



**WORKPLACE SAFETY AND INSURANCE
APPEALS TRIBUNAL**

DECISION NO. 1160/09

BEFORE: R. Nairn: Vice-Chair

HEARING: June 9, 2009 at Toronto
Oral hearing

DATE OF DECISION: September 22, 2009

NEUTRAL CITATION: 2009 ONWSIAT 2224

DECISION UNDER APPEAL: WSIB ARO decision dated December 12, 2006

APPEARANCES:

For the worker: Mr. R. Franklin, Lawyer

For the employer: Did not participate

Interpreter: Ms. M. Oleynyk, Polish

REASONS

(i) Introduction

[1] At the time of the events under consideration here, the worker was employed as a "home support worker" in the employer's home health care business. Born in 1951, the worker was hired by the accident employer in April 2001.

[2] On July 8, 2005, the worker experienced an onset of pain in her low back as she tried to help a client get out of a bathtub. The Health Professional's Report of July 13, 2005, completed by family physician, Dr. B. Pietraszek, provided a diagnosis of "lumbar strain".

[3] At the time of this incident, the worker was in receipt of a 19% Non-Economic Loss ("NEL") award for a low back injury she had sustained with another employer in July 1998.

[4] Information on file suggests that initially, the Workplace Safety and Insurance Board (the "Board") did not grant the worker entitlement to benefits for the 2005 incident being of the view that the worker's condition had not deteriorated below the level of her 19% NEL award. Further medical information was submitted however, and in Memo #8 dated October 25, 2005, Dr. Grbac of the Board noted:

[...]

The MRI report from Jul 05 however did document a right paracentral disc protrusion at L4-5 with probable compromise to the right L5 nerve root. The clinical history noted a "sudden post-traumatic right sciatic syndrome" and a "probable acute disc herniation".

1) It would appear that the medical information on file does support at least a temporary deterioration of this IW's condition below the prior NEL level. More recent narrative reports outlining the objective clinical findings should be reviewed.

2) The diagnosis appears to be compatible with the mechanism of injury as it is temporally related with no other causative factor having been identified.

3) The IW's LOI as noted in the F26 from Aug 05 was partial. The back restrictions which were present following the initial injury in 1998 would be applicable. The F26 of Aug 05 lists several restrictions but these are not completely decipherable.

[5] In light of the comments from Dr. Grbac, the worker was granted entitlement to Loss of Earnings ("LOE") benefits following the incident of July 8, 2005.

[6] In a letter dated August 2, 2005, addressed to Dr. Pietraszek, a member of the employer's human resources department advised that they had an Early and Safe Return to Work Program which could assist the worker getting back to work. The employer indicated in part:

In light of her recent injury, we can provide the following modified duties for this employee:

- light office duties such as filing, charting, packaging gloves etc. where [the worker] would not be required to perform any lower back activities so as not to hinder her recovery process. The hours of work can be gradually increased based on her progress and your recommendations.

and/or

- modified work duties within the community, initially with a buddy assistant, where she can perform some duties such as dusting, cooking, washing and drying dishes, cleaning kitchen services, folding laundry, tidying rooms, straightening the bed, socializing with the client, making coffee or tea as needed, and cleaning the microwave where [the worker] would not be required to perform any lower back activities so as not to hinder her recovery.

Please complete all areas of the attached Functional Abilities Form for timely return to work to let us know [the worker's] limitations and capabilities at this time so that we may create a modified work program based on your assessment.

- [7] Dr. Pietraszek completed a Health Professional's Progress Report on August 30, 2008 which indicated, among other things, that the worker would have permanent restrictions that included lifting and bending. The Claims Adjudicator reviewed the information provided and in Memo #9 dated November 8, 2005, concluded:

Further to MC comments in M#8, the medical information on file supports a temporary deterioration below the worker's prior NEL level.

Based on the F26 dated Aug 2005, worker has been considered partially impaired.

I noted employer's ltr 2 Aug 2005 offering modified work. Light duties consist of filing, charting, packaging gloves etc. and/or, mod work within community with a buddy assistant.

Noting that modified work is suitable and within worker's precautions, LOE benefits will be limited to 2 Aug 2005 only.

- [8] In a decision dated November 8, 2005, the Claims Adjudicator confirmed that the worker's LOE benefits were being terminated effective August 2, 2005, and noted:

The doctor's progress report of August 30, 2005 supports you are partially impaired and capable of returning to work within your medical precautions. Your employer has offered you modified work on 2 Aug 2005. A letter was sent to your family physician, Dr. Pietraszek indicating that modified duties are available. These duties consist of either light office duties such as filing, charting and packaging gloves and/or duties within the community with buddy assistance.

Noting that suitable modified work is available and noting that you are currently partially (impaired) Loss of Earnings benefits have been limited to August 2, 2005.

- [9] The worker objected to the termination of her LOE benefits and the matter was referred to the Board's Appeals Branch. However, before the appeal was heard, the Appeals Resolution Officer ("ARO") directed that the matter be returned to the Operating Area so that a ruling could be made on the worker's entitlement to benefits for depression which she claimed could be causally related to her compensable accident. Subsequently, the Claims Adjudicator requested a medical opinion and in Memo #34 dated September 6, 2006, Dr. Grbac noted in part:

[...]

The report from Dr. Zurowski of Aug 06 identified the presence of an adjustment disorder with an anxious and depressed mood [chronic]. The report identified not only the compensable injury but a combination of "unfortunate life events, poor adjustments, language barrier and physical injuries" as factors responsible for the IW's ongoing psych condition.

Medical opinion and general discussion based on a review of the available medical information on file at the time of this review:

- 1) The report from Dr. Muller supports a partial LOI.
- 2) Board policy stipulates that the psychotraumatic disability applies if it 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. This does not appear to be satisfied in this claim. As such, the IW's adjustment disorder with an anxious and depressed mood (chronic) does not appear to be the responsibility of this claim.

[10] In a decision dated September 12, 2006, the Claims Adjudicator confirmed that the worker was not being granted entitlement to benefits for a psychotraumatic condition. The Claims Adjudicator noted:

On review of the claim, it is the Medical Consultant's opinion that psychotraumatic disability does not apply as it is shown to be related to the extended disability and to non-medical socioeconomic factors.

Depression must be directly and clearly related to the work-related injury.

It does not appear the above has been satisfied in this claim. Therefore, depression has not been granted.

Based on Dr. Muller's report, you continue to be partially impaired and therefore Loss of Earnings benefits are not in order [...]

[11] The worker's objections to the termination of the LOE benefits and the denial of entitlement for a psychotraumatic condition were returned to the ARO and in a decision dated December 12, 2006, the ARO denied the worker's appeal and concluded:

Having assessed all information on file including the additional medical reports from Dr. Muller and Dr. Zirowski as well as the opinion expressed by the Workplace Safety and Insurance Board Medical Consultant, I find there is no entitlement for depression in this claim as the worker does not meet the criteria for psychotraumatic disability entitlement outlined in *Operational Policy Manual* Document No. 15-04-02.

Additionally, the worker's level of impairment is considered to be partial. I have reviewed the modified duties offered by the accident employer and find the modified duties are suitable for low back restrictions. As such, there is no entitlement for LOE benefits beyond August 2, 2005.

(ii) **Issues on appeal**

[12] The issues to be determined in this case are:

- (a) whether the worker has initial entitlement to benefits for a psychotraumatic condition (i.e. depression) which she claims can be causally related to her compensable accident of July 8, 2005; and
- (b) whether the worker has ongoing entitlement to LOE benefits after August 2, 2005.

(iii) **The worker's testimony**

[13] In her testimony, the worker, currently 58 years of age, confirmed that she came to Canada from Poland in 1991.

[14] Not long after arriving in this country, she obtained a job as a cleaner with a company that was responsible for providing maintenance services to a condominium. In this position, she was responsible for cleaning the public areas of the condominium and usually worked eight hours a day, six days a week. She had no problems performing the physically demanding duties associated with this job.

[15] The worker confirmed injuring her back in this employment while lifting a mattress. She was off work for about six months but then was able to get back to work and continue with her regular duties.

[16] The worker also confirmed that in 1995, she underwent surgery to deal with a brain aneurysm she had experienced. According to the worker, "everything worked out fine".

[17] The worker also advised that prior to the events in 2005, she was very happy and had a good, quiet life. She socialized frequently with her son and daughter-in-law and had planned to

undertake some English language training to improve her job prospects. She had worked as a nurse in Poland and while she wished to continue working with senior citizens, she hoped to be able to improve her qualifications. She also enjoyed reading.

[18] The worker confirmed that she started with the accident employer in 2001 as a "home worker". She indicated that she worked seven days a week, usually seven or eight hours a day. Her job required her to visit various clients and the duties she performed varied with the needs of the client. Her duties might include changing the beds, washing the clients, placing them in chairs and preparing their meals. She would also do some shopping and cleaning of rooms. She noted it was very important for her to be pleasant while performing her job. She loved her work and particularly enjoyed the gratitude which was shown to her by the clients. While she hoped to improve her qualifications so that she could dispense medication or change dressings, she had hoped to stay in this line of work until she retired.

[19] The worker described the incident in July 2005 and indicated she was at a client's home early in the morning and when she went to get the client out of the bathtub, she felt a severe pain in her back and could not move. She reported the incident to her employer. Her daughter-in-law took her to see a doctor. The worker confirmed that she has not returned to work since July 8, 2005 and continues to experience severe pain in her lower back.

[20] According to the worker, Dr. Pietraszek, who had been her family doctor for at least 10 years, told her not to return to work and made referrals to various specialists. She has continued to see Dr. Pietraszek ever since. Currently, in addition to the constant back pain, she also experiences some numbness in her feet and has difficulty sleeping because of the pain.

[21] Subsequently, the worker began to experience feelings of depression. These feelings came on within a few months of her compensable accident and she eventually spoke to her family doctor about them. A referral was made to Dr. Zurowski. The worker claimed that her feelings of depression were related to the financial problems that arose as a result of the fact that she could not work and her feelings of being "left out" and no longer being needed or appreciated by her clients.

[22] The worker has tried to cope with her pain through the use of medication and "living with it". The pain has had a great impact on her life. While she was once an avid reader, she finds it very difficult to sit for any length of time and has trouble performing simple activities like going to the grocery store. Her son is no longer able to provide financial support and she finds she has trouble with her memory. The pain and depression has also made her very irritable and she does not believe she would be able to be pleasant around her clients.

[23] The worker acknowledged that the employer had made an offer of modified work. She did not believe she would have been able to perform the modified jobs as she has difficulty sitting and even would have a problem getting on a streetcar to get to work. She has a problem walking down stairs and had to be driven to this hearing by a neighbour. Her daughter-in-law transports her around to various appointments. The worker was also of the view that she would not have been able to perform the modified duties visiting clients since this was very physically demanding work. She has a problem walking more than about 20 feet without a rest and cannot stand for more than 10 or 15 minutes at a time. The back pain also makes her hip sore. She often has to hold on to something while moving.

(iv) Analysis**(a) Psychotraumatic entitlement**

[24] Board *Operational Policy Manual* Document No.15-04-02 entitled "Psychotraumatic Disability" (March 2005) provides in part:

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.

[25] Reviewing the information on file, it appears that the Board's decision to deny the worker psychotraumatic entitlement was based to a large extent on their view that the symptoms of depression she was experiencing were caused by a variety of non-compensable factors. As noted earlier, Dr. Grbac, in Memo #34, had accepted that "unfortunate life events, poor adjustments, language barrier and physical injuries" were responsible for the worker's condition.

[26] Tribunal case law is clear that in order to be successful in this type of appeal, the worker need not establish that the compensable event is the only cause of a subsequent disability. The worker need only establish that the compensable accident was a significant contributing factor in the onset of her psychotraumatic disability. In fact, entitlement may still be granted even if there are other significant factors which contributed. Entitlement may be granted as long as the compensable accident was one of the significant contributing factors.

[27]

After reviewing the information before me and considering the testimony provided, I am satisfied that the balance of evidence supports a conclusion that the accident in 2005 made a significant contribution to the worker subsequently developing depression. In reaching that conclusion, I have taken particular note of the following:

- In her testimony, the worker acknowledged undergoing surgery for an aneurysm in 1995 and also losing her husband in an accident the same year. While these incidents were no doubt stressful, I accept the worker's testimony that she was able to deal with these difficulties and they did not prevent her from performing her physically demanding work as a cleaner or being able to deal effectively with the clients to whom she was assigned by the accident employer.
- In a report dated August 24, 2006, Dr. Zurowski (who was seeing the worker "in the capacity of a general practitioner psychotherapist") noted "there is no previous psychiatric contacts and family history is not contributory".
- In a report dated October 20, 2006, Dr. Pietraszek noted:

[...] Due to prolonged and severe pain she is totally disabled. [The worker] has developed symptoms of depression. She is at present, attending Dr. Zurowski. Her depressive symptoms had become very significant after the injury directly related to her inability to return to work. She now has to live with her son who supports her, due to lack of money and the very inappropriate handling of her case by WSIB. Her family situation and previous problems did not interfere with her work, prior to her accident.

In summary, [the worker] sustained a back injury due to her work. She is still totally disabled and suffering from secondary depression, directly related to her accident and her prognosis is guarded.
- In a report dated November 21, 2006, Dr. Zurowski advised:

[...] Initially diagnosed with adjustment disorder she progressed into depression. My intention is to refer her for a psychiatric opinion to optimise her treatment. The current emotional instability is directly related to inability to work because of her work accident.
- In a report dated April 26, 2007, Dr. J. Swierczek (psychiatrist) advised:

[...]

She reports that her emotional difficulties began with an accident at work about five years ago. She worked as a housekeeper and sustained a low back injury. This was not recognized and she was denied compensation by the WSIB. She used up all her savings and eventually ended up on welfare. She explained that she has constant low back pain with significant limitations in mobility and ability to function. She has been on analgesics, mostly Tylenol #3 up to four tablets per day.

She endorsed feeling depressed for the past two years, manifested by a sense of hopelessness, isolation, fatigue and passive suicidal thoughts. Her sleep is fragmented and non-restorative. She has no social life and no motivation to do anything. She worries about her physical health as she is now diabetic, has hypertension and problems with her stomach.

Her past medical history is relevant for brain surgery in 1995 to remove an aneurysm. This was successful and she is grateful.

There is no past history of emotional difficulties. Her husband died in an accident in 1995 and this was of course very traumatic for her.

Her personal history revealed that she was born and raised in Poland. Her family was very poor. Prior to immigration to Canada she worked as a registered nurse. She has three sisters and there is no family history of psychiatric disorders.

[...]

Diagnosis

Axis I Major depression.
 Axis II nil.
 Axis III as per medical records.
 Axis IV back injury, financial problems.
 Axis V GAF 50-55.

In conclusion, the findings on examination are consistent with a diagnosis of major depression in an individual with numerous medical problems and little social support. Her current medications are insufficient to relieve her symptoms and I would suggest maximizing the Sertraline to achieve better remission. In view of her chronic pain, she may benefit from a small dose of amitriptyline instead Trazodone.

- In his recent report of May 8, 2009, Dr. Zurowski confirmed that "there is no history of previous psychiatric problems or contacts. Her emotional instability is related to accident at work".

[28] After reviewing all of the information before me, I am satisfied that while there may well have been other factors which contributed to what Dr. Swierczek has diagnosed as "major depression" the compensable accident in July 2005 was a significant contributing factor and as such, the worker is entitled to be compensated. My review of the medical evidence satisfies me that the worker's psychotraumatic disability is 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". In my view, the worker's treating physicians are consistent in their view that the worker's difficulties with depression came on after the compensable accident in 2005 and are related to her ongoing pain and discomfort, her subsequent financial difficulties and her inability to be as active as she once was. These findings are consistent with the worker's testimony that she began to become depressed when she could not work and felt she was no longer needed by her clients.

[29] Given that the worker continues to experience this depression, some four years after the compensable accident, I am satisfied that this is a permanent condition and as such, she ought to be assessed for a Non-Economic Loss ("NEL") award.

(b) Ongoing LOE benefits after August 2, 2005

[30] At the time the Board determined that the worker could have performed the modified duties offered by the accident employer, she had not been granted entitlement to benefits for a psychotraumatic disability. In my view, the combination of the worker's organic and psychotraumatic disabilities has rendered her essentially incapable of performing any type of work. In reaching that conclusion, I have taken particular note of the following:

- I accept the worker's testimony that the combination of her back pain and depression has made it virtually impossible for her to consider a return to dealing with clients. As she noted, her compensable conditions have affected her concentration and memory and with the ongoing discomfort, it is unlikely she could be "pleasant" with the clients as is required.
- In his recent report of May 1, 2008, Dr. Pietraszek noted that "she is not able to return to the regular workforce". He also noted that the worker "attempted to return to work, on modified duties, and was unable to perform her job. In the meantime, she developed other medical problems, which further exacerbated her existing condition".

- In his report of May 8, 2009, Dr. Zurowski noted that the worker "has difficulties to concentrate, focus, her memory is poor. She is procrastinating and has no energy". Dr. Zurowski concluded that "her combined psychological and medical conditions posed significant functional limitations and restrictions in her ability to perform activities of daily living, including normal function in the community to ability to function in the community or ability to function in a workplace environment".
- In a report dated October 20, 2006, Dr. Pietraszek noted that the worker "sustained a back injury due to her work. She is still totally disabled and suffering from secondary depression, directly related to her accident and her prognosis is guarded".
- In a report dated August 24, 2006, Dr. Zurowski noted that the worker complains "that she is unable to cope, worrying all the time, crying for no reason, unable to sleep, having no energy, procrastinating, having memory problems and difficulty to focus. She has floating thoughts about death [...]".
- In his report of March 27, 2006, Dr. Pietraszek indicated:

[...] She is not able to return to any modified work. She has restrictions on bending and lifting and repetitive type of activity. She is able to sit for 15 to 30 minutes and has limitations on walking and standing. Due to prolonged sickness, she developed signs of depression and was started on anti-depressive medication. In summary [the worker] sustained back injury with a disc displacement and at present is not able to work.
- In a report dated December 5, 2005, Dr. P. Muller (neurosurgeon) advised that "she is not in a position to return to work as the nursing assistant or personal healthcare aide at this juncture".
- In a report of January 14, 2007, Dr. Pietraszek noted:

[...] She also developed secondary depression due to pain and her inability to work and the ongoing problems with WSIB. Due to her back injury, she is totally unable to return to any gainful employment. She is a housekeeper within the elderly population. The job requires all help at home and personal attendance. Her employer has offered her "modified" duties, insisting that she be able to perform such duties as cooking, washing, drying dishes, cleaning kitchen services, folding laundry and straightening beds. All those tasks require extensive low back activities which she is not able to perform. The only "modified" duty which she would be able to perform would be socializing with the clients; and even that duty would require prolonged standing or sitting, which she is unable to do. She will have to use strong analgesics which will make her drowsy and again, she will not be able to perform these tasks. Her employer indicated that she would not have to perform any low back activities, within the tasks set out above. I am not able to comprehend how she could perform these duties, without stress on her low back.

In summary, [the worker] sustained a back injury due to her work. She is still totally disabled and continues to suffer from secondary depression, directly related to her accident.
- In his report of October 20, 2006, Dr. Pietraszek had indicated that "she is still totally disabled and suffering from secondary depression, directly related to her accident and her prognosis is guarded".

[91]

In summary, after reviewing the information before me, I am satisfied that the combination of the worker's now compensable psychotraumatic condition and the restrictions imposed by her compensable back condition (which include restrictions on sitting, standing, walking, bending and lifting) have rendered her essentially incapable of employment and as such, her entitlement to LOE benefits ought not to have terminated on August 2, 2005.

[32]

While the worker's representative has also requested that I deal with the issue of whether the worker has deteriorated below the level recognized by her 19% NEL award, I am satisfied that this issue is one which would more appropriately be dealt with by the WSIB given that it does not appear to have been addressed specifically by the ARO. The worker would, of course, have the usual rights of appeal from any decision made by the Board on that issue.

DISPOSITION

[33] The worker's appeal is allowed.

[34] The worker is granted initial entitlement to benefits for a psychotraumatic disability. The Board will assess her for a NEL award.

[35] The worker has ongoing entitlement to LOE benefits after August 2, 2005.

DATED: September 22, 2009

SIGNED: R. Naim