WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1207/17

BEFORE: R. Woodrow: Vice-Chair

HEARING: April 18, 2017 at Toronto
Oral

DATE OF DECISION: May 18, 2017

NEUTRAL CITATION: 2017 ONWSIAT 1517

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) dated January 30, 2014

APPEARANCES:

For the worker: O. Crimi, Paralegal

For the employer: In-House Representative

Interpreter: N/A

REASONS

(i) Introduction to the issues

[1] The now 58-year-old worker started with the accident employer on July 4, 2005, initially as a part-time employee, moving to full-time in March 2007. At the time of the injury the worker worked as a station attendant, performing baggage handling duties at an airport. He claimed he was injured on July 28, 2007 after increasing right knee pain for several weeks prior, attributed to increased duties, hours, and the busy season; loss of earnings (LOE) benefits were allowed. The Board allowed the claim as a gradual onset disablement accident for right knee strain; the worker had pre-existing osteoarthritis. The worker returned to modified duties in late November 2007, with intermittent time off thereafter. The worker was granted a 5% non-economic loss (NEL) award for a worsening of his pre-existing osteoarthritis medial compartment in his right knee on August 10, 2009.

[2] The worker claims initial entitlement for a left knee injury. The Board denied entitlement to the left knee in a decision dated April 14, 2008, noting the medical information from March 2008 that referenced a left knee injury while swimming. The Board also denied entitlement to a NEL redetermination in a decision dated August 15, 2011, that found a worsening of the right knee condition but it was not likely related to the work injury. The worker appeals a decision of the ARO, which denied initial entitlement for the left knee injury claimed to have also been sustained on July 28, 2007 and denied a NEL redetermination as there was no evidence of a significant deterioration. The ARO rendered a decision based upon the written record without an oral hearing.

(ii) Issues

[3] The issues under appeal are as follows:

1. Entitlement for a left knee injury claimed to have been sustained at work on July 28, 2007.

2. Entitlement to a redetermination of the NEL award for the right knee.

(iii) Law and policy

[4] Since the worker claimed to be injured in 2007, 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.

[5] An "accident" is defined in section 2(1) to include:

(a) a wilful and intentional act, not being the act of the worker,

(b) a chance event occasioned by a physical or natural cause, and

(c) disablement arising out of and in the course of employment;

[6] General entitlement to benefits is governed by section 13:

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.

> **(2)** If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

The statutory presumption set out in section 13(2) does not apply to an injury by disablement. See, for example, *Decisions No. 268* and *42/89*.

[7] 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*.

[8] The standard of proof in workers' compensation proceedings is the balance of probabilities.

[9] 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 #1 – Initial Entitlement
- Package #31 – Secondary Conditions
- Package #107 – Aggravation Basis/SIEF
- Package #264 – NEL Redetermination
- Package #300 – Decision Making/Benefit of Doubt/Merits and Justice

[10] I have considered these policies as necessary in deciding the issues in this appeal, in particular those set out below.

[11] *Operational Policy Manual* (OPM) Document No. 15-02-01, "Definition of Accident", describes a chance event as "an identifiable unintended event which causes an injury", an injury itself is not a chance event. The policy defines a disablement as "a condition that emerges gradually over time" or "an unexpected result of working duties."

[12] OPM Document No. 11-01-01, "Adjudicative Process", states that an allowable claim must have five points: an employer, a worker, personal work-related injury, proof of accident, and compatibility of diagnosis to accident history. OPM Document No. 11-01-01 provides the following guidelines for determining proof of accident:

> **Proof of accident**
>
> Decision-makers may consider the following when examining proof of accident,
>
> - Does an accident or disablement situation exist?
> - Are there any witnesses?
> - Are there discrepancies in the date of accident and the date the worker stopped working?
> - Was there any delay in the onset of symptoms or in seeking health care attention?

[13] OPM Document No. 18-05-09 "NEL Redeterminations" defines the term "significant deterioration" as follows:

> A significant deterioration refers to a marked degree of deterioration in the work-related impairment that is demonstrated by a measureable change in objective clinical findings.

[14] I am also required to consider the following when considering if there are objective clinical findings that support a finding of significant deterioration: changes in the worker's range of motion, complications in the worker's medical condition, evidence of neurological dysfunction, increase in the health care treatment, and information about lost time from work.

(iv) Analysis

(a) Entitlement for the left knee

[15] The appeal with respect to entitlement for the left knee is allowed for the reasons set out below.

[16] The worker's representative submits that initial entitlement for a left knee injury on a disablement basis with an accident date of July 28, 2007 should be allowed, as the right knee was allowed by the Board. In order to make this determination, I will first consider the medical reporting and initial reporting to the Board. The Form 7 of the employer dated August 14, 2007 noted the worker had right knee pain for three weeks while loading bags onto aircraft, that worsened. The Form 6 of the worker dated August 31, 2007 noted gradual injury for two to three weeks getting worse because of heavy bags, with area of injury noted as the right knee with left knee crossed out.

[17] The clinical notes of family physician Dr. Ing dated November 13, 2006 record joint pains left knee osteoarthritis; an x-ray of the left knee on November 18, 2006 did not make any significant findings. Her clinical notes of July 4, 2007 note the worker has had two weeks of right knee pain, with the comment "unsure if work related." In follow-up she saw the worker on August 1, 2007 for his "knees." On August 13, 2007 the clinical notes record "right knee pain - worse after rest" and "stiff" with a notation right greater than left knee. A right knee x-ray was performed on July 30, 2007. Dr. S. Ing provided a Form 8 on August 1, 2007 in which she indicates left and right knees as areas of injury, and diagnosis of "osteoarthritis with the manual labour, reaggravates pain." On August 14, 2009 she made a request for an MRI examination of the right knee; the MRI took place on October 18, 2007. On September 12, 2007 the Board recorded a phone call with Dr. Ing, inquiring if the osteoarthritis was the correct diagnosis for the gradual onset of pain; Dr. Ing explained the worker has osteoarthritis but as a result of his job duties he was suffering from knee strain. A new Form 8 was provided by Dr. Ing on September 12, 2007, at the Board's request, indicating that the worker has progressive knee pains right greater than left, worsening with luggage lifting, type of injury was sprain/strain, areas of injury left and right knees, with a diagnosis of "repetitive strain injury through manual labour causing chronic pain and changes with knees, likely developing arthritic changes." Functional abilities forms (FAFs) were provided by Dr. Ing on September 14 and October 1, 2007 noting the area of injury as "right knee."

[18] The worker was referred to specialists. An assessment by, specialist in internal medicine and rheumatology, Dr. Y. Liu on September 12, 2007 noted right knee pain under history of presenting illness; he opines the worker may have a mechanical knee problem. The worker also saw orthopaedic surgeon Dr. B. Weening on November 12, 2007, who noted he was referred for

his right knee, and had "mild to moderate left sided knee pain." Dr. Weening opined the worker had "mild osteoarthritis of his right knee and may have similar pathology on the left side."

[19] Dr. Ing provided another Form 8, assessment date of October 29, 2007 but dated May 20, 2008, noting the worker twisted his left knee at work when compensating for right knee pain; diagnosis of left knee sprain. The majority of FAFs and Form 26s she provided thereafter make note of the right and left knees; notably the FAF dated October 29, 2007 notes the worker twisted his left knee compensating for right knee pain. She also provided a letter dated November 21, 2007 that indicated the worker was compensating with his left knee and now complains of left knee pain; his left knee x-ray shows arthritic changes and he is waiting to get a left knee MRI. A left knee x-ray on November 15, 2007 noted "mild tricompartmental osteoarthritis at the left knee, most pronounced in the medial and patellofemoral compartments, with joint space narrowing, subchondral sclerosis and osteophyte formation." An MRI was performed on December 18, 2007 that showed "moderate joint effusion. Mild degenerative changes of the medial and lateral compartments. Probable partial tear of the anterior cruciate ligament. Small horizontal cleavage tear of the posterior horn of the medial meniscus. The proximal medial tibia shows evidence of a subchondral fracture or spontaneous osteonecrosis."

[20] The worker was further assessed by orthopaedic surgeon Dr. Victor Naumetz on February 21, 2008. Dr. Naumetz opined "if the worker had a fracture of the tibial plateau on the left, it would have been healed by now." Dr. Naumetz discussed left knee arthroscopic debridement but noted the worker was working modified duties and a brace might assist.

[21] The worker was provided with a note on March 5, 2008 from Dr. Ing who wrote that he "reinjured knee" left greater than right while swimming the day before. She later provided a Form 8 dated March 26, 2008 in which she diagnosed a sprain and wrote "patient told me he was swimming and twisted his left knee again. Reinjured left knee."

[22] The worker was later referred to orthopaedic surgeon Dr. Brien, whom he first saw on May 15, 2008 and continues to see. Dr. Brien records that the worker had an injury and "twisted his knee" on July 4, 2007 and had bilateral but mainly right knee pain with the left knee becoming more symptomatic as time went on; she suggested the MRI be repeated. An MRI of the left knee was performed on June 3, 2008 that had an impression of a possible partial ACL tear vs functional ACL insufficiency, complex potentially unstable medial meniscal tear, mild to moderate chondromalacia patella with mild chondropathic change of the medial and lateral compartments of the knee, mildly enlarged lymph nodes, and moderate knee effusion. Dr. Brien later comments on the left knee not being covered by the Board on July 25, 2012 "I only [k]now what he says to me, so we will have to certainly take him at his word for this, if the left one was injured in rehabilitation then I would suspect this is so. He has bilateral significant medial compartment arthritis, the right one being exacerbated by his job."

[23] Dr. Ing provided a letter to the Board, May 16, 2008, noting multiple times that the worker had "numerous records of his left knee pain" and indicating that left knee pain started on August 13, 2007. Dr. Ing again wrote to the Board, as an update to the May 16, 2008 letter, on December 2, 2008. Dr. Ing wrote the worker "has been suffering from on and off bilateral knee pains since his initial WSIB report on July 4, 2007. It initially started as right knee pain. However, because he was trying to compensate for his right knee pain, he began having left knee pain."

[24] The worker testified; I found his testimony largely unhelpful as he could not recollect specific detail. However, he was clear in his testimony that he reported both his right and left knees to his doctor, acknowledging that he complained about his right knee more, which is consistent with the medical reporting of Dr. Ing. His testimony also confirmed the reporting to the Board that his work prior to the injury increased and was heavy in nature.

[25] The worker's representative argued the left knee disablement was related to his increase in hours and duties when moving from part time to full time and working the busy season. She recognizes the references to twisting of the left knee, explaining them as recurrences from his initial July 28, 2007 injury from which he had not resolved. The worker's representative noted the early medical reporting that noted the left knee; the later examinations made findings not limited to osteoarthritis. The worker's representative argued the focus was initially on the right knee, but the close timing of the left knee disablement and report to the doctor indicates a causal link that the left knee was injured in the course of employment.

[26] The employer's representative argued there was no specific injury recorded for the left knee and no new claim filed, the initial reporting to the Board and employer was for a right knee injury, and there was no initial treatment for the left knee with the x-ray of the left knee some three months later. The employer's representative argued the five point check system was not satisfied and the worker's problems with the left knee were related to the pre-existing osteoarthritis. The employer's representative submitted that the worker's appeal should be denied.

[27] The medical reporting indicates that the worker had pre-existing osteoarthritis but it was not significantly symptomatic prior to July 2007. The worker's family doctor noted the area of injury initially as right and left. The referrals to specialists Dr. Liu and Dr. Weening indicate the worker was referred for assessment of his right knee; consistent with this, the initial imaging was for the right knee only. The clinical notes on July 4, 2007 only record right knee pain but on August 1, 2007 "knees" is noted and on August 13, 2007 the "left knee" is noted by Dr. Ing. Consistent with Dr. Ing's clinical notes, her initial reporting to the Board (August 1 and September 12, 2007 Form 8's) notes area of injury as right and left knee that she relates to heavy luggage lifting. The phone call with the Board on September 12, 2007 does not specify right or left knee strain, however, a request was made for a new Form 8; when provided the areas of injury included sprain/strain and the area of injury indicated right and left knee. Dr. Ing later records findings for the left knee in subsequent medical reporting, including the Form 8 with the assessment date of October 29, 2007. Dr. Ing is the worker's family physician and treated the worker prior to and after the workplace injury. In making my decision I prefer the contemporaneous medical reporting of Dr. Ing who recognizes a left knee injury, which she also supports in letters to the Board in 2008.

[28] I also accept Dr. Ing's opinion on compatibility with the worker's work duties, where the Board has accepted that there were increased and heavier duties that led to the worker's right knee injury after the workplace injury. The duties the worker was performing prior to the injury were, as accepted by the Board, increased and heavier and I find that the work duties made a significant contribution to the left knee injury.

[29] On a balance of probabilities I find that the worker has entitlement for a left knee disablement injury.

(b) Entitlement for NEL redetermination

[30] The appeal with respect to entitlement for a NEL redetermination is denied for the reasons set out below. In order to find the worker eligible for a NEL redetermination I must find that his right knee has significantly deteriorated, a marked degree of deterioration, from the NEL Assessment. For the purposes of comparison, I have reproduced the NEL Assessor's findings in the same chart format as follows:

(1) 2009 NEL Assessment

Abnormal Motion				**Impairment**	
Joint	**Movement**	**Angle**	**ROM**	**%**	**Reference**
Right Knee	Flexion Extension to neutral	130 0	 130	7 0	P. 68, T. 39

Other Non-Scheduled Impairments		**Impairment**	
Location	**Description of Impairment**	**%**	**Reference**
Right Knee	Arthritis due to any etiology, including trauma Arthritis due to any etiology, including trauma; chondromalacia	5	P. 68, T. 40

Calculation

Abnormal Motion: 7%
Other Impairment: 5%
Combined (using Combined Values Chart): 12%
Whole Person Impairment (P. 72, T. 46): 5%

[31] I note that both abnormal motion and arthritis were rated to establish the worker's NEL award.

(2) The worker's condition since the 2009 NEL Assessment

[32] The medical reporting after the request for the NEL redetermination includes the following:

- January 4, 2011 x-ray – no significant further medial compartment narrowing, although advancing osteophyte production and mild spurring at the lateral compartment
- January 20, 2011 consultation with Dr. Brien – examination showed bilateral varus knees not particularly changed, 2+ effusion in the right knee, range of motion is 0 to 110° bilaterally, slight pseudolaxity on the right more than the left
- March 18, 2011 Functional Abilities Evaluation Report
- May 17, 2011 Dr. Ing letter – range of motion full extension and flexion 110°. "This deterioration is permanent and will get worse."
- October 12, 2011 x-ray – bilateral osteoarthritis with no progression from previous
- November 7, 2011 consultation with Dr. Brien – severe bilateral knee osteoarthritis, unable to fully extend right knee with 15° extension block, flexes to 110°, hip range of motion full

- November 30, 2011 FAF of Dr. Brien – severe limitations due to severe knee arthritis. Abilities walking 100 - 200 metres, standing up to 15 minutes, lifting from floor to waist and lifting waist to shoulder up to 5 kilograms, limit stair climbing, no ladder climbing; restriction of bending/twisting repetitive movement of knees
- January 17, 2012 Form 8 of Dr. Ing – diagnosis strain right knee, exacerbation arthritis
- January 20, 2012 Form 26 Dr. Ing – flexion 120°, no comment on extension
- July 25, 2012 consultation with Dr. Brien – "… He has bilateral significant medial compartment arthritis, the right one being exacerbated by his job. His industrial active victims' group is looking for a letter would (sic) allude to his work contributing to the aggravation of his knee arthritis. Certainly any heavy work will aggravate knee arthritis, particularly deep bending and loading. I certainly do not think he is able to do any deep step climbing up and down stairs or heavy lifting on this arthritic knee on the right. I cannot comment as to whether his work duties accelerated the arthritic process. This is difficult to know given the presence of arthritis on his initial report"

[33] I acknowledge there were further medical reports included in the Case Record beyond those summarized above, namely: May 24, 2014 letter of Dr. Brien; August 27, 2014 FAF and Form 26 of Dr. Ing; and June 1, 2015 consultation with Dr. Brien. The worker requested a NEL redetermination verbally on March 23, 2011, with a request for further medical information from the Board on April 7, 2011. The ARO decision under appeal is dated January 30, 2014. Accordingly, I have focused my analysis on evidence that sheds light on the period that the Board considered the NEL redetermination. I do note, however, that of the medical reports prepared in 2014 and 2015, the only report with any measurement in objective clinical findings is Dr. Brien's letter of May 24, 2014, which notes the same range of motion findings as Dr. Ing did on January 20, 2012, which I have discussed below. Also, of those further medical reports, none provide clinical objective findings on osteoarthritic changes. In this regard, it is important to note that this decision will not preclude the worker from making a fresh request for a NEL redetermination to the Board, based upon objective evidence of a significant deterioration.

(3) Conclusion

[34] The worker's representative argued that the Board acknowledged the worker's condition was worsening in the decision of August 15, 2011, then concluded it was not related to the work injury; she submitted there is a significant deterioration of the right knee. I was not pointed to any specific medical reporting by the worker's representative; she relied on the imaging in the Case Record that she submitted shows a worsening of the osteoarthritis. The employer's representative submitted that if there is a significant deterioration it is attributable to the non-compensable pre-existing osteoarthritis.

[35] As summarized above, there are reports in 2011 from both Drs. Ing and Brien, relating to the right knee:

- On May 17, 2011, Dr. Ing noted full extension with flexion at 110°, with no comment on arthritis. Assuming the worker's arthritis remained the same as the 2009 NEL Assessment, the only measurable change was in flexion, from 130° to 110°. If measured, the worker would have a 14% abnormal motion impairment (14% for flexion + 0% for extension), which would then combine with the 5% other non-scheduled impairment (arthritis), for a

total of 18%. This converts to a 7% whole person impairment, signifying a 2% change in the worker's NEL rating.

- There are two reports of Dr. Brien's in 2011 that include objective clinical findings, dated January 20, 2011 and November 7, 2011. Both note flexion at 110°, but only the November 7, 2011 report notes objective clinical findings for the worker's right knee extension, which is at 15°. If measured using Dr. Brien's November 7, 2011 report, the worker would have an 18% abnormal motion impairment (14% for flexion + 4% for extension), which would then combine with the 5% other non-scheduled impairment (arthritis), for a total of 22%. This converts to a 9% whole person impairment, signifying a 4% change in the worker's NEL rating.
- I note that Dr. Brien comments on "severe knee arthritis" in November 2011. However, this is not accompanied by any objective clinical findings. Rather, there is a contemporaneous x-ray of October 12, 2011 that indicates "bilateral osteoarthritis with no progression from previous." Accordingly, I accept and prefer this x-ray of October 12, 2011 over Dr. Brien's finding of "severe knee arthritis", as the x-ray provides an objective clinical finding. I find that the worker has not experienced a significant deterioration of his osteoarthritis since the 2009 NEL Assessment.

[36] The only objective clinical findings from 2012 are from Dr. Ing's Form 26 of January 20, 2012, which notes flexion 120°. There is no comment on arthritis or extension. Assuming the only change was in flexion from 130° to 120°, if measured, the worker would have an 11% abnormal motion impairment (11% for flexion + 0% for extension), which would then combine with the 5% other non-scheduled impairment (arthritis), for a total of 15%. This converts to a 6% whole person impairment, signifying a 1% change in the worker's NEL rating.

[37] Dr. Ing's Form 8 noted "exacerbation arthritis" that is not accompanied by any objective clinical findings. For the reasons set out above, I prefer the x-ray of October 12, 2011 over Dr. Ing's finding of "exacerbation arthritis."

[38] OPM Document No. 18-05-09 provides that significant deterioration must be demonstrated by a "measurable change in objective clinical findings." In reviewing the above, I find there has been no marked degree of deterioration in the work related impairment demonstrated by a measureable change in the objective clinical findings. While I acknowledge there may have been a temporary deterioration in the worker's right knee condition in 2011, this improved by 2012. The 2012 objective clinical findings result in a 6% whole person impairment, which is a 1% change from the NEL rating in 2009. Tribunal case law has held that a 1% change in the NEL rating based on a small change in range of motion findings is not sufficient to constitute a significant deterioration. A significant deterioration must be something more than a minimal or minor deterioration, even when that deterioration was sufficient to result in a small increase in the NEL award (see *Decision No. 891/15*).

[39] Accordingly, the medical evidence does not support a significant deterioration in the worker's compensable permanent right knee impairment. Pursuant to section 47(9) of the WSIA, therefore, there is no entitlement to a NEL redetermination for the right knee.

[40] This decision does not preclude the worker from making a fresh request for a NEL redetermination to the Board, based upon objective evidence of a significant deterioration.

DISPOSITION

[41] The appeal is allowed in part as follows:

1. The worker has initial entitlement for the left knee.

2. The worker does not have entitlement for a NEL redetermination.

[42] 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: May 18, 2017

SIGNED: R. Woodrow