

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1174/04

- [1] This appeal was heard in Burlington, Ontario on July 6, 2004, by Tribunal Vice-Chair V. Marafioti.

THE APPEAL PROCEEDINGS

- [2] The worker appeals the decision of the Appeals Resolution Officer S.M. Elliott dated May 15, 2003. That decision concluded that there was no entitlement for a neck impairment, as the evidence would support that the worker had degenerative changes which were progressing causing clinically defined neck symptoms. The Appeals Resolution Officer also concluded that there was insufficient evidence of a true thoracic outlet syndrome and entitlement would not be granted for that condition. In addition, the Appeals Resolution Officer concluded that the worker did not meet the Workplace Safety and Insurance Board's (the "Board") medical criteria for chronic pain disability benefits and entitlement would not be granted for this condition. Furthermore, the Appeals Resolution Officer concluded that there was insufficient findings related to the basis for which this claim was established to support the worker's inability to remain in the workforce beyond November 30, 1998 and the recurrence was denied.
- [3] The worker attended and was represented by Mr. Barrafato, Barrister and Solicitor. The employer attended in the person of Ms. Toni Whibbs, Human Resources Manager and Ms. June McPherson, Nurse Consultant and were represented by Mr. Kevin Coon, Barrister and Solicitor, with the firm of Baker & McKenzie.

THE RECORD

- [4] I heard oral testimony from the worker and considered the following documents:
- Exhibit #1: Case Record;
 - Exhibit #2: Addendum No. 1;
 - Exhibit #3: Addendum No. 2;
 - Exhibit #4: Addendum No. 3;
 - Exhibit #5: Hearing Ready Letter;
 - Exhibit #6: Clinical notes from Dr. O. Badawi;
 - Exhibit #7: Post-Hearing submissions from Mr. Barrafato and attachments.

THE ISSUES

- [5] I must determine whether the worker is entitled to chronic pain disability benefits, whether the worker is entitled to neck impairment benefits, whether the worker is entitled to thoracic

outlet syndrome and whether the worker is entitled to loss of earning benefits subsequent to November 30, 1998 due to a recurrence.

THE REASONS

(i) Background

[6] On December 15, 1997 the worker suffered myofascial pain of the left shoulder and tenderness was found in the left scapular area.

[7] At that time the worker was employed in a position called auto hip pocket sewer. It was the worker's position that she began to work on oversized pants for several months before December 1997 and this caused the onset of pain.

[8] The worker was assessed for a non-economic loss award on February 17, 1999 and was granted a 5% award for chronic strain of the left rhomboid muscle.

[9] The worker subsequently claimed entitlement for a neck impairment, thoracic outlet syndrome and chronic pain disability. The Board's Medical Advisor reviewed these complaints, but eventually ruled as indicated earlier.

[10] An MRI was performed on April 17, 1998 which demonstrated the presence of small osteophytes at the cervical level and more significantly a bulging disc at the C5-6 level. Although there was no focal disc herniation, Dr. Greenwood indicated in his report of March 18, 1999 that impingement of the cervical disc can cause symptoms that are felt down the arms and into the fingers and this could be an underlying source of the worker's problems.

[11] The Board's Medical Advisor indicated that there was no injury to the neck per se, and as such, the symptoms of radiculopathy would not be related to the basis for which this claim was established.

[12] The Medical Advisor noted that several physicians had offered a diagnosis of thoracic outlet syndrome, however, there have been no EMG studies compatible with thoracic outlet syndrome. The Medical Advisor noted that except for drooping shoulders which is a posture problem, there were no clinical findings compatible with thoracic outlet syndrome.

[13] The Board's Medical Advisor reviewed the issue of medical compatibility regarding chronic pain disability in this claim. The Medical Advisor noted that several components of the worker's symptomatology arose from pain symptoms not related to the basis for which this claim was established. The Medical Advisor concluded that the worker did not meet the Board's criteria for chronic pain disability.

[14] The worker claimed recurrences subsequent to the fall of 1998 until she finally stopped working altogether on November 30, 1998. The Board determined that there was insufficient physical findings to substantiate that the worker could not remain in the workforce.

[15] A Board ergonomic specialist has reviewed the pre-accident job as well as the front and back serge job. The ergonomic specialist determined that the jobs would be suitable even if the

worker incorporated the pre-accident position and only performed the job for two hours on and two hours off.

[16] The Board essentially determined that the worker's employment was suitable and available. The worker appealed this decision to the Tribunal based on the Appeals Resolution Officer's decision of May 15, 2003 denying the worker's objection.

(ii) The law and Board policy

[17] On January 1, 1998, the Workplace Safety & Insurance Act (1997) ("WSIA") took effect. However, pursuant to Section 102 of the WSIA, the Worker's Compensation Act continues to apply to pre-1998 injuries. Thus, the pre-1985 Act, pre-1989 Act and pre-1997 Act continue to apply, as amended by the WSIA.

[18] Pursuant to Sections 112 and 126 of the WSIA, the Appeals Tribunal is required to apply any applicable Board policy when making decisions. Pursuant to the WSIA, Section 126, the Board has identified certain policies as applicable to this appeal. The Legal Services Division of the Board confirmed that the following policy packages, Revision #5, would apply to the subject matter of this appeal:

Policy Package #1 – Initial Entitlement

Policy Package #31 – Secondary or Non-Compensable Conditions

Policy Package #39 – Recurrence – Date of Accident Prior to January 1, 1998

Policy Package #47 – Early and Safe Return to Work and Temporary Benefits as of January 1, 1998

Policy Package #64 – Psychotraumatic/Chronic Pain Disability – Date of Accident January 2, 1990 – December 1, 1997

Policy Package #107 – Aggravation Basis or SIEF

Policy Package #300 – Decision-Making – Benefit of Doubt – Merits and Justice

[19] The policies are extensive and will not be duplicated here for practical purposes, however, I have considered the policies in the context of the appropriate legislation in arriving at my decision.

(iii) The worker's position

[20] Mr. Barrafato submitted that in 1997 the nature of the work changed for this worker, as she was obliged to perform work with oversized pockets. It is Mr. Barrafato's position that although the worker had a pre-existing neck condition, the nature of the work permanently aggravated the pre-existing condition preventing her from a return to work in 1998 even though there were several attempts at doing so. Mr. Barrafato submits that the Appeals Resolution Officer erred in not properly considering all the evidence and improperly applying different tests and criteria to the claims.

[21] Mr. Barrafato reviewed the clinical notes and record particularly of Dr. Badawi and the clinical notes of Dr. A. Porte dated December 1, 1998. In addition to the referencing and the

reviewing of these medical notes, Mr. Barrafato noted the reporting from Dr. A. Ghouse in particular those of September 1998 and early February 1999. Mr. Barrafato further referenced the reporting of Dr. Scocchia, rheumatologist, who saw the worker on behalf of the employer's private insurance. In addition Mr. Barrafato referenced the reporting of Dr. Ennis who noted a diagnosis of major depression and remission pain disorder associated with both psychological factors and general medical condition. Mr. Barrafo also noted the reports of Dr. N. Preradovic and Dr. Cividino.

[22] In summary Mr. Barrafato submits that the evidence of several doctors should not confuse the worker's prior neck complaints or the existence of degenerative disc disease as being the source of any significant problems for the worker.

[23] Mr. Barrafato submitted that the worker's complaints are all based on the upper left-side quadrant area and the source of the pain is the left shoulder strain. He again submitted that the source of the problem for the worker occurred when she was doing the oversized pants on the auto hip pocket sewing machine which caused much more use and power of the left shoulder to deal with the size of the materials which had to be processed through the machine.

[24] Mr. Barrafato noted that when the worker went back on that job on November 30, 1998 ,the pain level again escalated to the point where the worker simply collapsed and could not go any further.

[25] Mr. Barrafato referenced Tribunal *Decision No. 574/02* in support of this worker's claim indicating that in this decision a sewing machine operator developed hand and wrist symptoms and the worker appealed the decision of Appeals Resolution Officer for chronic pain disability. Mr. Barrafato noted that the Tribunal decided that while the worker did not experience a specific accident or trauma in the course of her employment, on the balance of probabilities it was found that the repetitive nature of the worker's duties led to the initial onset of symptoms which led to the development of chronic pain disability.

[26] In essence Mr. Barrafo relied on the medical reporting from the various medical physicians including Dr. Cott, Behavioural Medicine Specialist, Dr. Buckley and Dr. Parkinson as well as Dr. Kumbhare.

[27] Mr. Barrafato noted that initially the medical reporting essentially indicated that the worker did not meet the criteria for chronic pain disorder in that the worker's pain started with her compensable injury and escalated to the point that it was invasive to all parts of her life. He noted that the medical reporting indicated that the pain was inconsistent with any organic injury and further treatment should have been approached on this basis, however, the Board never approved a pain management approach.

[28] In summary, Mr. Barrafato submitted that the worker is entitled to chronic pain disability. He submitted that the worker's neck situation related to the 1984 motor vehicle accident had effectively resolved and did not impede the worker in doing her work until 1997 and onwards.

[29] In conclusion, Mr. Barrafato submitted that it is clear from the evidence and from the reporting of Dr. Badawi particularly in September and November that the worker was required to receive a series of injections to the left shoulders but which provided only temporary relief.

Mr. Barrafato submitted that Dr. Scocchia and Dr. Ghouse provided restrictions which clearly prevented the worker from doing the job of sewing machine operator in any capacity which would involve the repetitive use of her arm. It is Mr. Barrafato's submission that it is clear that the worker was unfit to do the work in any form whatsoever as an automatic pocket operator and particularly dealing with oversized pants.

[30] Mr. Barrafato noted that the evidence from Dr. Scocchia and Dr. Porte stated that the source of the worker's complaint is with her shoulder and not with the neck. In essence Mr. Barrafato submits that the evidence from Dr. Cott and the reports from Dr. Ennis clearly showed marked life disruption and noted that the worker would qualify for benefits under the chronic pain disability policy. He submitted that given the chronicity and the degree of pain that the worker suffered, she would be unfit to do the job of hip pocket operator and was unfit for any sewing machine operator position. Mr. Barrafato noted that according to Dr. Scocchia and Dr. Ghouse, the worker was only fit for sedentary work which would not involve the use of her upper extremities.

[31] In conclusion Mr. Barrafato submitted that the worker is entitled to benefits as a result of the recurrence of November 30, 1998 and entitled to loss of earnings benefits and entitlement to chronic pain disability.

(iv) The employer's position

[32] Mr. Coon did not provide post-hearing submissions. However, his submissions at the hearing indicated that it is the employer's position that the Appeals Resolution Officer's decision is correct and should stand. According to Mr. Coon, the Board has done a proper analysis and has used the proper test in considering all the issues and evidence in this worker's appeal. Mr. Coon asked that the Tribunal deny all of the worker's objections and deny any benefits for the neck, the thoracic outlet syndrome as on the balance of probabilities the evidence was appropriately considered in the Appeals Resolution Officer's decision.

[33] Mr. Coon indicated that there is significant evidence to indicate that the worker's progressive condition resulted from factors unrelated to her compensable injury and it is obvious that there is clear evidence of progressive degenerative disc disease that is occurring and documented in the file.

[34] Mr. Coon submitted that the evidence clearly indicates that the loss of earnings could have been prevented if proper procedures were followed as suitable work was available for the worker.

[35] Mr. Coon noted that the Board's ergonomist reviewed the jobs in question and found them suitable. In essence, Mr. Coon submits that there are a number of inconsistencies in the worker's claim which impacts on the evidence and therefore the ultimate conclusions.

[36] Mr. Coon essentially requests that the Appeals Resolution Officer's decision be upheld as in his view the evidence does not support further entitlement. Mr. Coon reviewed the medical reporting and the nature of the work that the worker carried out and concluded that the evidence did not support the worker's objections.

(v) The Vice-Chair's findings and conclusions

[37] I am satisfied that the worker is entitled to benefits under the chronic pain disability criteria.

[38] I note in particular *Operational Board Policy*, Document No. 03-03-05 which the Board uses to adjudicate claims for chronic pain syndrome. It provides a certain criteria must be established before entitlement is granted. The requirements are:

1. work-related injury occurred,
2. chronic pain is caused by the injury,
3. the pain persists for six or more months beyond the usual healing time of the injury,
4. the degree of pain is inconsistent with the organic findings, and
5. the chronic pain impairs earning capacity.

[39] I am satisfied, on a balance of probabilities, that it was the nature of the employment which caused the worker's problems and recurrence in November 1998. The worker performed a highly repetitive job requiring her hands, arms and wrist use. The medical reporting in particular persuades me that the worker's condition was caused by her employment.

[40] I note that the worker was able to carry on her employment until the compensable accident, but since the compensable accident she attempted on a number of occasions to return to work, but was unable to continue.

[41] On reviewing the evidence before me, including the worker's testimony, the submissions by the representatives and in particular the medical reporting on record, I am satisfied that the worker is disabled by chronic pain disability which can be causally related to the compensable in the nature of her employment.

[42] Following the hearing I requested that the clinical notes be made available from the treating physicians. In reviewing the clinical notes and records of Dr. Badawi, I note that there is a clinical note of Dr. A. Porte, orthopaedic surgeon dated December 1, 1998 wherein he states that he has examined the worker and noted that there is nothing wrong that he could assess orthopaedically to account for her pain. He indicated that he had been unable to identify any specific cause for the worker's injury.

[43] I note that in the fall of 1998 the worker was receiving trigger point injections and these are noted in the reporting from Dr. Badawi.

[44] I also note the reporting from Dr. Ghouse in September of 1998 and again in February 1999. In September 1998 Dr. Ghouse noted that he saw the worker with complaints over the left shoulder girdle, left scapular region and left flank. He noted that the worker suffered soft tissue injuries over the left shoulder girdle currently manifested by a myofascial pain syndrome and two identifiable trigger points. The trigger points were injected with medication. The worker was asked to avoid heavy lifting and carrying out any work with the left arm as well as repetitive work that required her to be holding her neck and left shoulder in a sustained position for prolonged periods of time. Again in February 1998 Dr. Ghouse noted that

the trigger point injections were only providing temporary relief and the worker was advised to avoid holding her neck and left shoulder in sustained positions as well as avoiding repetitive reaching and lifting of the left arm above the shoulder level.

[45] I note that in the report of October 7, 1999, Dr. Ghouse stated:

...

At this time she has chronic myofascial pain syndrome and shoulder dysfunction. At this time I do not think she will have any improvement or restoration of function.

[46] On December 12, 2002, Dr. Ghouse reports as follows:

...

Unfortunately, not much can be done for chronic myofascial pain other than symptom relief and encouragement for range of motion exercises to avoid a frozen shoulder.

[47] Continued reporting indicates that the worker did experience chronic post-traumatic myofascial pain syndrome which essentially did not improve and remained a factor in the worker's condition. Dr. Ghouse in April 2003 noted as follows:

She has been working as a sewing machine operator at [the employer]. This is a physical demanding job where she had to be using her left arm in a repetitive fashion with reaching posteriorly and sideways, lifting and frequent turning motions.

Over the last five years she has developed a repetitive pain syndrome which currently features chronic myofascial pain effecting the latissimus dorsi, periscapular, pectoral, supraspinatus, trapezius and the pericervical muscles.

[48] I also note the reports from the various medical doctors essentially indicating that the worker continued to have problems of a chronic pain nature and, in particular, I note the reporting from Dr. Ennis who diagnosed the worker and on examination noted major depression and remission pain disorder associated with both psychological factors and a general medical condition. He noted further as follows:

In my opinion, the patient does meet the criteria for what the WSIB would define as chronic pain disorder. It has been chronic in nature. Based on her description, it is associated with the nature of her work.

[49] I also noted that Dr. Preradovic, the Board's Medical Consultant, concluded that there was no evidence of a pre-existing condition in this case.

[50] In particular I noted the reporting of Dr. Scocchia, a rheumatologist, who examined the worker for the employer's private insurance who stated as follows:

I think it is important because it suggests that her problems have nothing to do with her neck but rather have to do with her pain syndrome and left shoulder, which have been allowed under the claim. In these notes it states that [the worker] has ongoing myofascial pain affecting the left shoulder girdle and upper thoracic region. There are many postural abnormalities which today were not apparent on the chest x-rays that have been previously noted by Dr. DeVilliers. There is however, a significant muscle wasting of the supra infraspinatus. This suggests either significant disuse of the left arm or a neurological abnormalities resulting in secondary muscle wasting. This would not be consistent with her previously noted C7, C8 chronic radiculopathy. I could not on

today's examination, find clinical evidence to suggest that her problem is from thoracic outlet syndrome. There is some mild postural abnormality on the cervical x-rays which might indicate some muscle spasm. There is also some degenerative pathology in the thoracic spine which might be contributing to her thoracic pain. These changes on x-rays usually are not significant to cause major impairments. She has also ongoing symptoms of worsening headaches.

It also appears that depression is significant of her ongoing problems. I am unable to judge whether this might be primary or secondary to her pain and loss of self-esteem and social contact with her friends.

[51] In summary, I am satisfied, on a balance of probabilities, that the worker suffers from chronic pain disability and should be assessed under the chronic pain disability criteria. The worker is entitled to the recurrence of November 30, 1998 and the appropriate loss of earnings benefits that flow. In particular I arrived at my decision reviewing the preponderance of medical evidence on file which led me to conclude that the worker suffers from chronic pain disability related to her compensable accident and that her complaints are best assessed under this criteria. I am not satisfied that the worker's prior motor vehicle accident was the cause of the worker's complaints, but I am satisfied that the worker does suffer chronic pain disability which has developed as a result of the compensable accident and nature of her employment.

[52] As indicated earlier, I was persuaded by the reporting of Dr. Badawi, Dr. Ghouse and Dr. Scocchia. Dr. Ghouse in particular clearly indicates that the worker's condition prevents her from doing jobs of sewing machine operators and any repetitive use of her upper extremities. In my view the worker was unfit to do the work assigned to her in any capacity and in particular the job of automatic pocket operator, particularly when one considers the nature of the products involved.

[53] The worker's complaints involved primarily the shoulder and upper extremity area and not the neck directly. The evidence from Dr. Cott and the reports from Dr. Ennis clearly indicate marked life disruption which again would qualify the worker for chronic pain disability under the Board's criteria.

[54] In conclusion, I am satisfied given the chronicity and degree of pain that the worker experiences, particularly in her upper extremity, that she is unfit to do the work provided. I am satisfied that the worker is entitled to the recurrence of November 30, 1998 and benefits that flow under the chronic pain disability policy criteria.

THE DECISION

[55] The worker's appeal is allowed. The worker is to be assessed under the chronic pain disability policy and is entitled to benefits for the recurrence of November 30, 1998. In my view there are sufficient findings related to establish this entitlement.

DATED: December 14, 2004.

SIGNED: V. Marafioti.