WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 3119/18

BEFORE: E.J. Smith: Vice-Chair

HEARING: October 1, 2018, at Toronto
Written
Post-hearing activity completed on November 29, 2018

DATE OF DECISION: March 22, 2019

NEUTRAL CITATION: 2019 ONWSIAT 737

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated July 19, 2017

APPEARANCES:

For the employer: R. Fink, Lawyer

For the worker: Not participating

Interpreter: Not applicable

REASONS

(i) The issues; the outcome

[1] The employer appeals a decision of the Appeals Resolution Officer (ARO) dated July 19, 2017 with respect to a low back injury that the then 45-year-old worker suffered on March 23, 2016. The injuries initially reported were to the low back, the right ankle, and of an abrasion on the low back which became infected. However, the ankle and the abrasion healed. The injury which Mr. Fink submits became enhanced and prolonged is the injury to the low back.

[2] The ARO granted the employer 50% SIEF relief based on findings of a moderate severity of accident and a pre-existing condition of moderate significance.

[3] The employer seeks 90% SIEF relief based on a finding that the accident was of minor severity and the pre-existing condition was of major significance.

[4] I have allowed the appeal in part. I have granted the employer 75% SIEF relief based on a finding that the accident severity was moderate and the pre-existing condition was of major significance.

[5] I have addressed each issue in turn. The reasons for my findings are set out below.

(ii) Law and policy

[6] The Board's authority to establish the Second Injury and Enhancement Fund derives from section 98 of the WSIA, which states:

> **98 (1)** The Board may establish a special reserve fund to meet losses that may arise from a disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class.

[7] *Operational Policy Manual* (OPM) Document No. 14-05-03, entitled "Second Injury and Enhancement Fund," provides in part:

> **Policy**
>
> If a prior disability caused or contributed to the compensable accident, or if the period resulting from an accident becomes prolonged or enhanced due to a pre-existing condition, all or part of the compensation and health care costs may be transferred from the accident employer in Schedule 1 to the SIEF.
>
> Both physical and psychological disabilities are included.
>
> **Guidelines**
>
> There is no provision in the Act for the Fund to apply to Schedule II employers.
>
> In situations where alcoholism plays a role in the causation of an accident, it is not considered to be a pre-existing condition with regard to the application of SIEF relief.
>
> The objectives of this policy are to provide employers with financial relief when a pre-existing condition enhances or prolongs a work-related disability. It thereby encourages employers to hire workers with disabilities.
>
> **Definitions**
>
> Pre-accident disability is defined as a condition which has produced periods of disability in the past requiring treatment and disrupting employment.

Pre-existing condition is defined as an underlying or asymptomatic condition which only becomes manifest post-accident.

(…)

SIEF-application to employer costs

Medical significance of pre-existing condition*	**Severity of accident****	**Percentage of cost transfer*****
Minor	Minor Moderate Major	50% 25% 0%
Moderate	Minor Moderate Major	75% 50% 25%
Major	Minor Moderate Major	90%-100% 75% 50%

NOTES

* The medical significance of a condition is assessed in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person. An associated pre-accident disability may not exist.

With psychological conditions, the possibility of prior psychic trauma resulting from life experience could be considered as evidence of vulnerability, and justify recommending relief to the employer, even in the absence of pre-existing psychological impairment.

** The severity of the accident is evaluated in terms of the accident history and approved definitions.

Accident History Components

- mechanics (lift, push, pull, fall, blow, etc.)
- position (kneeling, standing, sitting, squatting, bending, etc.)
- environment (lighting, temperature, weather conditions, terrain, etc.)

Definition – "Severity of Accident"

Minor: expected to cause non-disabling or minor disabling injury
Moderate: expected to cause disabling injury
Major: expected to cause serious disability probable permanent disability

*** The percentage of the total cost of the claim transferred to the SIEF.

[8] As can be seen from the table of relief found in the Board's SIEF policy, the amount of SIEF relief granted is dependent on two variables: the severity of the accident and the severity of the pre-existing condition.

[9] Board policy requires that accidents be characterized as either "minor" (expected to cause non-disabling or minor disabling injury), "moderate" (expected to cause disabling injury) or "major" (expected to cause serious disability, probable permanent disability). In addition to these definitions, the policy suggests that the severity of the accident is to be evaluated in terms of the "accident history components," which include "mechanics" (lift, push, pull, fall, blow, etc.),

"position" (kneeling, standing, sitting, squatting, bending, etc.) and "environment" (lighting, temperature, weather conditions, terrain, etc.). In determining the severity of accident *Decision No. 1021/12* confirmed that the actual injuries are not considered but rather the extent of disability the mechanics of the accident would reasonably be expected to cause.

[10] With respect to the matter of the pre-existing condition, Board policy requires that it be characterized as minor, moderate or major. The policy does not define these terms and indicates only that the medical significance of a condition is assessed "in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person." These provisions were interpreted as follows in *Decision No. 1582/07*:

> I interpret the policy to mean that the medical significance of a pre-existing condition should be considered to be "minor" if it made the worker slightly more liable to develop a disability of greater severity than a normal person, and that it should be considered "major" if it made the worker extremely liable to develop a disability of greater severity than a normal person. If the extent to which the pre-existing condition made the worker more liable to develop a disability of greater severity than a normal person was more than slight, but less than extreme, the medical significance of the pre-existing condition could be considered moderate.

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

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

[12] The Vice-Chair's reasoning in *Decision No. 529/07* is instructive regarding severity of accident in disablement cases. The Vice-Chair was concerned with the use of the word "expected" in the Board's SIEF policy, especially in the context of a disablement claim where a worker suffers a gradual onset injury. If the word "expected" means "likely" or "probable" then, if the injury were probable, the work would be unsafe per se and likely raise health and safety concerns. The Vice-Chair found:

> Therefore, if "expected" means "probable," then, on this interpretation, generally, a gradual onset injury would almost always be considered "unexpected," and the result of a "minor" accident. However the SIEF policy does not stipulate that all disablements should be found to be the results of minor accidents. I consider it likely that the Board would have specified this, if that had been the intent of this wording.
>
> …
>
> In addressing this issue, in a disablement claim, I do not consider it reasonable to interpret the word "expected" to mean that injury is probable. I interpret it to mean only that an injury of the type experienced is reasonably possible, or not unexpected…

[13] *Decision No. 1568/11* considered whether degenerative change consistent with a worker's age, could, in itself, be construed as a pre-existing condition within the meaning of the SIEF policy. The Vice-Chair cited the Tribunal Discussion Paper on Back Pain prepared by Drs. Harris, Fleming and Gertzbein which states that "degenerative disc disease" is not really a

disease but normal aging change. The SIEF policy also notes that the medical significance of a condition is assessed in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person. Several Tribunal decisions have held that evidence of degenerative changes typical of a worker's age does not in and of itself represent a pre-existing condition for the purposes of the Board's policy (see, for example, *Decisions No. 14/11*, *1528/05*, *701/01* and *238/89*).

[14] The Vice-Chair in *Decision No. 1743/13* qualified *Decision No. 1568/11* by emphasizing that: "it remains open to a Vice-Chair to determine that pre-existing degenerative changes or osteoarthritis are contributing to the extent of the injury if there is specific evidence of that impact."

(iii) The severity of the accident

(a) The submissions

[15] Mr. Fink disputes the Board's finding that the mechanism of accident was of moderate severity. He submits that the ARO erred in describing the accident as an eight-foot fall. There was no height included in the original description of the accident. Mr. Fink has enclosed an email from the Health and Safety Manager of the employer with pictures of the grate on the truck from which the worker fell. The Manager describes the fall as from a height of three feet at a maximum.

[16] Mr. Fink asks that if I do not accept this evidence of the height from which the worker fell, that I schedule an oral hearing to determine this issue.

[17] On review of the file, the worker's Form 6 does not describe the mechanics of the accident. However, in the telephone call to the Board on May 12, 2016,the worker has described that he:

> …was standing on a grate doing salt jam, the grate was covered in hydraulic fluid due to a leak; the grate snapped, he slipped partially twisted his left ankle, bounced off the side of the grate frame, bounced off of that, and landed on the concrete, hitting his low back and tailbone area.

[18] The employer's Form 7 states:

> The employee pulled over while out salting to check the salt hopper. While walking along the catwalk on the truck he fell through the grate and fell off the truck.

[19] Mr. Fink submits that a slip and fall would normally be a minor accident. He notes that Dr. Ford, in his report of March 21, 2018, describes the fall as "from minor to moderate" severity. Mr. Fink submits that I should accept the opinion of Dr. Ford, but that the decision between minor and moderate is "mainly in the discretion of the Panel." I understand that he accepts that the question of whether it is minor or moderate is therefore a matter for judgement by the Vice-Chair.

(b) Analysis and conclusions: severity of the accident

[20] In my view, even assuming that the fall was only from a height of three feet (as is indicated in the evidence provided by Mr. Fink), the severity of the accident was moderate and not minor. The question is whether it was expected that a fall from this height would cause disabling injury. It is clear that the reference to disabling injury in the policy is not to permanent

impairment. If an accident is expected to cause temporary disability, that is sufficient to meet the terms of the provision.

[21] The term disability is not defined in the policy or in the WSIA, per se. However, a pre-accident disability is defined in the policy as a condition which has produced periods of disability in the past requiring treatment and disrupting employment. Therefore I understand the question, of whether the mechanism of accident is expected to produce disability post-accident, to be similar, i.e. to be whether it is expected that the injury will require treatment or disrupt employment beyond what is described for a minor accident. A minor accident is defined as one resulting in no disability or minor disability, i.e., on this interpretation, minor treatment/ disruption of employment. In my view, also, a requirement for modified work constitutes a disruption of employment.

[22] I consider it reasonably expected that a fall from a height of three feet, landing on the buttocks, would result in more than minor disability. I also note the additional aggravating factor that the worker slipped on oil, a very slippery surface, which would have limited the extent to which he could save himself in the fall and possibly the speed at which he fell. He also hit the side of the truck as he fell. I have also taken into consideration the fact that he landed on concrete.

[23] I find the severity of the accident to be moderate. It would be expected to cause an injury which would require medical treatment and/or modified work for more than a minimal period, if not time off work.

(iv) The significance of the pre-existing condition

(a) The submissions

[24] Mr. Ford refers me to the following pre-existing conditions to support his submission that the pre-existing conditions were of major significance:

- He refers me to the reports of Dr. M. Ford, an orthopaedic surgeon, dated April 17, 2017 and March 21, 2018. Dr. Ford expresses the opinion that the pre-existing degenerative findings were of major significance. Mr. Fink also refers me to Dr. Ford's opinion that the annular tear found on MRI likely pre-existed the accident.
- Mr. Fink makes submissions about the extent to which the worker's low back condition was likely symptomatic prior to the accident and, even if it was not symptomatic, how the evidence of prior symptoms should be weighed.
- He makes submissions about the medical evidence that refers to pain behaviours prior to the accident. He makes submissions about psychological disability.
- He also refers me to the evidence that the worker was obese.

[25] I have accepted that there was a major pre-existing condition for the reasons set out below. I have considered each of these factors in turn.

(b) The pre-existing degenerative factors

[26] In his two opinions, Dr. Ford expresses the opinion that the pre-existing degenerative findings in the worker's spine were of major significance in prolonging and enhancing the injury. I note that he expresses this opinion based on the degenerative findings alone.

[27] However, I have not accepted that the degenerative findings constitute more than a moderate pre-existing condition, on an organic basis, for the following four reasons.

[28] First, Dr. Ford has not addressed what degree of degenerative findings would be "normal" for a 45-year-old worker. As noted above, in the absence of special factors, Tribunal decisions have found that degenerative changes that are normal for the age of the worker do not form a basis for SIEF relief.

[29] Secondly, Dr. Ford expresses the opinion that the annular tear identified on investigation was likely a pre-existing condition and was not caused by the accident. He disagrees with other medical opinion in the Board file. However, the Board has granted entitlement for the annular tear. A memo dated October 27, 2016 is explicit that entitlement is extended to include the annular tear. That entitlement was not appealed.

[30] A SIEF appeal addresses only how costs are attributed to an employer based on the entitlement that was granted. It does not constitute an appeal of the entitlement decisions. In a SIEF appeal, I do not have jurisdiction to reverse an entitlement that was granted but not appealed.

[31] Thirdly, Dr. Ford draws inferences about the significance of the role of the pre-existing degenerative changes based on the extent and prolongation of the worker's symptoms after the accident. He states:

> Despite the fact that imaging studies do not demonstrate any definitive pathology in the spine he continues to have persistent disabling symptomology. There is a fault in logic suggesting that the pre-existing degenerative etiology changes here are only moderately responsible for his continued level of disability. This begs the question of what then is responsible for the apparent severe level of disability given that there is no imaging evidence of any significant posttraumatic pathology.

[32] However, in a SIEF appeal, Tribunal decisions have been consistent in finding that the role of the pre-existing condition is not to be inferred from the facts of the specific worker's experience of the injury. The question of the significance of the pre-existing condition is to be addressed prospectively, in terms of what the expected effects would be on a worker generally.

[33] Fourthly, in any case, on these facts, Mr. Fink has submitted that there are non-organic factors contributing to the worker's symptomology. Therefore he has provided an alternative theory for why the worker's recovery was prolonged, quite aside from the role of the pre-existing degenerative findings

[34] In my view, the presence of the pre-existing degenerative symptoms, themselves, do not support a finding of more than the moderate pre-existing condition that the Board has determined.

[35] However, I have considered next the evidence that the low back condition was already at least intermittently symptomatic, and the evidence that the worker was experiencing non-organic pain symptoms, even prior to the compensable accident.

(c) The evidence of prior non-organic pain symptoms/ prior low back injury

[36] The ARO has found that the low back condition was not symptomatic immediately prior to the compensable accident. However, I accept, first, Mr. Fink's submission that a non-symptomatic underlying condition can at times be of major significance depending on the circumstances. Secondly, in this case, there is evidence of pre-existing low back complaints

which include non-organic pain symptomology. I accept that the extent and nature of the prior symptoms suggest that the worker was already vulnerable to an aggravation of his prior low back condition.

[37] The worker suffered a fracture to his coccyx in a slip and fall accident in 2005. Dr. Ford notes that he had intermitted low back pain after that date, at times requiring narcotic medication.

[38] The extent of those complaints is most apparent in the clinical notes of the worker's family doctor, which the Board obtained. I note that:

- A clinical note of July 10, 2006 refers to back pain radiating to the left buttock
- A note of November 14, 2013 describes chronic low back pain, coccyx pain from previous fall in 2005.
- A note of January 6, 2014 describes chronic low back pain, worse in the winter months, as well as tenderness in the coccyx area, and that the worker has a problem when working below his waist.
- The worker was referred to a specialist, Dr. E. Tam. The referring note of January 6, 2014 describes persistent low back pain, previous diagnosis of coccyx fracture.
- Dr. Tam's report to Dr. Chung of March 31, 2014 describes the 2005 fall as having involved bilateral scapular fractures as well as a coccyx fracture. The worker is experiencing pain in the left medial aspect of the buttock and has been told his gluteus muscle was torn. He has not been working since December 2013.

[39] There is also evidence of an MVA that the worker suffered on February 9, 2016. From the clinical notes, he injured his ribs and chest in that accident, not his low back. Dr. Chung states in a letter dated September 27, 2016 that there was no mention of back pain after this MVA. Therefore I accept that the MVA did not worsen the pre-existing level of low back pain. Dr. Chung also noted that the worker was no longer on pain medication (the Percocet prescribed after the February 9, 2016 accident) by February 15, 2016, a month before the compensable accident.

[40] However, Dr. Chung's clinical notes also indicate that the pre-existing low back pain was not resolved in this time period, either. A June 2, 2016 note from Dr. Chung to the specialist, Dr. Wong (sent after the compensable accident) noted chronic back pain as well as coccyx pain from a previous fall in 2005. Dr. Chung did not describe this as a new pain from the compensable accident in March 2016.

[41] The Board has determined that the compensable March 2016 accident worsened the low back pain, and caused the annular tear, and I have approached the issue on that basis. However, this note to Dr. Wong confirms that the worker had had longstanding low back symptoms prior to the workplace accident.

[42] With respect to excessive pain symptoms, the specialist, Dr. Tam, also describes pain behaviors in her note of March 31, 2014. She states:

> Pain behaviors were present today. His pain is soft tissue in origin, located in the gluteus muscle…. I explained my concern to [the worker] regarding his pain lasting 9 years, and that normally I would expect even a tear of a muscle would not continue to cause pain. My only other explanation for persistent pain, if he is unable to stretch and strengthen his core and pelvic muscles, would be central sensitization of pain, in which coping

> mechanisms with the aid of a counselor would be helpful. An interdisciplinary pain clinic may also be of benefit.

[43] In my view, the clinical notes indicate that the worker had ongoing if intermittent difficulty with his low back since 2005. In addition, in my view, Dr. Tam's report provides a diagnosis of pain behaviors and of likely central sensitization of pain even in 2014, well prior to the compensable accident. She recommended referral to a pain clinic in 2014, prior to the compensable accident.

[44] I also note the diagnosis provided for the worker in the Function & Pain Program report dated June 1, 2017, which is of:

> Somatic Symptom Disorder with predominant pain. Pain Disorder Associated with Both Psychological Factors and General Medical Condition
>
> Mechanical and myofascial back pain referred down the left leg. Possible left L5 nerve root irritation.

[45] In a memo dated March 20, 2017, the worker told the Board that while he may have had back injuries in the past, his work and work duties were not affected. The ARO has relied on the fact that the worker had continued to work in finding that the pre-existing condition was not of major significance. However, I note the description in the letter of Dr. Tam of March 31, 2014 that the worker has not been working since December. He is described as a welder and truck driver. The clinical note does not describe this work as seasonal, and so I understand the note to be indicating that the worker is off work because of his symptoms. Therefore the worker has likely suffered a disruption of employment due to his low back symptoms in the time period prior to his compensable accident. It may well be that the pre-existing condition in this case was sufficient to constitute a pre-existing disability, and not merely a pre-existing condition, given that there had apparently been both prior treatment and prior disruption of employment. However, it is not necessary for me to determine whether the pre-existing low back condition constituted a disability (rather than a pre-existing condition). The SIEF policy explicitly extends to both a pre-existing symptomatic disability and to a non-symptomatic underlying condition. The extent of the causal role depends on the specific facts.

[46] I also note, in particular, that Dr. Tam describes the worker's pre-existing ongoing symptoms in terms of a pain condition that is not explained by the organic injury. Whether due to a chronic pain disorder or to undetected organic pain, in my view this pre-existing experience of unexplained excess pain likely made the worker vulnerable to the continued experience of excess pain that is described in the medical reporting after the compensable injury. Taking into account the moderate level of pre-existing underlying degenerative changes that the Board has recognized, my finding that there was significant pre-existing prior back symptomology, and also pre-existing non-organic or unexplained low back pain, I find this evidence sufficient to support a major pre-existing condition.

(d) The evidence of obesity

[47] I have also considered the evidence of obesity as a possible pre-existing contributing factor.

[48] A report of the family doctor, Dr. Chung, dated September 27, 2016 describes the worker as weighing 315 lb. That weight is also referred to in the report of Dr. Koo dated March 23, 2016.

[49] A report of the Regional Evaluation Centre of an assessment on July 27, 2016 describes the worker's weight as 301 lbs., which suggests that he had lost 14 lbs.

[50] However, a report of Dr. Koo dated November 7, 2016 describes the worker's height as 5 feet 11 inches and his weight as 315 lbs., which suggests that he gained back whatever weight he had lost (or that the prior reference had been an error).

[51] An opioid assessment form from Dr. Chung, dated January 24, 2017 responds to the question: "Are there any existing or co-morbidities?" by specifying "obesity." There is also a reference to "back injury" which may be a reference to the old back injury, but the reference is partly illegible and not clear.

[52] Tribunal Decisions have found that obesity may be a pre-existing condition for SIEF purposes if there is evidence that it has prolonged or enhanced the period of disability (see *Decision No. 3514/17*). In this case, the medical reporting has not directly addressed the extent of the contribution made by the obesity. However, I infer from Dr. Chung's description of it as a co-morbid factor that it is relevant to the worker's health generally and therefore likely impacting his recovery.

[53] In my view, this reference to the worker's obesity supports my finding that there was a major pre-existing condition. Taking together the evidence of the extent and nature of the pre-existing low back condition, the pre-existing evidence of an excess pain experience, and the evidence of obesity, these different factors taken together confirm my finding of a major pre-existing condition.

DISPOSITION

[54] The appeal is allowed in part:

1. The severity of the accident was moderate.
2. The significance of the pre-existing condition was major.
3. The employer is entitled to 75 % SIEF relief.

DATED: March 22, 2019

SIGNED: E.J. Smith