WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2369/17

BEFORE:	P. Allen : Vice-Chair B. Wheeler : Member Representative of Employers C.S. Mannella : Member Representative of Workers	

HEARING: August 1, 2017 at Toronto
Oral

DATE OF DECISION: September 6, 2017

NEUTRAL CITATION: 2017 ONWSIAT 2715

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated September 25, 2015

APPEARANCES:

For the worker: O. Iacopini, Paralegal

For the employer: T. C., Human Resources Business Partner

Interpreter: L. Velasquez, Spanish

REASONS

(i) Introduction

[1] The worker claims that he experienced gradual onset injuries to his low back, mid-back, neck, hips and legs arising out of and in the course of his work duties. He now appeals the decision of the Appeals Resolution Officer (ARO) dated September 25, 2015. In this decision, the ARO concluded that the worker did not have initial entitlement to injuries of the low back, mid-back, neck, bilateral legs and hips. These are the only issues before the Tribunal.

[2] As a preliminary issue the worker's representative advised that the worker was withdrawing the appeal of the denial of entitlement for injuries to the mid-back, neck, bilateral legs and hips. Any attempt to renew the appeal of these issues will be subject to the time-limit provision of section 125(2) of the *Workplace Safety and Insurance Act, 1997* (the WSIA).

[3] The worker's representative confirmed that the sole issue before the Tribunal was initial entitlement to a low back injury.

(ii) Background

[4] The following are the basic facts.

[5] The now 57-year-old warehouse clerk sought medical attention from Dr. Garcia (family physician) on February 24, 2014, after experiencing low back pain while performing his regular duties. The worker did not report this accident to the Workplace Safety and Insurance Board (WSIB or the Board). However, on April 14, 2014, the worker advised the accident employer that he was unable to continue working as a result of a work-related injury. On April 15, 2014, the worker sought medical attention from Dr. Garcia who advised the worker that an April 1, 2014 MRI examination revealed an L5-S1 disc herniation. As a result, the worker completed a Form 6 (Worker's Report of Injury/Disease) advising that he suffered a low back injury (disc herniation) as a result of his work duties.

[6] On April 21, 2014, the worker provided the accident employer with a note from Dr. Garcia advising that he would remain off work indefinitely due to medical issues.

[7] On May 22, 2014, Dr. Juchniewicz (chiropractor) completed a form entitled "Acute Low Back Injuries Program of Care Initial Assessment Report" indicating that the worker's symptoms included a "stiff upper back, neck and shoulder" as well as pain in the low back into hips- sharp." The diagnosis provided was "L5-S1 paralateral disc herniation, chronic repetitive strain leading to cervical and thoracic strain."

[8] On May 29, 2014, the Eligibility Adjudicator denied entitlement for injuries to the worker's low back, neck, upper back and bilateral leg injuries. This decision was reconsidered on August 28, 2014 and denied. The worker appealed this decision.

[9] The worker remained off work until July 14, 2014, when he returned to modified duties.

[10] On September 15, 2014, the worker was assessed by Dr. Schacter (neurosurgeon) who determined that the worker's low back impairment was caused by the worker's repetitive work duties.

[11] On September 25, 2015, the ARO upheld the Entitlement Adjudicator's decision and denied entitlement to injuries to the low back, upper back, neck and bilateral legs/hips. It is from this decision that the worker now appeals.

(iii) Law and policy

[12] Since the worker claimed to be injured in 2014, the WSIA is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[13] An "accident" is defined in section 2(1) to include:

> (a) a wilful and intentional act, not being the act of the worker,
>
> (b) a chance event occasioned by a physical or natural cause, and
>
> (c) disablement arising out of and in the course of employment;

[14] General entitlement to benefits is governed by section 13:

> **13(1)** A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.
>
> **(2)** If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

[15] The statutory presumption set out in section 13(2) does not apply to an injury by disablement. See, for example, *Decision Nos. 268* and *42/89*.

[16] Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280*.

[17] The standard of proof in workers' compensation proceedings is the balance of probabilities. Pursuant to section 124(2) of the WSIA, the benefit of the doubt is resolved in favour of the claimant where it is impracticable to decide an issue because the evidence for and against the issue is approximately equal in weight.

[18] Pursuant to section 126 of the WSIA, the Board stated that the following Policy Packages, Revision #9, would apply to the subject matter of this appeal: #241 and #300.

[19] We have considered these policies as necessary in deciding the issues in this appeal.

(iv) Analysis

[20] The appeal is allowed for the reasons set out below.

[21] The worker seeks entitlement to a low back injury on a disablement basis. *Operational Policy Manual* (OPM) Document No. 15-02-01, "Definition of an Accident," describes a disablement as "a condition that emerges gradually over time" or "an unexpected result of working duties."

[22] OPM Document No. 11-01-01, "Adjudicative Process," states that an allowable claim must have five points: an employer, a worker, personal work-related injury, proof of accident, and compatibility of diagnosis to accident history. OPM Document No. 11-01-01 provides the following guidelines for determining proof of accident:

Proof of accident

Decision-makers may consider the following when examining proof of accident,

- Does an accident or disablement situation exist?
- Are there any witnesses?
- Are there discrepancies in the date of accident and the date the worker stopped working?
- Was there any delay in the onset of symptoms or in seeking health care attention?

[23] The Panel finds that it is not disputed that the worker's claim involves an employer as well as a worker. The Panel also finds that the worker's claim involves a personal work-related injury, namely, a disc herniation at L5-S1.

[24] With regards to compatibility between the worker's job duties and the L5-S1 disc herniation, the worker testified that he began to feel low back pain in December 2013 and that he informed his supervisor about the pain on several occasions. The worker testified that his job requires a lot of bending and lifting. The worker estimated that he was required to lift roughly 100 – 150 reels per day and that each reel weighed between 10 – 40 pounds. The worker also advised that he is required to perform "inventory" functions each February and that this job requires additional lifting of reels. Finally, the worker advised that in February of 2014 several of the accident employer's locations closed and, as a result, all of the reels from these locations were returned and he was required to inventory and store these items. The worker testified that, as a result of the increased workload in February 2014, his back pain became much worse. The worker's representative questioned the accident employer's witness (T. C.) if she had any dispute with the worker's description of his work duties (lifting 100 – 150 reels per day and weighing 10 – 40 pounds each). T. C. responded that she did not dispute any of the description of his job duties. T. C. was also questioned by the worker's representative about whether the accident employer disputed the increased work in February of 2014 and T. C. responded that she did not.

[25] The Panel finds that there is compatibility between the worker's job duties, which involves heavy lifting throughout the day and particularly in February 2014, when the workload increased, and the L5-S1 disc herniation identified on the April 1, 2014 MRI report. The Panel is supported in finding compatibility between the worker's work duties and his low back injury through the comments of three physicians as follows:

- **Dr. Schacter (neurosurgeon)**: On September 15, 2014, Dr. Schacter wrote a letter to the worker's family physician (Dr. Garcia) stating that "my thought is that this man has been doing a repetitive lifting and twisting type of occupation for many years and I would suggest that the causation factor here is a repetitive movement type of injury to the lower back."
- **Dr. Juchniewicz (chiropractor)**: On May 22, 2014, Dr. Juchniewicz completed a Program of Care form and indicated that the worker was involved in "heavy lifting with repetitive tasks and twisting, sharp pain in lower back referring into hips." The diagnosis provided with respect to the low back was "L5-S1 left paracentral disc herniation."
- **Dr. Garcia (family physician)**: On February 24, 2014, Dr. Garcia documented a clinical note indicating that the worker was experiencing low back pain at work and that he was "doing repetitive movements at work and lifting heavy, c/o lumbar pain, felt a sudden pull

at work and had to stop to obtain pain relief." In a clinical note dated April 15, 2014, Dr. Garcia had a follow-up appointment with the worker to advise him of the findings of the MRI examination which involved an "L5-S1 para lateral disc hernia."

[26] The Panel finds that the aforementioned physicians each supported compatibility between the worker's low back impairment and his work duties which involved "repetitive duties" and "heavy lifting." In addition, the Panel finds that, while the worker was accustomed to these duties having performed them since 1999, the worker's work duties increased in February of 2014. As a result, the Panel finds that there is compatibility between the worker's work duties which involved frequent heavy lifting (which increased in February of 2014 as a result of additional responsibilities) and the disc herniation at L5-S1.

[27] With regards to proof of accident, the employer's representative described that her main concern was the delay between the onset of the worker's low back symptoms on February 24, 2014 and the date the worker reported his low back symptoms to the accident employer on April 14, 2014.

[28] The worker testified that he began to experience back pain in December 2013 and that this pain increased significantly in February of 2014 when the frequency of his lifting duties increased because of inventory functions. The worker testified, and the Case Record supports, that the worker sought medical attention from Dr. Garcia on February 24, 2014. During this assessment, Dr. Garcia noted the worker's complaints of lumbar pain and in response prescribed a medication to the worker (Naproxen) and ordered an MRI examination. The worker testified that he continued to experience low back pain from February 24, 2014 until April 1, 2014, when he underwent an MRI examination. The worker also testified that he continued to perform his regular duties during this time and that he advised his supervisor of his low back pain on several occasions. The worker advised, and the Case Record supports, that on April 15, 2014, the worker was asked by Dr. Garcia to come to his office, whereupon the worker was advised that he had an L5-S1 disc herniation. On April 21, 2014, Dr. Garcia wrote a note, which the worker provided to the employer, advising that he would need to remain off work indefinitely.

[29] The Panel is satisfied that the delay in reporting his low back symptoms to the accident employer from February 24, 2014 (when he was assessed by Dr. Garcia) and April 14, 2014 (when he reported his low back gradual onset accident) is not excessive and, in the circumstance, is understandable. The Panel makes this finding for several reasons:

- **Minor Injury**: On February 24, 2014, Dr. Garcia advised the worker that his low back pain was caused by "Msk" issues. The worker testified that he believed that this meant that he had a "muscle spasm" and that it would soon resolve. The worker's Form 6 contains the following answer to the question about why he did not report the accident right away to his employer:

  > Injury was not reported immediately because I believe it was just a muscle spasm.

  The Panel finds that the worker's actions, in not reporting what he believed were low back muscle spasms until April 14, 2014, were reasonable. The Panel finds that the worker was hopeful that, with time and the benefit of medications prescribed by Dr. Garcia on February 24, 2014, that his low back pain would resolve.

- **MRI Results and Reporting**: The worker testified that he continued to perform his regular duties from February 24, 2014 while awaiting an MRI examination and hoping that his muscle spasm would resolve. While the MRI was performed on April 1, 2014 the results were not immediately available to the worker. Dr. Garcia's clinical notes indicate that the worker was asked to attend his office on April 15, 2014 where the results of the MRI were discussed and the worker was advised that he had an L5-S1 disc herniation. The Panel finds that, upon learning of his L5-S1 disc herniation, the worker advised his supervisor of the accident.

[30] The Panel finds that the worker's delay in reporting the accident from February 24, 2014 to mid-April 2014 is reasonable given that the worker believed that his muscle spasm would resolve with the aid of medications and given that he was not aware that he had a more serious injury (disc herniation). The Panel finds that, upon learning of the more serious injury, the worker advised his supervisor (on April 14, 2014) of the injury and advised the accident employer's HR Manager on April 25, 2014. The Panel also notes that the worker seeks entitlement to a "disablement" which OPM Document No. 15-02-01 describes as "a condition that emerges gradually over time." The Panel finds that the worker's delay in reporting his low back injury is reasonable as this condition emerged gradually over time.

[31] The employer's representative also submitted that the worker should not be granted entitlement to a low back injury as a result of the worker's perceived lack of cooperation with the employer's efforts to facilitate an early and safe return to work. The Panel finds that entitlement to a low back injury is a separate issue from return to work. While return to work issues may bear upon the worker's entitlement to LOE benefits, it has no bearing on initial entitlement to a workplace injury.

[32] The Panel finds that the worker has entitlement to a low back injury which involves an L5-S1 disc herniation. The Panel finds that the accident date is February 24, 2014 and that this date corresponds to the date when the worker first sought medical attention for his low back condition which, according to Dr. Garcia's clinical notes, was February 24, 2014.

[33] The worker's appeal is granted.

DISPOSITION

[34] The appeal is allowed as follows:

1. The worker has entitlement to low back disablement (L5-S1 disc herniation).

2. The accident date is February 24, 2014.

[35] The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication, subject to the usual rights of appeal.

DATED: September 6, 2017

SIGNED: P. Allen, B. Wheeler, C.S. Mannella