



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 401/19

BEFORE: A.G. Baker : Vice-Chair
M. Christie : Member Representative of Employers
G. Carlino : Member Representative of Workers

HEARING: March 5, 2019 at Toronto
Oral

DATE OF DECISION: April 30, 2019

NEUTRAL CITATION: 2019 ONWSIAT 1051

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated
November 21, 2017

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not Participating

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

(i) Introduction and issue

[1] The worker appeals the decision of Appeals Resolution Officer (ARO) L. Mansueti, dated November 21, 2017. From that decision the worker appealed two issues, entitlement to benefits for Chronic Pain Disability (CPD) benefits, or alternatively Psychotraumatic Disability benefits. The Panel also noted the following background that was provided by the ARO in the decision under appeal:

On or about July 8, 2010 the worker was operating a forklift on a customer's flatbed truck when the truck began rolling forward causing the truck and the worker to roll off the loading dock to the ground, falling a distance of 3 metres. The worker sustained a low back injury. The worker was 38 years of age at the time of injury, working as a forklift operator at a temporary agency. He had worked with the employer for less than 1 month.

Entitlement was accepted for a lumbar strain for health care benefits. The worker returned to work on July 12, 2010 and continued working until July 14, 2010. The worker sought medical attention on July 15, 2010. The employer offered the worker modified duties on July 15, 2010; however, the worker did not return to work until August 4, 2010. The worker stopped working on August 6, 2010 because he had been riding a bus that decelerated quickly, and he aggravated his back injury. The worker returned to work with the employer on August 23, 2010, performing modified duties. The worker remained off work as of August 24, 2010.

In October 2010 and November 2010 the operating area advised the worker there was no further entitlement to benefits under this claim due to his non-cooperation in health care assessments and lack of communication with WSIB.

In December 2015 the worker requested entitlement to benefits for a psychotraumatic disability or CPD. The decision letter dated March 7, 2017 denied benefits for a psychotraumatic disability and CPD. The worker objected to the decision dated March 7, 2017, and these issues are now before the Appeals Services Division.

[2] The ARO also denied both issues in the decision under appeal. The worker has appealed those findings to the Tribunal.

(ii) Law and policy

[3] The *Workplace Safety and Insurance Act, 1997* (WSIA) is applicable to this appeal. The Panel also noted section 126 of the WSIA requiring that we apply Board policy. In that regard, the following policy packages, Revision #9, have been stated by the Board to be applicable to this appeal:

- 9 – Psychotraumatic Disability
- 10 – Chronic Pain Disability
- 300 – Decision Making/Benefit of Doubt/Merits and Justice

[4] The Panel has considered the above noted policies as necessary in reaching the below decision.

(iii) Decision

[5] The worker's representative submitted that the worker's primary position was that he was entitled to CPD benefits. The Panel has considered the worker's testimony and the submissions from his representative and we find that the worker is entitled to CPD benefits. As such, there is no need in this decision to consider the alternative psychiatric claim, which is hereby denied.

[6] Board *Operational Policy Manual* (OPM) Document No. 15-04-03, deals with CPD entitlement, and provides in part as follows:

The WSIB will accept entitlement for chronic pain disability (CPD) when it results from a work-related injury and there is sufficient credible subjective and objective evidence establishing the disability.

Guidelines**Exception**

Not all claims involving persistent pain are adjudicated according to this policy. 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.

Eligibility criteria

For a worker to qualify for compensation for CPD the following conditions must exist, and must be supported by all of the indicated 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 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.

Condition	Evidence
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.

- [7] The ARO in this case reviewed the file and medical material extensively and concluded that the worker did not meet all five criteria under the CPD policy. In reaching that finding we noted that the first criterion was not at issue; there was a workplace accident and injury in this case to the low back.
- [8] The ARO however did not agree that the second criteria was met, noting that the evidence showed that there were pain complaints that were not caused by the work accident/injury. It was noted for example that there was only incidental mention of the work accident in third party medical examinations.
- [9] The ARO agreed, and it was also evident from the file that the worker's pain has persisted well beyond the six month window under the CPD policy.
- [10] The ARO however cited two doctors, Dr. Lexier and Dr. Handelsman, as likely underestimating the worker's functional abilities. It was concluded that the assessments conducted stood for the conclusion that the worker's chronic pain was not likely caused by the work accident. The ARO also noted the emphasis by the worker's representative on reporting from Dr. Jeffries in this case, and that his expertise had been previously recognized by the Tribunal in *Decision No. 2310/15*. However, the ARO did not agree there was a work-related somatic disorder. In brief, the ARO concluded that there was insufficient evidence to support the worker has a compensable pain disorder.
- [11] The ARO did not dispute that the worker's pain was inconsistent with the organic findings. Again, however, the ARO was not satisfied that the worker's presentation was in keeping with a CPD disorder. In that regard, the reporting from Dr. Handelsman and Dr. Romanelli was cited, including the finding that the worker demonstrated full ROM of his lumbar spine with no indication of neurological impairment.
- [12] In regard to the fifth criterion, the ARO noted reports from Dr. Waiser and Dr. Lexier, and that the worker was not found to be substantially unable to complete the essential tasks of his employment and engage in personal chores and home maintenance. Again, the ARO also concluded that the worker's ongoing inability to secure work was not associated with his 2010 work accident. Noting the failure to meet all the criteria under the policy, CPD benefits were therefore denied.
- [13] The Panel however noted the worker's testimony in this case. He evidently had a checkered work history in various jobs and was engaged by an agency that placed him in June 2010 as a general helper. He explained that he had some personal problems in the past, but that he was living a stable life at the time of the work accident. He also described his work injury as noted above. The worker went on to seek medical attention including from his family doctor and specialists. It was also evident from the medical information on file that the worker's condition progressed into a chronic pain condition.
- [14] The worker was not a good historian, but did recall being prescribed narcotic pain medication post-accident, as well as suffering personal and social consequences after his injury.

As noted, for example, from reports from Dr. Waiser in August of 2010, the worker had a difficult background that was characterized by substance abuse, family conflict and emotional distress. The worker also had pain and distress that was opined to have been aggravated by the non-occupational accident that impacted his compensable back condition. He also evidently suffered from depression in addition to his pain condition.

[15] The worker's family doctor opined in March of 2014 that there was a medical relationship between the worker's ongoing difficulties and his work injury. It was noted for example that the worker presented with chronic pain, leg pain and depression. He was prescribed narcotics and analgesics and his chronic pain was only in partial remission according to the doctor. It was also noted that it was not possible to separate the compensable and non-compensable injuries to the worker. The doctor also stated that the worker had suffered steady deterioration in mental health, as well as suffering from chronic pain, fatigue, and muscular dysfunction. The worker was referred to a pain clinic in order to address pain control and reduce reliance on prescription pain medication.

[16] A number of other reports were noted on file that also supported a more widespread chronic pain condition. They included for example the report from Dr. Dance, physiatrist, in September 2010, which also noted the worker's narcotic pain medication and radiating pain symptoms. Certainly, the doctor questioned the worker's history in light of prior addiction problems. However, the doctor did recommend further psychiatric and pain management strategies be addressed. The worker's representative also led the Panel through prior medical records that showed the worker had been successfully treated and was stable at the time of the work accident.

[17] It was also evident from the clinical records on file that the worker increased reliance on prescription medication by August of 2010. Functional abilities reporting into September 2010 continued to show physical restrictions. As noted in occupational therapy reporting in January 2011, the worker continued to suffer from widespread pain and required assistance with a range of household duties. A number of recommendations also included assistive devices and ongoing rehabilitation for the cervical and lumbar spine, pain management, and to improve range of motion.

[18] The Panel also noted the reporting of Dr. Handelsman, rheumatologist, in February of 2012. The doctor provided the following opinion:

[The worker] has chronic pain. There also appears to be anxiety and likely depression. It is unclear what medication he is taking. He may benefit from Cymbalta in view of the diffuse pain he is getting, as well as the personality changes and although a psychiatrist/psychologist assessment or reassessment might be helpful, in my experience this is more of the case when there is insight into the problem.

[19] It was evident from the above-noted reporting that the worker suffered from progressing widespread chronic pain that has persisted well beyond the six-month window under the policy, and that is not consistent with the original organic injury in this case. Rather, it is evident that the worker's condition now includes a radiating pain condition that also has a significant psychiatric component. As Dr. Salama stated in an October 2012 mental health consultation, the worker's chronic pain has impacted his mood and sleep. The Panel also noted the mental health consultation from Dr. Rudky in 2015, and that confirmed the worker suffered from both chronic pain and depression.

[20] The October 2014 reporting from Dr. Jeffries, psychiatrist, was also persuasive to the Panel in relation to the causal connection and other policy criteria relating to the worker's CPD condition and his work injury. We noted that the history included the 2010 work accident and the further aggravation of the injury. The worker's ongoing use of pain medication was also noted in relation to the sequelae from the work injury, as well as the negative impact it has on his social life. It was also noted that he remains with ongoing physical limitations that prevent him from performing more than light household chores. It was also noted the worker has been unsuccessful in finding a job.

[21] Dr. Jeffries also reviewed the worker's medical history and interviewed the worker. The doctor diagnosed the worker with adjustment disorder, depression, and a somatic symptom disorder with predominant pain. Of importance to this decision was the doctor's opinion that the worker's pain disorder "...will definitely impair his ability to work..." and that "...it will be extremely difficult for him to become employed." The doctor also stated that there are obvious physical problems and chronic pain that would require major accommodations for any employment prospects.

[22] In summary, we find that the worker developed a chronic pain disability from his work injury to the low back, which has never fully resolved, and has persisted well beyond the six month window under the policy. It was also evident from the above noted reporting that the work accident was a significant contributing factor to the worker's widespread pain, and that the pain is not consistent with the organic findings. That was evident from the balance of the above noted medical reports, notably from Dr. Jeffries and Dr. Handelsman. It was also evident from various reports that the worker's pain condition has significantly contributed to his inability to perform many physical activities, has caused marked life disruption, and has evidently impaired his earning capacity.

[23] The Panel therefore finds that the worker has satisfied the criteria under the above noted policy. He is entitled to CPD benefits, and a Non-Economic Loss (NEL) assessment in that regard. Further, given the granting of CPD benefits, we did not find it necessary to address the worker's alternative claim for Psychotraumatic Disability benefits, which is hereby denied.

[24] We also note in that regard that a CPD rating is holistic and that, when assessing a worker for CPD, all organic and psychiatric accident-related impairments are considered under a global impairment rating for CPD. The CPD award therefore replaces the worker's organic low back injury, which is hereby rescinded.

DISPOSITION

[25] The appeal is allowed in part.

[26] The worker is entitled to benefits for Chronic Pain Disability, and a Non-Economic Loss assessment in that regard.

[27] The worker is not entitled to benefits for the alternative claim for Psychotraumatic Disability benefits.

DATED: April 30, 2019

SIGNED: A.G. Baker, M. Christie, G. Carlino