

## SUMMARY

### DECISION NO. 2226/99

#### *Chronic pain.*

The worker suffered a right arm disablement from repetitive work at a deli counter. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for chronic pain.

Medical evidence supported the worker's claim that she developed chronic pain as a result of the injury and that she was experiencing marked life disruption. The appeal was allowed. [7 pages]

DECIDED BY: Libman

DATE: 21/12/1999

ACT: WCA

# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 2226/99

[1] This appeal was heard at Toronto on December 10, 1999, by Tribunal Vice-Chair P.K. Libman.

### THE APPEAL PROCEEDINGS

[2] The worker appeals the decision of the Workplace Safety and Insurance Board Appeals Resolution Officer Mrs. J. Pereira dated April 30, 1998 which found the worker had no entitlement for chronic pain disability, a NEL reassessment nor to a temporary supplement beyond June 20, 1997.

[3] The worker was present and represented by Mr. Victor Slater and Mr. Douglas Spiller of the law firm of Slater & Spiller. The accident employer was represented by its Manager, Occupational Health & Safety.

[4] On January 1, 1998, the *Workplace Safety and Insurance Act* (WSI Act) took effect. This legislation amends portions of the *Workers' Compensation Act*, which continues to apply to injuries which occurred before January 1, 1998. All references to "the Act" in this decision mean the *Workers' Compensation Act* as it read on December 31, 1997, unless otherwise indicated.

[5] An important change relevant to this appeal is that the Appeals Tribunal is now required to apply Board policy in accordance with sections 112 and 126 of the WSI Act. While the Tribunal did consider and apply Board policy previously in deciding Board appeals, the prior Act did not contain this express provision. In addition, the jurisdiction of the Appeals Tribunal is now described by section 123 of the WSI Act, with necessary modifications.

### THE EVIDENCE

[6] The Vice Chair had before him the Case Record material (2 volumes) prepared by the Tribunal Counsel Office. This was marked as Exhibit #1. In addition the Vice Chair had Addenda #1 and #2 and an Information Request Form which were respectively marked as Exhibits #2, #3 and #4.

### THE ISSUES

[7] The Appeals Resolution Officer has given the following history of the issues under appeal:

On November 25 19, 1992, while employed as a part-time deli-counter clerk, (the worker) developed pain in her right elbow due to the repetitive movements of pushing and pulling deli slices. The initial diagnosis was right elbow epicondylitis. The claim was accepted for the right elbow and benefits were paid accordingly.

(The worker) laid off work on May 27, 1993. Entitlement for the recurrence and the resulting lost time were denied on the basis that she was not below her maximum medical rehabilitation (MMR) level and was capable of doing suitable modified work which did not involve the use of the right hand.

The decision review specialist decision of April 20, 1994, confirmed that (the worker) was not totally disabled subsequent to May 27, 1993, and that her job was not repetitive and did not exceed her medical restrictions.

When (the worker) had right tennis elbow release on November 12, 1993, full benefits were restored.

Based on the Board medical advisor's review of February 25, 1994, (the worker) was considered to be partially impaired with permanent restrictions. Effective April 6, 1994, (the worker's) benefits were reduced to temporary partial 50 per cent.

Initially, entitlement for the right shoulder was denied but was later accepted when the file was reviewed in May, 1994.

In the future economic loss (FEL) decision of May 5, 1994, a FEL benefit was granted effective June 1, 1995 to June 1, 1997 along with a vocational rehabilitation (VR) supplement.

As (the worker) developed left shoulder problems while she was absent from work, entitlement was denied as unrelated to her compensable disabilities.

Noting that her medical records indicated chronic pain, the file was reviewed for CPD but entitlement denied on the grounds that the pain was found to be consistent with the organic findings. Entitlement for psychotraumatic disability was also denied as neither the injuries nor the sequelae were traumatic.

It was determined that (the worker's) diabetes, clinical depression and hypo-glycaemia reaction were not related. As (the worker's) treatment for her non-compensable disabilities did not constitute a medical rehabilitation program, a temporary supplement was denied. VR services were closed when (the worker) claimed total disability. The Board medical advisor reviewed the medical reporting and found no deterioration of the compensable condition. As (the worker) was not below her NEL level, benefits beyond June 20, 1997 were denied.

(The worker) was granted 15 per cent non-economic loss (NEL) for the right elbow and right shoulder.

Her FEL benefit was extended from June 1, 1997 to June 1, 2000. Her temporary supplement was closed effective June 20, 1997.

[8] The Appeals Resolution Officer, without holding an oral hearing, and issued a written decision dated April 30, 1998 denying the worker's objection.

[9] The worker has appealed the Appeals Resolution Officer's decision to this Tribunal.

## **THE PANEL'S REASONS**

### **(i) Preliminary Issues**

[10] In Addendum #1 is a letter from the Board dated March 19, 1999 certifying that the following Policy Packages apply to this appeal:

- #10 (Chronic Pain Disability (CPD) Entitlement)

- #61 (Increase in NEL Quantum)
- #64 (NEL Award for Psych/CPD (Accident from January 2, 1990 to December 31, 1997 inclusive))
- #77 (General S.43(9) Supplement)

[11] The parties agreed that these policies applied to this appeal. The employer's representative indicated that the employer supported a determination that the worker had entitlement under the Board's chronic pain disability policy guidelines but wanted a determination as to the appropriate cost relief the employer would have been entitled to.

**(ii) Evidence Presented**

[12] The worker gave sworn evidence. The worker stated that she had constant pain throughout her right arm which had not abated since the compensable accident in 1992. The worker stated that her chronic pain now went into her neck and she had headaches and as a result of favouring her left side she now had carpal tunnel in her left hand and tendonitis in her left thumb and elbow.

[13] The worker stated that she was unable to work due to the constant pain and although she tried to work with her brother's company as a receptionist or file clerk after her VR file was closed she was unable to continue because of the pain.

[14] The worker stated she had difficulty sleeping, was unable to properly dress herself and infrequently left her house. The worker stated that her husband and son did the housework and cooking and she did few daily activities other than attempting to sleep or sitting in a reclining chair.

[15] The worker stated that she was taking medication for pain and sleeping and that she tried to limit the daily intake of Tylenol #3 to eight. The worker stated that she saw her family doctor every month.

[16] Following completion of the evidence, submissions were made on behalf of the parties.

**(iii) Panel's Findings**

[17] I have carefully reviewed the evidence presented, the material in the Exhibits and the submissions made on behalf of the parties.

[18] The issues for determination in this appeal are whether the worker has entitlement for chronic pain disability, a NEL reassessment and a temporary supplement beyond June 20, 1997.

[19] In the Appeal Application the worker's representative has essentially set out his submissions as to why the worker has entitlement under each of the five headings of the Board's chronic pain disability guidelines.

[20] In making my determination on this issue I have noted the following documentation:

- a) The report of Dr. Rachel Edney dated December 22, 1998 (and not available to the Appeals Resolution Officer) which provides the following:

I am a duly qualified practitioner licensed to practise in the province of Ontario since 1970. I have been (the worker's) family physician since 1981.

(The worker) injured her right elbow in 1992. Following treatment for her elbow (the worker) developed pain in her right shoulder. Both these injuries were accepted for compensation. Since this time (the worker) has continued to have constant totally debilitating pain her right shoulder and arm and constant severe headaches. The pain has been persistent in (the worker's) life totally disabled her from any form of work whatsoever.

Whether this pain is entirely physiological or partially psychogenic is immaterial. There is no doubt it has caused a total change in (the worker) so that she is unable to lead a normal productive life. The pain has resulted directly from the work related injury she received.

- b) The memo by Dr. Aronshtam, Unit Medical Adviser, dated June 6, 1998 which provides the following:

This now 38 yr old worker has received a 15% N.E.L. award for impairment in her right elbow/shoulder, based on her examination in July '95, in relation to her injury in Nov '92.

It does not appear there is ongoing continuing consistent abnormal pain presentation following the accident, so I agree with the previous medical opinions that C.P.D. medical criteria would not be met... the I.W.'s impairment remains partial.

- c) The memo by Dr. Colaco, Unit Medical Adviser, dated August 18, 1977 provides the following:

Current medical on file does not indicate any deterioration of worker's compensable condition to R. shoulder and elbow.

- d) The memo by Dr. Varma, Unit Medical Adviser, dated June 23, 1995 provides the following:

1. Psych entitlement not in order, noting RSI injury and not stressful.
2. Re CPD, medical criteria not met noting:
  - a) Dr. Hatch notes condition not changed from initial presentation to now. I find it difficult to see how this would lead to a full blown CPD. Worker has continued to remain at MMR and has a PI, which has been recognised. Her symptoms are in keeping with organic problems now, notwithstanding original inj.
  - b) Pain now in neck and L. shoulder as well. CPD policy states pain should be limited to compensable body part only and no other part.

An earlier memo by Dr. Varma dated February 6, 1995 provides the following:

Pain is from her chronic epicondylitis and frozen shoulder and is not out of proportion for CPD...

- e) The memo by Dr. Walker, Unit Medical Adviser, dated February 25, 1994 which gives the following:

...shoulder problems appear related to the diabetes...

the diabetes is prolonging recovery to at least a minor degree.

- f) The report of Dr. Edney dated January 31, 1996 which provides the following:

...I have difficulty in understanding why the board does not consider this patient has a chronic pain disability. Obviously her injury occurred at work and the pain was caused by this injury. The pain has been present for 3 yrs and certainly persisted beyond MMR. Dr. Hatch clearly states that as her orthopaedic surgeon, he considers the pain totally out of proportion to the injury she received (highlighted in his letter), and finally the injury clearly impairs (the worker's) earning capacity...

- g) The notes of the Claims Adjudicator of a conversation with the Dr. Edney, the worker's treating physician (on the issue of marked life disruption) dated July 12, 1996 which provides the following:

...GP also indicated that the worker seems to be totally consumed in her job search to the point where she is not sleeping, eating, taking her medns properly.

GP said worker is not taking care of her 13 year son as she is consumed with the idea of looking for work.

GP indicated that the worker appears to be very depressed and unable to function...

In the same memo, the following conversation is attributed to the spouse of the worker:

Husband supported GP's concerns.

Husband indicated that the worker's condition – diabetes and depression are directly related to her injury...

Worker is not sleeping, not eating, totally "obsessed" with looking for a job search.

Husband indicated that his wife is "obsessive-compulsive..."

- h) The accompanying report of Dr. Hatch is dated May 31, 1995 and contains the following:

...(the worker) has a chronic painful condition now involving both shoulders. I don't believe there is a conscious attempt to magnify her symptoms to mimic disability. I do believe however that the pain which she experiences is totally out of proportion to any underlying soft tissue injury she may have received and she really seems to have achieved a full blown chronic pain syndrome and I understand that attendance at the Pain Clinic has produced no benefit...

[21] I find that the worker has testified in a straightforward and credible fashion at this hearing and I accept her evidence of the marked life disruption resulting from the compensable injury.

[22] I do not agree with Dr. Varma, UMA, that for entitlement under the Board's CPD policy, that pain should only be limited to the compensable body parts and I note that another UMA, Dr. Walker has opined that the worker's diabetes is related to the compensable injury.

[23] I agree with the worker's treating physicians Drs. Hatch and Edney that each of the Board's five criteria for chronic pain disability has been met and that the worker should therefore have entitlement under that policy.

[24] Although the issue of SIEF cost relief was not considered by the Board in this appeal and although I note that the deadline for manual adjustment of the employer's 1992 NEER assessment was September 30, 1996, had I been adjudicating this issue, I would have found that the worker had a minor accident and a major pre-existing condition (as set out in the medical

reporting above, particularly the diabetes) and the employer would thus, according to the matrix in the Board policy been entitled to 90% SIEF cost relief.

[25] I am therefore allowing the worker's appeal.

**THE DECISION**

[26] The appeal of the worker is allowed. The worker is found to have entitlement under the Board's chronic pain disability policy. The Board is directed to determine the benefits that flow from that finding including a permanent impairment reassessment and entitlement to additional supplementary benefits after June, 1997.

DATED: December 21, 1999

SIGNED: P.K. Libman