

2016 ONWSIAT 3532
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 3232/16

2016 CarswellOnt 20894, 2016 ONWSIAT 3532

DECISION NO. 3232/16

S. Peckover V-Chair

Heard: December 7, 2016

Judgment: December 20, 2016

Docket: 3232/16

Counsel: Worker, for himself

M. Senicar, for Employer

Subject: Employment; Occupational Health and Safety; Public

Headnote

Labour and employment law

S. Peckover V-Chair:

(i) Introduction

1 The employer appeals a decision of the ARO dated December 9, 2014, 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 whether the employer is entitled to SIEF relief with respect to the costs of this claim.

(iii) Background

3 The following are the basic facts.

4 The worker, an aircraft engine builder born in 1957, began working for the accident employer in 1980. On October 31, 2012, he advised the employer that he had been having difficulty with pain in both wrists, which he attributed to the repetitive nature of his job duties. Entitlement was allowed for bilateral carpal tunnel syndrome (CTS).

5 The worker underwent surgery on his right wrist on March 27, 2013. He received Loss of Earnings (LOE) benefits from March 27, 2013 to May 13, 2013, at which point he returned to modified work with the employer. He later was granted a 6% Non-Economic Loss (NEL) award for the residual impairment in his wrists.

6 Shortly after his return to work, the worker complained of bilateral pain at the base of his thumbs and other areas of his hands. Investigation revealed osteoarthritis in the carpometacarpal joint bilaterally. The worker remained on modified work as a result of this pain. His physician filed a Form 8 reporting this development, but the Board found that the osteoarthritis was not work related.

7 In a letter dated March 16, 2014, Mr. Senicar wrote to the Board on behalf of the employer. He requested that the file be reviewed with respect to SIEF relief. He also disputed initial entitlement and the NEL award. In a decision letter dated March 18, 2014, the Case Manager upheld initial entitlement and the NEL award, and stated that the file had been referred to the SIEF team for their review regarding SIEF cost relief.

8 In a letter dated May 4, 2014, Mr. Senicar followed up with respect to the SIEF cost relief request. In a decision letter dated May 8, 2014, the Board denied entitlement to SIEF relief, on grounds that there was no evidence that the worker's osteoarthritis and degenerative changes at the thumb carpometacarpal joints had enhanced the injury or delayed the recovery.

9 At the Appeals Services Branch, in a decision dated December 9, 2014, the ARO again denied entitlement to SIEF relief, stating that there was no pre-existing condition of medical significance that caused or contributed to the work accident of October 31, 2012 or prolonged or enhanced the worker's period of recovery from his bilateral carpal tunnel syndrome injury.

10 The employer appeals from this decision.

(iv) Law and policy

11 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.

12 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.

13 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*.

14 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. 247 — SIEF; and
- Package No. 299 — Decision Making / Merits and Justice.

15 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%
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.

16 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.

17 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.

18 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.

(v) Documentary and medical evidence

19 The following medical documentation is relevant to the issue before me.

- In a report dated October 4, 2013, neurologist Dr. Baryshnik reported as follows:

Thank you for referring this 57-year-old right-handed gentleman seen in neurologic consultation on October 3, 2013. He was seen today with discomfort in his right hand. He was seen back in January 2013 complaining of pain and numbness in his right hand for more than a year. The numbness was involving the second, third and fourth fingers. He was found to have a severe carpal tunnel syndrome. He underwent decompression of the right median nerve in March. **He complains that he has ongoing pain through the ventral wrist. Also pain along the third finger if he extends his finger, particularly through the palm. He complains of pain through the base of the thumb; first metacarpal region. Pain increases with any activity or hand use. He has difficulty gripping or lifting anything. He also complains of some numbness yet in the right hand with gripping. He is concerned about his left hand and wonders if it has worsened. He complains of pain through the left third finger. Also through the thumb and wrist area.**

He has been on light duties at work, not doing much at all with his hands.

Past health includes **low B12**. He is still receiving B12 supplements.

...

Electromyography and nerve conduction studies were carried out today in both right and left upper extremities. A detailed report will follow. In summary, eletrophysiologic testing today demonstrates **significant improvement in motor and sensory conduction of the right median nerve carpal tunnel region**. The distal motor latency is decreased from 5.8 ms to 4.4 ms. Sensory latency thumb is now normal at 3.4 in [sic] the second, third and fourth fingers have improved to 3.8, 3.7 and 3.9 ms amplitude respectively; all significantly improved compared to the previous study. On the left, the distal motor latency of the left median nerve is still slightly prolonged at 4.1 ms and sensory latencies are all in the normal range with no significant change of all on the left.

...

You might consider referring him to the Hand clinic at Southlake for further evaluation. **I don't think any of his hand symptoms are related to median nerve compression** and appear to be more of a local cause etc.

[Emphasis added]

- A bilateral hand X-ray dated October 24, 2013 found as follows:

There are osteoarthritic changes at the first carpometacarpal joint bilaterally. There is joint space narrowing, small marginal osteophytes, and cystic change. Findings are more notable on the left than right.

There is a cystic focus in the left lunate which may represent an interosseous cyst or ganglion.

There is mild narrowing at the right third metacarpophalangeal joint with marginal osteophytes.

There is early narrowing of the dip joints of both hands.

No focal erosion.

OPINION:

Osteoarthritic changes as documented above.

(vi) Analysis

20 In analyzing a SIEF appeal, *Decision No. 1404/11* states:

The standard of proof in a Tribunal appeal is the balance of probabilities. In a SIEF appeal, this means that the evidence must demonstrate that it is more likely than not that the underlying condition prolonged or enhanced the worker's disability resulting from the workplace accident. The severity of the accident and the significance of the pre-existing condition must also be determined based upon direct evidence or reasonable inferences which may be drawn from the evidence. In a SIEF appeal, there is often a lack of direct evidence, and the parties may be drawn into relying upon unsupported assertions and arguments. I find it necessary to emphasize, however, that entitlement for SIEF relief must be demonstrated on the basis of valid evidence or reasonable inferences drawn from the evidence.

21 Thus, I must decide whether a pre-existing *condition*, as defined above, prolonged the worker's recovery or enhanced his injury. On the other branch of the test, I must decide whether a pre-existing *disability*, as defined above, caused or contributed to the workplace accident. If the answer to either question is yes, the employer may be entitled to SIEF relief.

22 In his submissions dated April 20, 2016, Mr. Senicar submitted that the worker's arthritis and Vitamin B12 deficiency were of significance in this claim. He obtained an Independent File Review by orthopaedic surgeon Dr. Weinberg, dated April 6, 2016, upon which he relied. Dr. Weinberg's opinion was as follows:

ANALYSIS AND OPINION

It would appear from the file that the Worker had been on the job for about 32 years before he ran into significant problems with the carpal tunnel syndrome. Although the work activity could certainly contribute to this problem, it was unlikely the cause of the problem considering the later onset. If the condition was directly related to the work activity, one would expect disabling symptoms to occur much sooner in my opinion. The file information would suggest that there are other factors which certainly could have contributed to the development of carpal tunnel syndrome.

A vitamin B12 deficiency can be associated with numbness in the hands and feet and the Worker was troubled by numbness in both hands. Smoking has also been known to increase the risk of peripheral nerve problems such as carpal tunnel syndrome and the Worker was reported to be a smoker.

It was evident in the file that the Worker had **pre-existing arthritic problems in the carpometacarpal joints of the thumb and at the base of the right long finger in the metacarpophalangeal joint.** These pre-existing problems did not directly affect the carpal tunnel syndrome but certainly served to prolong the disability following surgery and modification of work activity. Generally there is very good recovery and an expectation of resumption of normal activity following successful surgical decompression for carpal tunnel syndrome. In this case the Worker had prolonged difficulties

which would appear to be primarily related to the pre-existing arthritic problems. **Despite the fact that the post-operative nerve studies did indicate improvement on the right side the Worker did continue to complain of numbness in both hands. This could have been related to residual carpal tunnel syndrome difficulties but the B12 deficiency may have been a factor as well.**

[Emphasis added]

23 Thus, Dr. Weinberg identified three pre-existing conditions in this case: smoking; vitamin B12 deficiency; and osteoarthritis in the thumbs and middle fingers of both hands. Mr. Senicar has not argued that smoking is a pre-existing condition, perhaps based on prior decisions from the Tribunal which found that smoking is a behavior, rather than a pre-existing condition, and thus SIEF relief is not available for it.

24 Thus, Mr. Senicar argues that the worker had two pre-existing conditions which had an impact on his recovery: vitamin B12 deficiency and osteoarthritis in the hands.

25 With respect to the worker's osteoarthritis in the hands, the Board found this to be non-compensable in nature. This would appear to be a condition which co-existed with the worker's CTS.

26 In *Decision No. 1756/07*, the Vice-Chair dealt with the issue of co-existing conditions, and found as follows, beginning at paragraph 23:

In his submissions, the employer's representative referred to a number of conditions from which the worker suffered from time to time, both before the accident and subsequent to the accident. The submission referred to those conditions, such as shoulder pain and neck pain as "co-existing conditions". As I have noted, **the central question in determining whether the employer is entitled to SIEF cost relief, in this appeal, is whether the worker suffered from a pre-existing condition which would make her liable to develop a disability of greater severity than a normal person.** The disability in question is, of course, her compensable disability, which in the worker's case was right-sided epicondylitis. **There is no basis upon which I could conclude that the "co-existing conditions" such as headaches, neck pain or shoulder pain would make the worker liable to develop epicondylitis of greater severity than a normal person.**

[24] In order to be relevant for SIEF purposes, the condition exacerbating the compensable condition must pre-exist and be associated with the compensable condition in other than merely a temporal manner. Such "co-existing conditions" are not relevant to SIEF considerations either according to the relevant policy, or in the context of the stated purpose of the policy. Accordingly, I am not able to take such "co-existing conditions" into account as they are not relevant to the determinations that must be made in this appeal.

[Emphasis added]

27 I agree with that analysis, and adopt it in deciding this appeal. As indicated in this quotation, the central question is whether the worker suffered from a pre-existing condition which would make him more liable to develop a disability of greater severity in his wrists than a person without that pre-existing condition. The documentation quoted above reveals that the worker's right wrist condition improved significantly following the surgery, as seen in the EMG testing. I therefore do not find that the worker's pre-existing osteoarthritis had any impact on the severity of the worker's CTS. SIEF relief therefore is not available for this condition.

28 With respect to the worker's pre-existing vitamin B12 deficiency, I note that this medical difficulty was known to exist prior to the workplace accident, and therefore does not meet the definition of a pre-existing *condition*. Neither does it meet the definition of a pre-existing *disability*, as there is no evidence before me that the worker suffered any workplace disruptions, either in the form of lost time from work or having to do modified work, prior to the workplace accident as a result of his B12 deficiency. SIEF relief therefore is not available for this medical difficulty.

29 As I have found that neither the osteoarthritis nor the vitamin B12 deficiency is eligible for SIEF relief, the appeal must fail.

DISPOSITION

30 The appeal is denied.

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