2018 ONWSIAT 1746
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 1525/18

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DECISION NO. 1525/18

Z. Onen V-Chair

Heard: May 17, 2018
Judgment: May 28, 2018
Docket: 1525/18

Counsel: C. Oliverio, for Worker
D. Marchione, for Employer

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated August 31, 2016

***Z. Onen V-Chair*:**

(i) Introduction

1 The worker appeals a decision of the Appeals Resolution Officer (ARO) which denied him entitlement to benefits for a permanent impairment to his right foot. The ARO also denied the worker's claim for a secondary injury as a result of his right foot injury.

(ii) Background

2 This appeal arises out of an accident the worker suffered at work on January 24, 2014. At the time he was employed as a Hi Lift driver for the employer which is in the business of catering for passenger airlines. The worker had been with the employer since November 1997. The accident occurred when a full trolley the worker was pushing onto the tailgate tipped over onto the worker's right foot.

3 The worker received emergency health care in hospital. The diagnosis was that he had suffered a soft tissue injury with no fractures. He was provided with a boot as a temporary cast and a crutch and he remained away from work for a short period. He was treated with medication and physiotherapy. The worker returned to light work with restrictions on February 7, 2014. He continued in light work until July 19, 2014 when he stopped working to undergo double hernia surgery. After his hernia surgery, the worker returned to light work with the employer on May 9, 2015. He continued in light work until October 5, 2016 when the employer told the worker it no longer had modified work available. The worker once again returned to light work with the employer on January 31, 2015 and he has continued with modified work since.

4 Before his 2014 injury, the worker injured his low back in a work accident on February 20, 2005. The diagnosis was lumbar strain and medical investigations showed that the worker also had degeneration in his lumbar spine which was not causing symptoms at the time. The worker initially returned to modified work after this accident and he returned to his regular job in December 2005.

5 Shortly after his right foot injury, the worker reported that he was experiencing an increase in low back pain which he attributed to his uneven gait as a result of his right foot injury. The worker continued to report ongoing symptoms of pain in his right foot and his low back. On July 13, 2015, the Case Manager denied the worker ongoing entitlement as

well as entitlement for a permanent impairment as a result of the injury to his right foot. The injury was considered to be resolved. On November 30, 2015, the Case Manager denied the worker entitlement for a secondary low back condition related to his right foot injury. These decisions were reconsidered on March 22, 2016. On appeal, the ARO confirmed these decisions in August 2016.

(iii) Issues

6 The issues before the Tribunal are:

> 1. Whether the worker has entitlement to benefits for an ongoing injury to his right foot as a result of the work accident of January 24, 2014, and if so,
>
> 2. Whether the worker has entitlement to benefits for a permanent impairment of his right foot, and,
>
> 3. Whether the worker is entitled to benefits for a secondary injury to his low back as a result of the work injury to his right foot.

(iv) Law and policy

7 The worker's injury occurred in 2014 and as such the applicable legislation is the *Workplace Safety and Insurance Act, 1997* (the WSIA). The Workplace Safety and Insurance Board (WSIB) (the Board) provided policies it determined apply in this appeal. These are found in Policy Package #31 and #300, Revision #9. I will refer to them as necessary in my reasons.

(v) Entitlement to ongoing benefits for the worker's right foot injury

8 The worker seeks entitlement to benefits for a permanent impairment which he claims was caused to his right foot as a result of the work injury of January 2014. By section 13 of the WSIA, a worker who has sustained an injury at work is entitled to benefits. In this case, the Board has determined that the worker's entitlement to benefits ended because the right foot injury resolved. Board policy found in *Operational Policy Manual* (OPM) Document No. 11-01-05 titled "Determining Permanent Impairment" addresses the tests to be met to find entitlement for a permanent impairment. It states that an injury is considered to be resolved where there is: "...no evidence of an ongoing work-related impairment at the time MMR is reached." MMR or maximum medical recovery is reached according to the policy when a plateau has been reached in the recovery and no further improvement is expected.

9 The Board and later the ARO determined that the worker's injury resolved by July 2015 and there was therefore no residual impairment or ongoing entitlement to benefits. The employer supports the conclusion reached by the ARO. Ms Oliverio pointed to evidence on behalf of the worker that in her submission, it showed that the worker had an ongoing organic condition. I will refer to this evidence later in my reasons. As I will explain, on reviewing the evidence I have concluded that on balance it shows that the worker's organic right foot injury more likely than not resolved in or before July 2015. Accordingly the worker does not have entitlement to benefits for an ongoing right foot injury.

10 After the right foot injury, the worker was regularly assessed by an orthopaedic specialist associated with the fracture clinic of the hospital where he received emergency treatment. Dr. R. Jinnah saw the worker three times in January, February and March of 2014.

11 The first visit was two days after the injury on January 26, 2014. He described the worker's injury stating that the worker was complaining of pain and difficulty with walking. He localized the pain toward the forefoot area on the right side and along the plantar aspect of the right foot. Dr. Jinnah's report included his findings on examination:

> On examination, he is an otherwise well-appearing gentleman who is in no acute distress, awake, and alert. He is able to move his toes and his sensation to light touch is normal. There is no significant bruising or deformity noted at the present time. However, there is mild tenderness to palpation near the dorsal aspect of the right foot and

along the plantar aspect. X-rays show no obvious fractures. I have explained to [the worker] that he may have a soft tissue injury ..."

12 Dr. Jinnah recommended that the worker minimize walking, standing and climbing over the following two weeks. This report shows that on examination the findings were confined to tenderness to light touch and complaints of pain on walking. There was no other abnormality identified.

13 The second consultation with Dr. Jinnah was on February 13, 2014. His report of the same date notes that the worker was still complaining of discomfort with mobilization, localized to the superior lateral side of the foot as well as along the plantar medial aspect. Once again the only finding on examination was minimal tenderness on palpation. Dr. Jinnah recommended a further course of physiotherapy for symptom control and to help improve ranges of motion in the worker's foot and ankle. He again repeated that the worker should avoid prolonged standing, walking or climbing. I note that this restriction was repeated in a Functional Abilities Form (FAF) prepared by the worker's physiotherapist on February 24, 2014.

14 Dr. Jinnah saw the worker next on March 13, 2014. He noted that the worker was reporting improvement in his symptoms with physiotherapy but he still complained of pain along the dorsal and plantar aspects of his right foot. Dr. Jinnah reported that there were no findings of note stating that there was minimal tenderness on palpation with no bruising, induration or erythema. X-rays were negative. Dr. Jinnah stated he would see the worker in three weeks and at that time he expected the worker would resume his regular activities.

15 I take Dr. Jinnah's reports to mean that the worker's right foot injury was not significant and that it was expected to resolve very soon. There were no findings of note on objective examination except for tenderness. Dr. Jinnah stated he expected the worker to return to regular activity within a few weeks.

16 Following his work injury the worker also saw his family physician, Dr. M. Elahi. The evidence includes copies of his clinical notes from February 7, 2014, when he first saw the worker, until January 19, 2015. The worker saw the doctor approximately once a month during this period. He continued to complain of pain in his right foot and right ankle. On February 28, 2014, the worker was also concerned that he was experiencing low back pain. The worker was provided with prescriptions for medication for pain, inflammation and mood or depression. Otherwise treatment was conservative and included counselling encouraging greater activation, reassurance and a recommendation that the worker continue in modified work and that he exercise. The clinical notes indicate that after the July 23, 2014 hernia surgery, the worker started to complain about discomfort at the site of the operation. This, along with his complaints of low back pain and hemorrhoid discomfort, were persistent after the summer of 2014. Dr. Elahi's notes show that during this period, in the fall of 2014, he was also encouraging the worker to return to modified work.

17 Dr. Elahi provided Functional Abilities Forms in May, July, and September 2014. He provided restrictions for a return to modified work at regular hours. The restrictions included walking standing, sitting, lifting and climbing. His report of May 2014 states that he expected the restrictions to apply up to 14 days. His later report of July and September 2014 amended this and stated that the restrictions were expected to continue in excess of 14 days.

18 Dr. Elahi also provided notes on the worker's status. On November 28, 2014, he stated the worker continued under care for a chronic foot injury with significant pain and paresthesia and that he had referred the worker to a pain clinic. He did not mention the worker's complaints of low back pain and pain at the site of his hernia repair. He stated that the worker should start modified work. On December 29, 2014, he provided a further note stating that the worker was in his care for chronic right foot and low back pain. He repeated his view that the worker could undertake modified work.

19 The Board referred the worker for assessment to its Regional Evaluation Centre (REC) in the spring of 2015. The assessment was carried out by Dr. A. Karabegovic and J. Calwell, a Work Capacity Liaison. Their report is dated May 20, 2015. The assessment was focused on the worker's right foot injury. The assessors noted that the worker had other conditions including low back pain and pain over the site of his inguinal hernia repair. The worker reported that

due to his right foot injury, he was limited in his ability to sit, stand, walk and lift. His right foot pain was described as intermittent with numbness and tingling along the lateral aspect of the dorsum of the foot with sharp pain along the mid/forefoot on the plantar side. Clinical examination results were that the worker had an active range of motion within functional limits. There was a report of numbness over the dorsolateral aspect of the foot, and tenderness on the plantar aspect of the foot. There were no neurological findings and there was nothing to indicate that the worker's injury was more serious than a soft tissue sprain/strain.

20 The report included the results of tests to measure barriers to recovery and return to work. The report stated that the worker scored high on a test for kinesiophobia or fear avoidance behaviour. The report stated: "...he scored "crippled"..." on the Lower Extremity Functional Scale indicating a very high level of perceived disability that is inconsistent with and does not correlate with the objective findings on physical examination. The assessors noted "yellow flags" signifying barriers caused by a belief that hurt equals harm and a fear/avoidance of activity.

21 The REC diagnosis was right foot sprain or strain. The worker had a partial functional recovery with full recovery expected within four weeks. He was to have physiotherapy in the interim to address the worker's pain complaints. The assessors noted that the worker required therapy to activate and to improve his strength, endurance and functional stability. According to the report the worker also required education in hurt versus harm concepts to understand that activation would not cause further injury. I interpret the REC report as stating that the worker had essentially recovered from his strain injury and that his ongoing complaint of pain could be addressed with strengthening and activation. The recommended four weeks of additional time on modified work were to provide the worker with an opportunity to rebuild his resilience for normal activity.

22 After the REC report, Dr. Elahi provided two further reports on the worker's condition on October 31, 2015 and November 1, 2017. In his October 2015 report, he stated that the worker was suffering from chronic pain syndrome of his right foot and ankle related to his January 2014 work injury. The worker had been treated at a pain clinic, including with injections, without any appreciable improvement in his symptoms. Dr. Elahi stated that his view was that the worker was unable to return to his regular work due to his foot injury as well as his low back pain and his pain at the site of his hernia incision.

23 In a later report dated November 1, 2017 in response to questions put to him by the worker's representative, Dr. Elahi confirmed that there was no change in the worker's right foot condition. He stated that he had last seen the worker in July 2017 because the worker had moved to another city. He described the worker's ranges of motion in the right foot as 75% of normal, with ongoing complaints of numbness and tingling in the right foot. He did not describe any other findings on clinical examination. I note that a review of Dr. Elahi's clinical notes generally does not disclose reports of objective findings for the worker's right foot and ankle. The regular report is that of pain and at times swelling and tenderness. In contrast, Dr. Elahi regularly reported on ranges of motion for the worker's low back. Similarly, medical reports prior to 2017, including that of the REC, did not report any appreciable restrictions in the worker's ranges of foot and ankle movements.

24 The worker testified at the hearing of this appeal. He described the injury to his right foot and treatment afterward. He testified that he felt numbness and a burning pain. He found it difficult to walk. Physiotherapy was helpful to reduce his symptoms but only while he was in therapy. He has continued to experience pain largely located on top of his foot. Since the removal of his cast he had pain when bending his foot and ankle to walk. His foot also becomes numb if he sits for too long. He has been taking the same medication since shortly after his injury.

(vi) Conclusions

25 The question for the Tribunal to decide is whether the worker has an ongoing right foot injury after July 2015 and if so, whether he has entitlement for a permanent injury. Earlier I set out my finding that the worker does not have entitlement for an ongoing injury to his right foot. In reaching my decision, I acknowledge that the worker has continued to complain of right foot pain, particularly on standing and walking. His complaints have been persistent and

the medical evidence and in particular that provided by Dr. Elahi shows they have not changed significantly over time despite treatment. The evidence also shows however that there are few findings on objective assessment to document an ongoing organic condition. Effectively, the examining doctors did not report findings to support an ongoing organic injury in the worker's right foot or ankle. The evidence also shows that the worker has a fear of pain and activation such that he resisted attempts to help him to normalize the use of his right foot.

26 Dr. Jinnah saw the worker three times shortly after the accident. His reports disclosed few objective findings even in the early stages of the worker's recovery. Dr. Jinnah reported only mild tenderness on clinical examination. By March 2014, Dr. Jinnah expected the worker to resume regular activity within a short while. In April 2014, he discharged the worker stating he only needed to see him if and when required.

27 Dr. Elahi's reports including his clinical notes generally report the worker's complaints of pain with occasional references to tenderness and swelling. Dr. Elahi provided reports stating the worker required modified work, however there is little to support this on the basis of objective findings.

28 The report of the REC assessors set out similar results after an assessment of the worker's right foot. There were few findings on clinical examination with the exception of some tenderness. The REC recommendation for a further four weeks of physiotherapy was for the purpose of strengthening so that the worker could withstand normal activity. The assessors also emphasized that the worker was avoidant of activity due to a fear of pain and this was a barrier to return to work. This also likely explains why the worker required physiotherapy to strengthen muscles and improve endurance in order to be able to return to full duties.

29 In making my decision as to the worker's ongoing right foot entitlement, I noted that after July 2015 when the Board concluded entitlement, the worker continued to complain of pain in his right foot, he walked with an altered gait, took medications, and was provided with notes by his doctor to remain on modified duties. All of this evidence tends to point to a conclusion that the worker had an ongoing right foot condition after July 2015. The result of my analysis of the evidence is, however, that this evidence is outweighed by the evidence of the worker's doctors found in reports starting with those of Dr. Jinnah shortly after the accident, showing that there were few, if any, organic findings on examination. This did not change over time. The REC assessment of May 2015 also concluded there were few findings on examination. The worker was, however, found to be fearful of activity and pain. The worker took medications after this date however these would apply equally if not more to his low back pain and other complaints. His ongoing modified work with the employer can also be explained on the basis of his low back pain or his other complaints. In coming to this conclusion, I acknowledge Dr. Elahi's opinion that the worker required modified duties for his right foot and low back. The basis for these modified duties is unclear. As noted previously there are few, if any, organic findings to support ongoing right foot restrictions beyond July 2015. I prefer to rely on the opinions of the REC assessors that the worker's right foot injury resolved by July 13, 2015, with no ongoing restrictions. The REC assessors considered the lack of organic clinical findings whereas Dr. Elahi's opinions did not provide a persuasive explanation for the restrictions beyond the worker's complaints of pain.

30 A finding of entitlement to benefits for an ongoing organic injury requires that there be evidence to show that the injury continues. In this case, as I described, there is little to support a conclusion that the worker had an ongoing organic impairment after July 2015. In May 2015, the REC assessors noted the worker required some additional strengthening in order to be considered fully recovered. They stated that this should take about four weeks. By July 2015, this period had elapsed. In the absence of any material clinical findings to support an ongoing organic condition in the worker's right foot and ankle, I find that a preponderance of the evidence supports the conclusion that his injury had resolved by July 13, 2015, when his entitlement was terminated. The worker therefore does not have entitlement to benefits after that date for this injury. It follows that there is, therefore, no entitlement to benefits for a permanent impairment based on an organic right foot injury. I note that Dr. Elahi reported that the worker was suffering from a chronic pain syndrome. The question of the worker's entitlement for chronic pain was not before me and I make no finding respecting entitlement on this basis.

(vii) Entitlement to benefits for the worker's low back pain as a secondary injury

31 The worker seeks entitlement for low back pain stating that it was aggravated by his right foot injury. Board policy found in OPM Document No. 16-05-01 titled "Secondary Conditions - Resulting from Work-Related Disability/ Impairment" sets out guidelines for the adjudication where the work injury is claimed to have caused or aggravated another condition. The policy states that secondary conditions causally linked to the work injury will lead to entitlement to benefits for the additional condition:

> Entitlement for any secondary condition is accepted when it is established that a causal link exists between it and the work-related injury. ...

32 In this case, my review of the evidence has led to the conclusion that on balance, it is not likely that the worker's right foot injury caused an aggravation of his low back condition. My reasons follow.

33 The worker sustained an injury to his low back in the course of employment on February 20, 2005. He testified that the injury occurred as he tried to open a door that was jammed. The claim file for this injury was included in the evidence for this appeal. These documents show that the worker was diagnosed with a lumbar strain. He returned first to modified work and then regular duties on December 1, 2005. According to the worker's evidence, he continued to experience some back symptoms after he returned to work, however these did not interfere with his ability to work at his regular job, and he did not seek medical treatment for them. He stated that shortly after his right foot injury, his low back pain increased. He attributed this to his uneven gait as a result of the injury, causing him to rely more on his left leg. He stated that he has limped since the injury to his right foot.

34 Dr. Elahi's clinical notes first documented a complaint about increased low back pain on February 28, 2014. At the time, the worker was still complaining of right ankle pain, but he now had increased low back pain with radiation down his left leg. After this initial report of increased low back pain, the worker continued to report back pain, at times with radiation at almost every visit. After the hernia surgery of July 2015, the clinical notes stated that the worker continued to complain of right foot and back pain.

35 The worker saw Dr. H. Li, a neurosurgeon about his low back pain. Dr. Li's report is dated July 12, 2016. He noted the symptoms as low back pain with some left leg radiation and some tingling in the legs. The worker had difficulty with flexion and extension due to pain in his low back. His neurological examination was otherwise normal. Dr. Li set out his opinion stating:

> Although this patient had a lumbar herniated disc, clinically he presented more with lower back pain or mechanical back pain. I do not think that surgery will improve these symptoms. He will probably need to be seen by a pain specialist to have a comprehensive management of this pain. ...

36 The worker was also seen by Dr. A. Farno, an orthopaedic surgeon. His report of his assessment of the worker is dated September 29, 2016. He set out the history stating that the worker's pre-existing low back pain became worse when he injured his right ankle, putting more pressure on his left leg. Dr. Farno noted that an MRI in January 2016, showed disc herniation at the L4 L5 level causing pressure on the related nerve roots. He stated that the herniation was compatible with the worker's symptoms. Dr. Farno did not recommend surgery and advised ongoing modified work.

37 There are two opinions by Board consultants in the file on the question of causation. On September 18, 2015, Dr. J. Castiglione responded to a request for an opinion by the Case Manager as to the relationship between the worker's right foot injury and his low back pain. Dr. Castiglione first compared the results of MRI examinations of the worker's lumbar spine on June 6, 2005 and December 5, 2014. He noted that they disclosed little change with only a mild bulge at L3-4 which he stated was consistent with the degenerative process. He also stated that in his view, a temporary gait abnormality would not cause or aggravate low back symptoms. In arriving at his conclusion, he relied on a Tribunal Medical Discussion Paper prepared by Dr. I.J. Harrington titled "Limping and Back Pain" revised in August 2013.

38 The Board's Case Manager sought a further opinion from a consultant on receipt of Dr. Elahi's report of October 2015, stating that the worker's back pain flared up during treatment for his right foot. Dr. G. Seward provided an opinion on November 26, 2015. After a review of the file, he stated that there was no objective evidence to support a conclusion that the right foot injury led to an aggravation of the pre-existing low back condition. He noted that MRI results showed the worker had a degenerative condition in his lumbar spine with few changes over nine years and that the degenerative spine condition explained his lumbar pain.

39 The Discussion Paper by Dr. Harrington is part of the record of this appeal. The Discussion Paper describes the body mechanics related to the effect of a limp on the spine and related soft tissues. The worker had what was described as an antalgic gait. Dr. Harrington noted that with limping, there is a shift of the body's centre of gravity toward the affected leg, causing the trunk to shift to that side. The magnitude of the limp will determine the degree to which there is a vertical displacement of the body's centre of gravity with each step. Dr. Harrington stated that the repetitive pull of the trunk musculature resulting from this shift in gravity could affect degenerative change in the spine. Depending on the nature of the limp, over time the bending and rotation caused to the trunk could accelerate normal aging processes.

40 Dr. Harrington also stated that injuries causing temporary limping of a low magnitude are unlikely to cause additional stress on the spine or the other leg. He set out criteria for evaluating appeals including the type and magnitude of the limp and the duration of the limp.

(viii) Conclusions

41 The worker is seeking entitlement to benefits for his low back pain as a secondary condition resulting from his right foot injury. A finding of entitlement requires evidence to support a causal link between the worker's right foot injury and his low back pain. Having reviewed the evidence, I find that on balance, a preponderance of the evidence does not support a link between the work injury to the worker's right foot and his low back pain.

42 There is no question that the worker had pre-existing low back pain which he stated did not prevent him from working in his regular job. About a month after the right foot injury, the worker reported to Dr. Elahi that he was experiencing increased low back pain. The evidence also shows that the worker has had a mild limp from the time of his injury in January 2014. The worker's limp was described in the REC report of May 2015 as: "... a mild antalgic gait favouring the right side, ..." The Discussion Paper prepared by Dr. Harrington indicates that an antalgic gait could lead to an aggravation of spinal degeneration over time. In this case, the worker reported an increase in pain within a month of his injury. According to Dr. Elahi's reports after that the worker consistently reported back pain. There was no evidence for significant deterioration when the MRI results from 2005 were compared to those obtained in 2014. There is therefore little objective evidence of an acceleration in the worker's underlying degenerative disc disease. According to the information in the Discussion Paper, there was also not enough time between the right foot injury and the first report of increased back pain a month later, for there to have been a deterioration caused by the altered gait. It is therefore unlikely that the worker's low back pain complaints shortly after his right foot injury were caused by acceleration in the underlying degenerative disc disease.

43 There are also other explanations for the worker's complaints of low back pain. Dr. Farno was of the view that the worker's low back pain was explained by his disc deterioration at L5 and S1. This would indicate that the worker's pain is likely a result of his pre-existing condition. Dr. Li's view was that the worker was suffering from mechanical low back pain. Neither Dr. Farno nor Dr. Li provided an opinion as to a relationship between the worker's right foot injury and his low back pain. Finally, two Board consultants were of the view that the worker's low back complaints were explained by his underlying degenerative disc disease and that it was unlikely that the cause was his right foot injury. These consultants did not examine the worker and so their opinions, in my view, carry less weight. Nevertheless, with the exception of Dr. Elahi's view that the worker's low back condition was linked to his right foot injury, there is little other evidence to support such a relationship. Although Dr. Elahi was of the opinion that there was a causal link between the right foot injury and the low back pain, he did not provide any medical explanation to support his view.

44 For all of the foregoing I have concluded that the weight of the evidence does not support a link between the worker's low back pain and his right foot injury and accordingly he is not entitled to benefits for a secondary condition in his low back.

DISPOSITION

45 The appeal is denied.