See, for example, *Decisions No. 881/98 and 1858/13*. In addition, different Board policies apply to CPD and psychotraumatic disability claims.

[29] 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	Evidence
A work-related injury occurred.	A claim for compensation for an injury has been submitted and accepted.
Chronic pain is caused by the injury.	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

Condition	Evidence
	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.
The pain persists 6 or more months beyond the usual healing time of 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.
The degree of pain is inconsistent with organic findings.	Medical opinion which indicates the inconsistency.
The chronic pain impairs earning capacity.	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.

[30]

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.

Marked life disruption - physical aspects

- constant, unremitting pain
- pain upon movement or use of the "painful body part"
- specific activities aggravate pain
- sitting, standing, and walking are limited to short periods of time
- walking is limited to short distances
- restricted bending and lifting
- difficulty getting out of bed in the morning due to stiffness and pain
- sleep regularly disturbed by pain: difficulty falling asleep, premature awakening, repetitive awakening
- sleeping medication is required to initiate sleep
- change in appetite or weight (increase or decrease)
- increased or constant tiredness
- feeling of unsteadiness when standing
- dizziness
- headaches....

[31] The CPD policy recognizes that not all claims involving persistent pain are adjudicated according to the CPD policy, stating:

If pain is predominantly attributable to an organic cause or to the psychiatric conditions of post-traumatic stress disorder or conversion disorder, the worker will be compensated pursuant to the WSIB's policy on that organic or psychiatric condition. If, however, the chronic pain arises predominantly from psychological sources (other than post-traumatic stress disorder or conversion disorder, see 15-04-02, Psychotraumatic Disability) or undetected organic sources, the pain will be considered for compensation purposes under the CPD policy.

[32] The worker testified about her work history since coming to Canada in 1979 until she started with the accident employer in August of 2010. The worker also testified about her work injuries before the September 26, 2013 injury to her low back.

[33] The worker testified that she injured her low back in 1986 while working as a machinist and was awarded a 15% pension in 1990. The worker testified that she was off work for a

lengthy period of time after this accident. She subsequently obtained a new job as a sewer in November of 1992. The worker injured her low back while working for this employer in April of 1997. She returned to work but sustained another injury to her shoulder and upper back on December 19, 2005. She was laid off in 2008. She started looking for work at that time. She found a packing job doing some light packing. She then started working for the accident employer, as a temporary placement employee in August of 2010. She was hired full time in 2011.

[34] The worker testified that despite these earlier injuries, she was able to return to work. The worker also denied any previous psychiatric problems arising from these injuries.

[35] The worker testified that, while she experienced pain in her low back before the September 26, 2013 accident, this pain came on about once per month and lasted for about one day. The worker testified that the pains were not sharp pains and usually did not extend into her leg. She was able to perform the majority of her household chores but was limited from doing any heavy lifting.

[36] The worker testified that she had a good social life before the September 26, 2013 accident. She would go out with her family once a month to a restaurant. She would see her friends socially once or twice a month and she would go to temple every week. She saw her family doctor twice per month. The worker also testified that she had no problems with her marriage before September 26, 2013.

[37] However, this has changed since the September 26, 2013 accident. The worker testified that she has constant low back pain and that even sitting bothers her back. Because of this she no longer attends temple. She has problems with her legs and has been experiencing sharp leg pain for the last two years.

[38] The worker testified that she is unable to do any work at home because of her low back pain. Her marriage has been negatively impacted as she finds that she argues with her husband because he has to do more around the house. Her children do not want to help and they are angry at her when she asks for help. She does not go out to see her friends and they do not come to visit her. She is homebound and testified that she goes out of the house about twice per year for social functions.

[39] The worker testified that she has low energy and is very inactive. Her mood is affected because of her pain and the fact that she cannot function as before the September 26, 2013 accident. She is also upset because she cannot work. Her sleep is interrupted due to the pain and she only sleeps four to five hours per night. Her pain varies each day. When the pain is bad, she cannot do much, so she tries to rest and use the heating pad or take hot showers.

[40] She is not undergoing any active treatment but she does some stretches at home when she is able.

[41] After carefully considering the worker's testimony, the medical evidence and the submissions from the worker's representative, the Panel finds that the worker satisfies the Board's criteria for CPD. The worker sustained a low back injury as a result of a workplace accident that occurred on September 26, 2013.

[42] The Panel also finds that the worker has experienced low back pain which has persisted more than six months beyond the usual healing time for a low back strain. The worker testified that whereas before the September 26, 2013 accident she would have low back pain about once

per month, since the September 26, 2013 accident her low back pain is constant and now radiates into both legs.

[43] The worker reported constant back pain with radiation into both legs to Dr. Levine. In his report dated November 15, 2013, Dr. Levine states:

Based on the worker's symptoms and the clinical findings during today's assessment, the worker's back pain would be characterized as acute lumbar strain/mechanical back pain superimposed on prior chronic back pain. As noted, the worker presented in a pain focused and movement avoidant manner. Multiple "yellow flags" were evident, which collectively represent potential barriers to recovery. As such, prognosis appears somewhat guarded at this juncture.

[44] Dr. Levine also noted that the worker reported minimal relief from her medication and recommended that the worker be referred to the WSIB Back and Neck Specialty Clinic.

[45] The worker was assessed by Dr. Clements, an orthopaedic surgeon. In his report dated January 2, 2014, he noted that the worker continued to complain of constant low back pain which was aggravated by bending, lifting, reaching and movement. The worker also described radiation of pain into both lower extremities into her feet. It was his opinion that the worker sustained a lumbar strain superimposed on a non-compensable diagnosis of degenerative disc disease. There was no evidence of nerve root compression, irritation, radiculopathy or myelopathy. It was his opinion that the worker would return to her pre-accident state after four weeks of active exercise based therapy.

[46] However, the worker continued to complain of low back pain with radiation into both legs. As evidenced in Dr. Woo's clinical notes, the worker continued to see her family doctor with these complaints beyond the date that Dr. Clements opined that the worker would return to her pre-accident condition. The worker testified that she continues to see Dr. Woo every month and that he prescribes her pain medication. She currently takes Naproxen, Elavil and Tylenol #2. The Panel accepts the worker's testimony and finds that the worker's pain has persisted for more than six months beyond the usual healing time.

[47] The Panel also finds that the worker's continuing pain symptoms are not consistent with her organic findings. Dr. Levine noted that the worker demonstrated multiple non organic elements in her clinical presentation and that the worker's symptoms were not explained by his clinical findings. This issue was also raised by Dr. Clements who noted that the worker was unable to walk with other than a shuffling gait and that she needed to hold onto furniture in the room. He also identified yellow flags and noted that the worker had obvious concerns with the concept of hurt equals harm. The Panel finds that both Dr. Levine and Dr. Clements have raised concerns relating to a non organic psychiatric component to the worker's injuries.

[48] The Panel also finds that the effects of the worker's pain have caused a marked life disruption. The Panel accepts the worker's testimony that she spends most of her time at home and that she does very little by way of domestic chores. The worker testified that, whereas previous to the September 26, 2013 accident, she did all of the household chores, she testified that she no longer vacuums, makes the beds or cooks for her family. She needs help from her daughter to do the household laundry. The worker testified that she no longer does any of the shopping. The worker also testified that she is no longer socially active and does not see her friends or go to temple.

[49] The Panel notes that the worker was assessed by a psychologist, Dr. Garber who prepared a report dated July 6, 2015. Dr. Garber saw the worker on one occasion, for a period of approximately seven hours, involving clinical examination and psychological testing, at the request of the worker's representative. The Panel also notes that Dr. Garber reviewed the worker's medical file including medical information from the worker's previous workplace injuries and provided a thorough history in his report.

[50] Dr. Garber provides an Axis I diagnosis of Pain Disorder Associated with Both Psychological Factors and a General Medical Condition and Major Depressive Disorder, Single Episode, Chronic Mild to Moderate. Dr. Garber also finds that the September 26, 2013 accident was a significant contributing factor to the development of the worker's current psychological difficulties.

[51] In coming to the conclusion that the worker has entitlement to CPD, the Panel relies upon the following from Dr. Garber's report:

At one point during the course of the examination she became openly tearful. It was of interest to note that in attempting to explore that bout of tearfulness she was quite adamant that her tearfulness was attributable to pain and not to any form of sadness, disappointment, or emotional distress. It was only after the limits of her introspective ability were challenged that she acknowledged that she does feel some sadness; however, she was eager to ensure that there was a clear understanding that this sadness was because of her intractable pain.

What became evident as the examination process unfolded was her profound commitment to be seen as being riddled by pain, and that pain was her primary, if not sole issue. There appeared to be a substantive commitment to avoiding being identified as also struggling with psychological difficulty.

[52] The worker's pain related limitations are further noted by Dr. Garber as follows:

She reported a marked and substantive reduction in libidinal interest and activity to the point where she described herself as having no sexual interest.

Her friendships are limited to her relationship with her sisters which she has maintained, albeit with less frequency and intensity.

She indicated that her self-care is at times compromised, and that she requires some help.

Similarly, she is unable to fully satisfy all requirements associated with household shopping, cooking, cleaning, or laundry. She does require assistance from others in satisfying the more physically demanding components of such activities.

She stated that she also is unable to engage in any form of snow removal or lawn care. She leaves that to her husband.

She reported that she was able to satisfy most, if not all, of the above activities, albeit with some accommodation.

She indicated that these limitations are all attributable to pain-related concerns.

It was at this point in time that this was further explored. It became clear that not only does the worker experience pain, but of equal, if not potentially greater concern, is her exquisite dread of aggravating her pain. She thereby manages her pain primarily by a process of avoidance and some degree disengagement from the world around her.

Therefore, we are left with a rather interesting and, in my clinical opinion, significant conundrum, in the sense that when the worker reported pain it remains unclear as to whether she is reporting actual pain or the anticipation of such pain.

Regardless of what may be considered by some as a meaningful distinction, the end result is similar in that her actual or anticipated pain experiences resulted in a level of preoccupation and dread which likely impacted her level of functionality.

[53] The Panel accepts Dr. Garber's opinion and finds that the worker's condition is better reflected in entitlement for CPD rather than entitlement under the Psychotraumatic Disability Policy.

[54] The worker's appeal is allowed. The worker has entitlement for CPD.

Ongoing Entitlement for the low back beyond January 30, 2014

[55] The worker's appeal is allowed. The Panel finds that the worker has ongoing entitlement for a low back condition and is entitled to full LOE benefits beyond January 30, 2014.

[56] The Panel notes that, despite the worker's previous compensable claims, the worker was able to work at a relatively heavy job with the accident employer that was performed standing and working at a fast pace. The worker testified about her duties as a machine operator and that she would have to change a 20 pound filter two to three times per day. Her job also involved lifting twelve 20 to 30 pound boxes per hour and frequent twisting and bending.

[57] The Panel notes that after the September 26, 2013 accident, the worker returned to modified duties and hours on November 20, 2013. However, according to the worker's testimony, the work was highly accommodated and she started at four hours per day. She could take frequent breaks as needed. The worker testified that even though she was there for four hours, she only actually worked two hours. She last worked on December 19, 2013 and was up to eight hours for her last two days at work. However, the worker testified that she was not fully productive and that she was being assigned a variety of light duties but not a specific existing job.

[58] The Panel finds that the duties performed by the worker were highly accommodated and would not have been available in the general workforce. The Panel also notes the worker's past work history had been working as a sewer in a factory setting and as a machine operator. The worker had no previous experience in Customer Service. The worker has now been granted entitlement for CPD.

[59] The Panel notes that the worker has actively looked for work since she was laid off by the accident employer. The worker has prepared a resume and has kept a log of all the employers that she has contacted. However, the Panel finds that based on the worker's current age of 61, her work history and her chronic pain which to date remains untreated, the worker is unemployable. The Panel relies on the opinion from Dr. Garber who opines on the worker's work restrictions based on her psychological issues. Dr. Garber states:

She suffers from a rather entrenched chronic pain disorder, and as a result, it is probable that she will be exceedingly hesitant to attempt to engage in any activities in which she considers as jeopardous or beyond her level of capability. At this point in time I am of the opinion that, from a clinical psychological perspective, she would be restricted from engaging in any activities she perceives as jeopardous until such time that she has had an opportunity to improve her circumstance in a meaningful fashion, probably through involvement in a multidisciplinary chronic pain treatment program.

[60] The Panel finds that the worker's loss of earnings is related to her September 26, 2013 workplace injury and to the worker's development of CPD for which she now has entitlement. Dr. Garber states that, given the protracted nature of the worker's difficulties as well as the severity of her clinical presentation, the worker's prognosis is guarded. The Panel accepts Dr. Garber's prognosis that the worker's ability to return to work without involvement in a multidisciplinary chronic pain treatment program is guarded. The Panel finds that the worker was unable to work in any suitable occupation, as of January 30, 2014, as a result of the compensable CPD. Accordingly, the worker is entitled to full LOE benefits from January 30, 2014, subject to further statutory reviews.

[61] The worker's appeal is allowed.

DISPOSITION

[62] The worker's appeal is allowed.

1. The worker is entitled to benefits under the Board's CPD policy as arising from the workplace accident occurring on September 26, 2013.
2. The worker is entitled to full LOE benefits from January 30, 2014, subject to any applicable statutory review, to age 65.

[63] 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: January 11, 2018

SIGNED: E. Kosmidis, M.P. Trudeau, J.A. Crocker