

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1273/04R

- [1] This request for reconsideration was considered on December 31, 2004, by Vice-Chair R. Nairn.

THE RECONSIDERATION REQUEST

- [2] The worker is requesting that the Tribunal reconsider its *Decision No. 1273/04*, dated September 20, 2004. The reconsideration request form was prepared by the worker's representative Mr. M. Kelly, a lawyer and dated November 12, 2004.

- [3] I had before me *Decision No. 1273/04*, the reconsideration request form, and a package of correspondence on the reconsideration issue (including submissions prepared by Mr. Kelly) compiled by the Tribunal's Reconsideration Services Department.

THE ISSUES

- [4] The worker is claiming that *Decision No. 1273/04* should be reconsidered because there were significant errors in the content of the decision, errors of law and/or jurisdictional errors.

THE REASONS

(i) The reconsideration test

- [5] The *Workers' Compensation Act* and the *Workplace Safety and Insurance Act* provide that the Appeals Tribunal's decisions shall be final. However, sections 70 and 92 of the *Workers' Compensation Act* and section 129 of the *Workplace Safety and Insurance Act* provide that the Tribunal may reconsider its decisions "at any time if it considers it advisable to do so". Because of the need for finality in the appeal process, the Tribunal has developed a high standard of review, or threshold test, which it applies when it is asked to reconsider a decision.

- [6] Generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of decisions being final and the prejudice to any party of the decision being re-opened. The threshold test has been discussed in some detail in *Decisions Nos. 72R* (1986), 18 W.C.A.T.R. 1; *72R2* (1986), 18 W.C.A.T.R. 26; *95R* (1989), 11 W.C.A.T.R. 1; and *850/87R* (1990), 14 W.C.A.T.R. 1.

(ii) Background

- [7] The following background information is provided in order to place this matter into its proper context:

- When the worker initially appeared before the Tribunal, she was appealing the decision of Appeals Resolution Officer F. Mackin, dated October 30, 2003. That decision confirmed that benefits granted to the worker with respect to her injury of September 2, 2001, should be based on earnings as a non-permanent irregular worker. That decision also denied the worker ongoing entitlement to benefits after January 30, 2002, and denied entitlement to Chronic Pain Disability (“CPD”).
- In *Decision No. 1273/04* dated September 20, 2004, I granted the worker’s appeal in part. While I concluded that the worker’s loss of earnings benefits should be calculated on the basis that she was employed in regular permanent employment, I denied her entitlement to benefits after January 30, 2002, as well as entitlement for CPD. The worker’s request for reconsideration deals with those portions of her claim which were denied.
- With regards to CPD, I concluded:

(b) Chronic Pain Disability

[30] As noted by the Appeals Resolution Officer, there are five policy criteria which must be satisfied in order to establish a claim for CPD. A work-related injury must have occurred. The CPD must be caused by the injury, the pain must persist for six or more months beyond the usual healing time for the injury, the degree of pain must be inconsistent with the organic findings and the CPD must impair the worker’s earning capacity.

[31] After reviewing the material before me, I am not satisfied that the medical evidence has established that the worker suffers from CPD. As noted by the Appeals Resolution Officer, none of the physicians appears to have provided a diagnosis of “Chronic Pain Syndrome”. In support of the worker’s claim, Mr. Kelly submitted a report dated December 8, 2003, from Dr. Palmer, the worker’s family physician. In that report, Dr. Palmer noted that the worker suffered from “chronic back pain continuous and consistent since the time of her injury”. Dr. Offierski, in his report of September 13, 2002, also made mention of the worker continuing “to experience chronic pain in the back”. In my view, the use of the term “chronic” by these physicians suggests that the worker’s pain is “ongoing” rather than suggesting that the worker is suffering from Chronic Pain Disability.

[32] Given the state of the medical evidence on file, I cannot conclude that it supports a finding that the worker suffers from Chronic Pain Disability or that this condition can be related to the accident in September 2001.

- On the issue of benefits after January 30, 2002, I indicated:

(c) Benefits After January 30, 2002

[33] As noted earlier, this worker’s claim was allowed with a diagnosis of “lumbar strain-mechanical back pain”. After reviewing the material before me, I find myself in agreement with the Appeals Resolution Officer that the balance of evidence available suggests that the worker had essentially recovered from her organic back condition by January 30, 2002. In reaching that conclusion, I have taken particular note of the following:

- The Physiotherapy Assessment report of September 7, 2001, suggested that a complete recovery was expected with “8-10 weeks”.
- In his Physician’s Progress Report, dated September 26, 2001, Dr. K. Hedges suggested that a complete recover was expected within “6 weeks”.

- In his Physicians' Progress Report of October 25, 2001, Dr. Palmer estimated that the worker would be able to return to work on November 12, 2001.
- CT scans of the lumbosacral spine performed in 2001 and 2002 failed to reveal significant disability.
- In his report of December 5, 2001, Dr. Griffiths of the Regional Evaluation Center suggested that the worker would require "a full eight more weeks of active treatment".
- In a physiotherapy report dated June 4, 2002, commenting on the discharge report of January 30, 2002, it was noted that the "neurological exam is normal" and "this client has functional overlay – she should be able to do more than she says she can do. Physio has done all that can be done for this lady".
- In his report of September 13, 2002, Dr. Offierski noted that x-rays of the lumbar spine showed "normal disc spaces" and the CAT scan "does not show any disc herniation". He noted that the worker had "some mild lumbar facet oseoarthritic" and concluded that she "did not require any surgical intervention".

[34] In summary, I am satisfied that the balance of evidence suggests that the lumber strain which the worker sustained on September 9, 2001 had resolved by approximately January 30, 2002 and that she did not have ongoing entitlement to loss of earnings benefits after that date.

(iii) Submissions of the worker's representative

[8] In his submissions dated November 12, 2004, Mr. Kelly indicated in part:

Denial of Chronic Pain Disability

The premise of the denial at paragraphs 30 and 31 of the decision appears to be that none of the physicians appears to have provided a diagnosis of "Chronic Pain Syndrome".

With respect, it is submitted that a formal of diagnosis of chronic pain syndrome is not a requirement under the CPD policy. The policy sets forth the criteria to be looked at by the Claims Adjudicator (and by extension, an Appeals Officer or Vice-Chair assessing an appeal regarding CPD). That is, determining CPD is an adjudicator function, not a medical decision (See Decision 726/01 – where "the various medical reports did not provide an explicit diagnosis of chronic pain syndrome but they do strongly indicate the various elements that are present in the Board policy" – chronic pain disability allowed. Also see Decision 1924/99 as an example of a case where "chronic pain syndrome" is not diagnosed by the doctors, but the Vice-Chair proceeds through the analysis of the policy criteria looking at both the medical reports and the non-medical evidence, specifically the testimony of the worker).

It is submitted that a reasonable consideration of the evidence before the Tribunal leads to the conclusion that the criteria for CPD have been met by (the worker).

It is the position of the worker that the failure to adjudicate on the basis of the criteria in the policy constitutes an error of law (failing to abide by the requirement to follow Board policy) or alternatively a failure to exercise jurisdiction required by the policy to assess the evidence in light of the policy criteria.

The Board has accepted that a work-related injury did occur. There is no evidence of any pre-existing disability or condition causing or contributing to the worker's condition.

The policy requires that “chronic pain is caused by the injury” – the policy does not state “chronic pain *syndrome*” is caused by the injury. All of the medical reports indicate continuous, consistent genuine pain since the time of the injury. Note that the evidence requirement under this section refers to “subjective or objective medical or non-medical evidence”. Note that the Vice-Chair quotes from Dr. Offierski’s report that the worker “continues to experience chronic pain in the back”. It is submitted that this report in fact satisfied the criteria of the policy by confirming the existence of pain that is chronic in nature, and was caused by the work injury. The Tribunal should then have proceeded to assess, given the existence of chronic pain, whether the other criteria such as marked life disruption have been established.

It was in error in law to not proceed with such analysis.

The policy refers to “usual healing time” as the point in time in which the worker should have regained pre-accident functional utility. There were a number of “predictions” as cited in the decision where physicians suggested that treatment *would* resolve the pain – but there is doubt in the reports that the treatments *did not* resolve the pain. This evidence satisfied a requirement that the injury did not resolve within the usual healing time.

By the spring of 2002, the continued consistent pain had lasted more than six months beyond the expected healing time, and therefore this policy requirement was met.

The policy refers to the “degree of pain being inconsistent with organic findings”. The CT scan showed only minimal generalized bulging, no herniation and no spinal stenosis. There are references in the medical documentation fairly early in the process of “functional overlay” – which is a telltale sign of chronic pain syndrome i.e. pain without an explainable organic basis.

If the original organic diagnosis of “lumbar strain” was correct, this would not explain the organic basis of the worker’s ongoing consistent pain to the present time. Thus this criteria of CPD policy is met. (Alternatively, if the diagnosis of medical pain is correct, this could provide an organic basis to the injury but it is clearly permanent – this is dealt with below on the issue of benefits after January 30, 2002).

Submissions were made at the hearing on the issue of “marked life disruption” which were not referred to in the decision. Both the medical and non-medical evidence supported a finding of marked life disruption. [The worker] has suffered a consistent and significant impairment of earning capacity; the medical reports also confirm other significant functional impairments in her sleep; ability to dress herself and carry out other activities.

[...]

It is submitted that all of the evidence points to the criteria of the CPD policy having been met, and accordingly the errors of law in the analysis, if corrected, likely would have led to a different result.

In Decision No. 1331/97R, reconsideration was granted on denial of chronic pain entitlement where the Panel did not explain why it was rejecting some evidence in a medical report of marked life disruption. In the present case, there was a significant error in failing to address the criteria of the policy in explaining how the worker did not meet the policy criteria – rather it appears that CPD was denied based on factors other than the policy criteria (i.e. lack of a specific medical diagnosis).

Entitlement to Benefits after January 30, 2002

The Vice-Chair concluded that “balance of evidence suggests that the worker had essentially recovered from her organic back condition by January 30, 2002”.

It is submitted that the evidence does not support this conclusion. No doctor stated that the worker had recovered from her injury – the reports of Dr. Hedges, Dr. Palmer and Dr. Griffiths referred to at paragraph 33 suggested that she would recover after further treatment.

The Vice-Chair referred to reports of Dr. Hedges and by Dr. Palmer “estimating” that the worker would completely recover by early November 2001. However the physiotherapist report of November 26, 2001 states she “was only 50% better as a result of treatment”. Despite again predicting complete recovery in a few weeks, the subsequent physiotherapist report of December 10, 2001 again notes recovery is delayed.

The Vice-Chair relies on Dr. Griffiths’ opinion (which the Claims Adjudicator also relied upon) that the worker would require eight more weeks of treatment – notwithstanding that all earlier predictions of recovery were wrong. Yet the decision fails to mention the physiotherapy assessment of December 21, 2001 that notes paraspinal muscle spasm and positive SLR on the left leg. This report suggests 12 more weeks of treatment.

Dr. Griffiths did not examine or report on the worker after the “eight weeks” referred to. The Vice-Chair refers to the discharge report from the physiotherapist (produced months after the worker’s discharged from treatment in January 2002) but fails to mention that report also indicates “lumbar extension is still painful at 30o; still tender at L5, S1; static bending still a problem – ‘physiotherapy has done all they can do for her and treatments would no longer benefit her’ – the report does not say that [[the worker] fully recovered”.

In fact no doctor examining [the worker] on or after January 30, 2002 stated that she fully recovered from the work injury or that her pain had resolved. There is no evidence to support the conclusion of the Vice-Chair in this regard. It is an error of law to make a finding of fact that is not supported by any evidence.

No doctor examining [the worker] since this injury has identified any organic non-compensable cause of her ongoing chronic back pain.

The evidence is clear that [the worker] has had continuing genuine and consistent pain since the time of the injury. There is a significant defect in the content of the decision, as it denies any benefits to the worker for a permanent impairment despite the fact that the worker does indeed have a permanent impairment; and there is no other explanation but that the work incident was the cause or a significant contributing factor to the instigation of the permanent pain and impairment.

This error, if corrected, would likely have led to a different result.

(iv) Conclusions

(a) Chronic Pain Disability

[9] A review of *Decision No. 1273/04* reveals that the worker’s claim for chronic pain disability was denied, in essence, on the grounds that there was no diagnosis provided of “chronic pain disability”. After reviewing Mr. Kelly’s submissions and the Tribunal caselaw provided, I am satisfied that it was an error to require such a diagnosis before entitlement could be considered. This appears to have been the approach taken in other Tribunal cases. For example, in *Decision No. 726/01*, the Vice-Chair indicated:

While the reports do not provide an explicit diagnosis of chronic pain syndrome they do strongly indicate the various elements that are present in the Board policy, particularly that the worker’s pain is inconsistent with the organic findings and has continued to impair the worker’s earning capacity and obviously has persisted beyond the usual healing time. Even Dr. Burrell, who in January 1993 reported findings that indicated that on an organic basis the worker’s condition was close to normal, indicated in March 1994

that the worker would likely require ongoing assistance through a pain clinic. Thus the medical information, combined with the worker's testimony leaves little doubt that the worker suffers from chronic pain syndrome.

[10] In my view, rather than focusing on the question of whether a diagnosis of chronic pain syndrome had been made, it would have been more appropriate to consider whether the evidence supported a finding that the worker had experienced continuous, consistent and genuine pain since the time of her accident following which, the other policy criteria could have been reviewed. In my view, had this error and the decision been corrected, it would likely have changed the result of the original decision and therefore I am satisfied that the threshold test for a reconsideration has been met.

[11] Given that the employer is no longer in business, I am satisfied that it would be appropriate to proceed to consider the merits of the worker's appeal with regards to chronic pain disability.

[12] As noted in *Decision No. 1273/04*, Board policy lists five criteria which must be satisfied in order to establish a claim for CPD. A work-related injury must have occurred. The CPD must be caused by the injury, the pain must persist for six or more months beyond the usual healing time for the injury, the degree of pain must be inconsistent with the organic findings and the CPD must impair the worker's earning capacity.

[13] As noted above, while there is no diagnosis of chronic pain syndrome, there is medical reporting suggesting that the worker has continued to experience back pain since the time of her accident. For example, as noted in *Decision No. 1273/04*, Dr. Palmer in his report of December 8, 2003 indicated the worker suffered from "chronic back pain continuous and consistent since the time of her injury" and Dr. Offierski in his report of September 13, 2002, indicated the worker continued "to experience chronic pain in the back".

[14] As noted by Mr. Kelly, there is no dispute that a work-related injury has occurred or that the pain has persisted for six or more months beyond the usual healing time for the injury. Noting the worker's testimony that sitting, standing and bending forward bothered her back condition and her pain prohibits her from performing housework, cooking, laundry, gardening and shopping as well as returning to employment, I am satisfied that there is evidence her pain has resulted in marked life disruption. In addition, noting the medical reports referred to in *Decision No. 1273/04* with regards to the denial of ongoing organic entitlement, I am satisfied that the pain she currently experiences is inconsistent with the minimal organic findings. In addition, as noted by Mr. Kelly, there is no evidence before me suggesting that anything other than the compensable accident has contributed to the worker's current disability.

[15] In summary, I am satisfied that the balance of evidence supports a finding that the worker has entitlement to benefits for chronic pain disability arising out of the compensable accident of September 2, 2001. The issue of the type and quantum of benefits flowing from that conclusion will be returned to the Board for further adjudication.

(b) Benefits after January 30, 2002

[16] After reviewing the material provided by Mr. Kelly and in light of the conclusions reached above, I am not satisfied that there was a significant error in that portion of the decision which

concluded the worker did not continue to be disabled on an organic basis after January 30, 2002. In my view, the evidence referred to in *Decision No. 1273/04* supports the conclusion that there was little in the way of organic findings to explain the worker's ongoing complaints of pain. This was the same conclusion reached by the Appeals Resolution Officer who, in his decision of December 30 2003, decided that "other than subjective reports of pain, the medical evidence does not show any permanent organic low back impairment".

[17] While not all of the evidence may support such a conclusion, I am satisfied that on balance, the material before me supports the conclusions reached by the Appeals Resolution Officer and *Decision No. 1273/04*. As a result, that portion of the reconsideration request must be denied.

THE DECISION

[18] The request for reconsideration is allowed in part.

[19] The worker's request for reconsideration of that portion of *Decision No. 1273/04* dealing with ongoing organic entitlement after January 30, 2002, is denied.

[20] The worker's request for reconsideration of that portion of *Decision No. 1273/04* dealing with entitlement to CPD is allowed.

[21] On the merits of the issue of CPD, the worker's appeal of Appeals Resolution Officer Mackin's decision is allowed. The worker is granted initial entitlement to benefits for CPD in relation to the compensable accident of September 2, 2001. The matter of the type and quantum of benefits flowing from that conclusion is returned to the Board for further adjudication.

DATED: February 10, 2005

SIGNED: R. Nairn