2017 ONWSIAT 2686
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 2638/17

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DECISION NO. 2638/17

R. McCutcheon V-Chair

Heard: August 30, 2017
Judgment: August 31, 2017
Docket: 2638/17

Counsel: T. Zwiebel, for Worker
No one for Employer

Subject: Employment; Occupational Health and Safety; Public

Headnote
Labour and employment law

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) R.P. Horne dated March 20, 2014

***R. McCutcheon V-Chair*:**

(i) Introduction to the appeal and the issue

1 The worker appeals a decision of the ARO, which denied entitlement to a non-economic loss (NEL) assessment for psychotraumatic disability. There is one main issue in this appeal:

- Is the worker entitled to a NEL assessment for psychotraumatic disability?

2 At the operational level, the WSIB covered the cost of four psychological treatments, but entitlement under the psychotraumatic disability policy was denied. In the decision under appeal, the ARO accepted that the worker developed an adjustment disorder due to the injury and the Work Transition (WT) program; nonetheless, the ARO found that the worker did not have permanent psychotraumatic impairment due to the injury. In reaching this conclusion, the ARO noted that the worker did not appear to maintain a therapeutic relationship with the psychologist and the worker had other non-compensable stressors and health issues.

3 The worker's representative relied upon the worker's testimony and a psychology report from November 2012 in support of the argument that the worker has a permanent psychotraumatic disability due to the workplace injury.

(ii) Background

4 The now 68-year-old worker started as an aircraft maintenance engineer with the employer in 2009. He also had many years of previous experience in this field with other employers in Saudi Arabia and the United States.

5 On March 4, 2010, the worker injured his right knee at work when working under an aircraft. The WSIB accepted that the worker had a permanent right knee strain due to the injury. An MRI of May 2010 showed grade 3-4 patellar chondropathy. In January 2012, the worker's NEL award for the right knee was assessed at 13%.

6 The worker had permanent physical restrictions to avoid low level activities, stairs, and heavy lifting. The employer could not offer employment that was suitable for the worker's knee injury. Therefore, in late 2011, the worker began participation in WT Services offered by the WSIB. The initial goal was to qualify as an Aircraft Inspector, National Occupational Classification (NOC) 7315. The worker had difficulty with the academic upgrading program, however, and the goal was changed to Electronics Assembler, NOC 9483. The WT program included job search training and employment placement assistance.

7 The WT Specialist described the worker as cooperative in the WT program, although his motivation for job searching was questioned at times. The worker informed the WT Specialist of frustration with his compensable knee injury, non-compensable cardiac and eye problems, and family issues.

8 The worker completed the WT Plan in April 2013. In a decision dated April 29, 2013, the WSIB Case Manager reduced the worker's loss of earnings (LOE) benefit to reflect deemed earnings as an Electronics Assembler. [1] This resulted in a reduction in his LOE benefit.

9 The worker saw Dr. Silverman, a psychologist, on two occasions in 2012. Dr. Silverman's report of November 2012 offered a diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood and recommended treatment. The WSIB agreed to cover the cost of four treatment sessions to support the worker during the WT program. However, in a decision dated June 21, 2013, the Case Manager denied entitlement under the Psychotraumatic Disability Policy.

10 The worker only attended two sessions with Dr. Silverman and there are no further reports from Dr. Silverman in the record.

(iii) Law and policy

11 Since the worker was injured in 2009, 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 Psychological impairments are included in the definition of "impairment" in section 2(1) of the WSIA:

> "impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

13 "Permanent impairment" means an impairment that continues to exist after the worker reaches maximum medical recovery.

14 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*.

15 Pursuant to section 126 of the WSIA, the Board provided a list of applicable policy packages (Revision #9). I have considered the relevant policies in assessing the issues in this appeal.

16 *Operational Policy Manual* (OPM) Document No. 15-04-02, "Psychotraumatic Disability" provides that 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. The policy sets out the following "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.

. . .

17 The policy further states that 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.

(iv) Analysis: Is the worker entitled to a permanent impairment assessment for psychotraumatic disability?

18 For the reasons set out below, I find that the evidence does not support that the worker has a permanent psychological impairment. To the extent that the worker appears to have ongoing some ongoing negative feelings, there is insufficient evidence to conclude that the workplace injury is a significant contributing factor in perpetuating these symptoms.

19 The Psychotraumatic Disability Policy provides that 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. I find that there are no exceptional circumstances in this case.

20 Therefore, the appeal must be denied.

(a) What was the scope of the worker's initial entitlement for psychotraumatic disability?

21 In view of the worker's representative's arguments, it is helpful to understand the scope of the worker's entitlement for psychotraumatic disability as recognized by the WSIB to properly assess the permanent impairment issue. The following information from the record is instructive in this regard:

- Dr. Silverman's report of November 15, 2012 was based upon the worker's appointments on September 6 and October 16, 2012. According to Dr. Silverman, the worker said that he had been "mentally destroyed" by his

right knee injury and lifestyle disruptions, particularly with respect to his extended leave of absence from work. The worker reported feeling depressed, frustrated, irritable, and short-tempered with his family. Based upon the interview and structured tests, Dr. Silverman found that the worker's clinical presentation was consistent with the DSM-IV-TR diagnostic criteria for an Adjustment Disorder with Mixed Anxiety and Depressed Mood. Dr. Silverman recommended 12 one-hour weekly sessions of cognitive-behavioral psychological treatment.

• In December 2012, the Case Manager allowed coverage of the costs of four weekly psychological sessions with Dr. Silverman to support the worker during the WT program; however, the Case Manager denied entitlement for the condition of psychotraumatic disability, finding that it was not work-related. The Case Manager noted that the worker had numerous co-existing medical issues (heart problems, cataracts, diabetes and hypertension) and concluded that the worker did not meet the entitlement requirements of the Psychotraumatic Disability Policy.

• The Case Manager's approach is consistent with OPM Document No. 15-04-02, which states in part:

> Unrelated psychiatric disability
>
> In some cases, psychiatric disability/impairment may become apparent in an otherwise uneventful case, and enquiry establishes its origins to other factors (such as family crisis), having no relationship whatsoever to the accident.
>
> The WSIB may pay for the concurrent treatment for a worker if, by doing so, substantial payments under the insurance plan can be avoided. See 17-03-04, Health Care for Non-work-related Conditions.

• In a memo of April 24, 2013, the WT Specialist documented a telephone conversation with the worker. The worker expressed frustration that, in addition to handling his compensable and non-compensable issues of his health, he was short of money and was taking care of his ill son.

• The worker only attended two sessions with Dr. Silverman. In November 2013, Dr. Silverman advised the WSIB that he had not seen the worker in several months. There are no further reports from Dr. Silverman.

22 The worker's representative pointed to the ARO decision, which recognized that the worker did develop an adjustment disorder or a reaction to the unanticipated difficulty with his WT program. The ARO noted that, by definition, the adjustment disorder shoulder dissipate over time.

23 The worker's representative argued that the ARO thereby recognized that the worker still had an adjustment disorder in 2014, four years after the accident. The worker's representative submitted that an impairment that was present for that length of time should be considered permanent.

24 I do not accept the worker's representative's interpretation of the ARO decision. The ARO also noted in the decision that the worker did not maintain a therapeutic relationship with the psychologist after entitlement was denied beyond a few sessions. In my view, it is clear that the ARO did not accept that the worker had a current psychological diagnosis that would warrant a permanent impairment assessment, reasoning as follows:

> As there are no further reports from the psychologist I am unable to conclude if the worker responded to the specific psychological interventions and or the change in the WT plan. The worker testified that he still has ruminations. He is not however under active treatment and is taking no medication beyond home remedies. This is in my opinion insufficient evidence to support that the worker has a permanent psychological impairment as a consequence to his work related accident or as a reaction to his extended disablement and other psycho social stressors as related to the work accident.

25 Therefore, I do not accept the worker's representative's submission that the ARO recognized that the worker continued to have a psychiatric impairment at the time the decision was rendered in March 2014.

(b) Is there evidence of a permanent psychotraumatic disability impairment?

26 As noted above, the WSIA defines "impairment" as a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

27 In this case, there is no evidence from any health care professional showing that the worker has permanent psychological damage arising from the injury.

28 As noted above, the worker did not continue in treatment with Dr. Silverman, and only attended two of four sessions funded by the WSIB. There is one report on file from Dr. Silverman, and it does not comment upon whether the worker's condition was expected to be permanent. In his November 2012 report, Dr. Silverman concluded:

> [The worker's] clinical presentation was consistent with the DSM-IV-TR diagnostic criteria for an Adjustment Disorder with Mixed Anxiety and Depressed Mood (309.28) (DSM-IV-TR: Code 309.9) [...]
>
> [The worker] expressed a high level of motivation for participating in psychological treatment to address his psychological sequelae and adjustment difficulties. To the extent that he has been confused about how to manage his psychological sequelae and cope with his current situational stressors, I am recommending a course of 12 one-hour weekly sessions of cognitive-behavioral psychological treatment for normalizing and validating his experience, teaching pain management strategies, and providing direction and advice for enhancing his problems solving skills and facilitating his emotional and psychological adjustment to his current stressors.

29 Thus, Dr. Silverman does not suggest that the worker's Adjustment Disorder would be permanent; to the contrary, he appears to suggest that the worker should improve with the appropriate treatment.

30 The fact that the worker did not even attend the four treatment sessions covered by the WSIB indicates that his symptoms were, and are, transient and manageable. While the worker may certainly experience occasional low mood or anxiety, my attention was not drawn to any persuasive evidence demonstrating that the worker has an ongoing psychotraumatic disability condition.

31 The worker has had no form of ongoing psychological treatment since 2012 nor has he has he regularly taken any medication for psychological symptoms. He testified that he takes Tylenol for pain and a number of medications for his heart condition, blood pressure, and diabetes. The worker does not take any form of medication for depression and anxiety. He testified that he did not take such medications due to concerns about possible addictive properties. Be that as it may, the worker's representative did not draw my attention to any evidence that such medications were ever prescribed or recommended for the worker's emotional state. I further note that the worker sees his family physician on a regular basis, yet there is no report of the family physician to confirm an ongoing and permanent psychiatric condition.

32 The worker's representative relies on the worker's testimony that he is emotionally very sad because he lost so many things. He cannot do anything at home due to his knee. The worker described feeling terrible. He also began overeating after the accident, and gained weight as a result. In the absence of any treatment or medication, however, I find this evidence is insufficient to establish that the worker has permanent psychological damage within the meaning of the terms "impairment" and "permanent impairment."

33 Not all forms of emotional upset qualify for psychotraumatic disability entitlement. In *Decision No. 1022/98*, the Panel denied entitlement for psychotraumatic disability where there was a lack of medical evidence, reasoning as follows:

> In February 1996, the worker's family doctor stated that the worker was depressed, and that his marriage was failing. There is no evidence that the worker has received formal psychiatric treatment, nor is there any diagnosis of a psychiatric illness. Where a worker sustains an organic injury, it is to be expected that there will be some emotional effect on him, and that his emotional state may suffer for a time. There is not [*sic*: now?] some evidence that the worker was depressed, however this is insufficient in our view to lead to the conclusion that he is therefore entitled

to benefits for an additional psychotraumatic injury, nor is there sufficient evidence to show that any depression was significantly caused by the compensable injury. In this case, we are satisfied that any emotional reaction was a transient feature of the injury and other pressures experienced by the worker personally, and not sufficiently delineated as a separate injury such that it should attract separate benefits under the psychotraumatic disability policy.

34 Although *Decision No. 1022/98* addressed initial entitlement for psychotraumatic disability, I find that the above reasoning remains apt when considering permanent impairment due to psychotraumatic disability. Here, there is no evidence that the worker received formal psychological treatment beyond two sessions in 2012, nearly five years ago. While it is understandable that the worker experiences occasional low mood and frustration, it is not sufficiently delineated as a separate injury that warrants a permanent impairment assessment.

(c) Is the workplace injury a significant contributing factor in the worker's ongoing psychological condition, if any?

35 For the reasons set out above, I find that the worker does not have a permanent impairment due to psychotraumatic disability.

36 Furthermore, even if I were to accept the worker's testimony as sufficient evidence that he has a permanent impairment, it would still be difficult to conclude that the workplace injury plays a significant role in perpetuating such symptoms.

37 There is no question that the worker suffered a physical injury that affected his ability to maintain his livelihood. Essentially, he has knee pain which is managed with over-the-counter Tylenol and use of a cane. The permanent physical impairment was rated at 13% and he required physical restrictions. He also experienced frustration in the WT program, since he was not as successful with the academic components as he expected to be based upon his past experience. These factors contributed to the initial diagnosis of adjustment disorder back in 2012.

38 At the same time, however, the worker has experienced numerous significant health conditions and life stressors that likely overwhelm the role of the physical injury and the sequelae:

- The worker underwent a cardiac catheterization in early 2013. He was told that his heart almost stopped. At the same time, he learned that he was not getting enough oxygen during his sleep. The worker was diagnosed with tachycardia.

- The worker required cataract surgery in November 2012 and he has problems with his hearing.

- The worker reported stress with caring for his youngest son who had been diagnosed with obsessive compulsive disorder and anxiety.

- The worker also reported financial difficulties, which warrant further explanation. The worker received full LOE benefits from the date of the accident until April 2013, a period of approximately three years. His financial difficulties were related to an unsuccessful investment in a restaurant business with his son. He testified that he lost his savings. This happened around 2011.

- Memorandum #46 describes a telephone conversation between the worker and the Case Manager in September 2012 to discuss the worker's progress in WT. The worker felt that he could return to work, but had difficulty with stairs and prolonged walking, which is to be expected with a permanent knee injury. The worker stated that he was doing fine with four hours per day in school, and did not want to increase his hours. The worker said that he was worried about his future and thinks way too much about the future. He confirmed that he had seen a psychologist, Dr. R. Silverman, on one occasion. He was not referred to Dr. Silverman by his family doctor. According to the Case Manager, the worker said that he did not intend to pursue entitlement for his psychological symptoms:

> The worker confirmed that he is not claiming psychological entitlement in this claim. He stated that his depressive symptoms are related to many things and everything in general.

39 In summary, the worker had numerous non-compensable health conditions and stressors that were likely more significant than the knee injury, which is managed with Tylenol and a cane.

40 The worker's representative submitted that most people have life stressors. I agree that the mere existence of other stressors should not preclude entitlement for psychotraumatic disability or a permanent impairment for psychotraumatic disability. In this case, however, the worker has numerous significant life stressors and serious health conditions, which, taken together, overwhelm the significance of the knee injury. Furthermore, my attention was not drawn to any current medical report explaining how the workplace injury and/or its sequelae continue to make a significant contribution to any ongoing psychological symptoms.

41 In reaching this conclusion, I note that the worker has a long work history and I accept that he has a strong work ethic. The issue before the Tribunal, however, is whether he has a permanent psychotraumatic disability impairment as a result of the work injury. For all of the above reasons, I find that the evidence does not support allowing the appeal.

DISPOSITION

42 The appeal is denied.