Noteworthy Decisions
2008
Week 23

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Decision No. 247 07 **02-Apr-2008** **A. Patterson - M. Christie - D. Broadbent**

- Negligence
- Transfer of costs

A delivery driver for the employer was injured when he slipped on the loading dock of a bakery to which he was making a delivery. The employer appealed a decision of the Appeals Resolution Officer denying a transfer of costs from the employer to the bakery.

There was insufficient evidence to find that the bakery had failed to do something a reasonable and prudent person would have done. The worker testified that he slipped on a greasy substance that was about two inches in diameter. Evidence indicated that the bakery discharged its duty to maintain its loading dock area in a reasonable and prudent manner. The greasy spot was very small in relation to the overall area involved.

The appeal was dismissed.

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References:

Act Citation
- WSIA 84

Other Case Reference
- [w2308s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 14-05-01

Neutral Citation: 2008 ONWSIAT 885

Decision No. 713 08 01-Apr-2008 E. Smith

- Hearing (de novo)
- Loss of earnings {LOE} (employability)

The worker appealed a decision of the Appeals Resolution Officer granting only partial LOE benefits from August 2005 to June 2006.

The ARO found that the worker did not engage in concerted job search efforts. The ARO therefore granted LOE benefits based on entry level earnings with no training in the identified job objective. The Vice-Chair found that this approach was not unreasonable given the information available to the ARO. However, the ARO did not have available the results of the worker's LMR assessment. Those results are now available. A Tribunal hearing is a hearing de novo. New evidence is admissible about the vocational or medical facts related to the time period in issue.

The LMR assessment did not identify any SEBs that were within the worker's physical restrictions and that he could do without English language training. Based on the LMR assessment, the worker was competitively unemployable during the period in question, and entitled to full LOE benefits. The appeal was allowed.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2308s]

Neutral Citation: 2008 ONWSIAT 867

Decision No. 526 08 01-Apr-2008 E. Smith

- Second Injury and Enhancement Fund {SIEF} (severity of preexisting condition)
- Board Directives and Guidelines (SIEF) (one hundred per cent relief)

The worker aggravated a pre-existing knee condition when he stepped on an air hose at work. The Board granted the employer 90% SIEF relief. The employer appealed, claiming that it should be entitled to 100% relief or, alternatively, 98%.

Board policy provides a table for SIEF relief based on the severity of the accident and the medical significance of the pre-existing condition. It

also contains a statement with respect to 100% relief, allowing for full relief when a prior non-work-related condition is the cause of the accident.

The Vice-Chair considered the meaning of the word “cause” in that portion of the policy. It cannot mean that the pre-existing condition is the sole cause of the injury. If so, there would be no compensable accident. It cannot mean only that the pre-existing condition is one of several causes in the chain of causation. If so, the provision would apply in every case.

The Vice-Chair understood the word “cause” to refer to the precipitating or triggering cause of the injury. Where the pre-existing condition precipitates or triggers the injury (for example, for worker falls because he has an epileptic seizure), the employer would be entitled to 100% SIEF relief. Where the pre-existing condition does not precipitate or trigger the injury (for example, the worker slips on a wet floor at work, but underlying degenerative disc disease affects the severity of the injury), the employer is not entitled to 100% SIEF relief but is entitled to relief based on the Board’s table for rating the importance of each of the factors.

In this case, the triggering factor was the worker stepping on the air hose at work. His knee did not give out until he stepped on the uneven surface caused by the air hose. The employer was therefore not entitled to 100% SIEF relief.

According to the table in Board policy, there is a range of possible awards in the upper category. It is not practical or reasonable to attempt to distinguish between very minor differences, such as between 93% and 94%. However, there may be cases in which it is appropriate to award SIEF relief in the middle of the range. This was such a case. The worker had two prior failed reconstructive surgeries to his knee and a more recent arthroscopy. The knee continued to be symptomatic. In the circumstances, the employer was entitled to 95% SIEF relief. The 5% cost impact to the employer was fully sufficient, if not more than sufficient, to reflect the contribution of the workplace triggering event to the worker’s injury.

The appeal was allowed in part.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2308s]
- BOARD DIRECTIVES AND GUIDELINES: Operational

Policy Manual, Document No. 14-05-03

Reporter Citation
- 85 W.S.I.A.T.R. (online)

Neutral Citation: 2008 ONWSIAT 866

Decision No. 1 07 I 01-Apr-2008 E. Smith

- Estoppel

The worker suffered a back injury in June 1994. The employer appealed a decision of the Appeals Resolution Officer confirming initial entitlement for the back condition. The employer submitted that the worker had a pre-existing condition and that entitlement should only have been granted on an aggravation basis for three days.

In this decision, the Vice-Chair dealt with the preliminary issue of whether issue estoppel applied to preclude the consideration of the employer's appeal because the worker's entitlement to benefits was determined in Decision No. 184/04.

The Board granted the worker benefits until January 1997. The worker appealed that decision to the Tribunal. The employer had been pursuing the matter of initial entitlement in separate proceedings at the Board. When the worker appealed regarding to the Tribunal regarding ongoing benefits, the employer put in a cross-appeal regarding initial entitlement. However, the office of the Vice-Chair Registrar advised in its hearing-ready letter that the cross-appeal could not be considered because there was no final decision of the Board on that matter. In Decision No. 184/04, the Tribunal found that the worker was entitled to a full FEL award in January 1997.

The Board then confirmed its entitlement decision, which the employer now appealed to the Tribunal.

The Vice-Chair concluded that issue estoppel did not apply to the facts in this case. The entitlement issue of the aggravation of the pre-existing condition was not adjudicated at the Tribunal in Decision No. 184/04. Further, Decision No. 184/04 did not make adjudicative findings about the nature of the initial entitlement. Rather, it made finding about the level of the worker's disability and the suitability of modified work for that disability based on an assumption of the correctness of the Board's decision regarding compensability of the disability.

The Vice-Chair concluded that the employer's appeal can proceed.

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References:

Act Citation
- WCA

Other Case Reference
- [w2308s]
- CROSS-REFERENCE: Decision No. 184/04
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 215/98R (2002), 62 W.S.I.A.T.R. 47 consd; Decision No. 1000/00I (2003), 64 W.S.I.A.T.R. 1 consd; Decision No. 462/88 consd

Reporter Citation
- 85 W.S.I.A.T.R. (online)

Neutral Citation: 2008 ONWSIAT 873

Decision No. 19 08 31-Mar-2008 L. Gehrke

- Future economic loss {FEL} (review) (after sixty months)

At R2 in February 1998, the Board granted a FEL award offset by the amount of CPP disability benefits that the worker was receiving. In February 1999, payment of CPP disability benefits to the worker was suspended. In May 2003, the Board redetermined the worker's NEL award due to significant deterioration of his condition in November 2001. The Board the reviewed and adjusted the worker's FEL award effective November 2001 to reflect the deterioration of his condition and the fact that the worker was no longer receiving CPP benefits. The worker appealed a decision of the Appeals Resolution Officer denying adjustment of the FEL award from February 1999 to November 2001.

The suspension of CPP benefits would have been considered to be a material change under Board policy. However, under the legislation in effect from 1998 to November 26, 2002, adjustment of the FEL award for material change in circumstances after R2 was not permitted. It was only after November 26, 2002, under s. 44(2.1) of the WSIA, that adjustment of the FEL award was permitted due to significant deterioration that results in a redetermination of the degree of permanent impairment. In May 2003, the Board correctly applied s. 44(2.1) to adjust the FEL award from the date that the worker's condition worsened in November 2001.

The appeal was dismissed.

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References: Act Citation
- WCA 43
- WSIA 44(2.1), 107

Other Case Reference
- [w2308s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 22-01-02
- CROSS-REFERENCE: Decision No. 780/04

Neutral Citation: 2008 ONWSIAT 855

Decision No. 761 08 28-Mar-2008 M. Crystal

- Asbestosis
- Benefit of the doubt
- Accident (date) (occupational disease)

The Board granted the worker entitlement for asbestosis with an accident date of June 20, 2002. The employer appealed regarding the date of the accident.

There was no clear diagnosis of asbestosis on June 20, 2002. It was the date of a medical report referring to a CT scan demonstrating pleural thickening. The Vice-Chair noted that pleural thickening may be evidence of asbestos exposure but that it is not necessarily evidence supporting a diagnosis of asbestosis. In this case, there were a number of factors other than asbestos exposure, which might have been responsible for the worker's respiratory impairment, including systemic lupus and treatment with Methotrexate which can cause interstitial lung disease, as well as emphysema associated with smoking.

The Board allowed entitlement for asbestosis on the benefit of doubt. The Vice-Chair found that pulmonary impairment attributable to asbestosis was not established on the balance of probabilities. However, the issue of initial entitlement for asbestosis was not before the Vice-Chair.

Under ss. 119(2) and 124(2) of the WSIA, the benefit of doubt is resolved in favour of the person claiming benefits. The worker was not participating in this appeal and, accordingly, is not a person claiming benefits in this appeal. Appeals at the Tribunal are de novo, so the fact that an individual was a person claiming benefits in an earlier proceeding does not imply that such person is a person claiming benefits in the proceeding at the Tribunal if the person has elected not to participate in the appeal. Referring to Decision No. 2275/00, the Vice-Chair stated that the employer cannot be considered to be a person claiming benefits.

Accordingly, the evidentiary standard of the balance of probabilities had to be applied in this appeal.

The Vice-Chair found that the evidence did not establish on the balance of probabilities that the worker had a respiratory impairment attributable to asbestosis at any time. It follows that it could not be established on the balance of probabilities that the respiratory impairment was attributable to asbestosis on a different date than June 20, 2002.

The appeal was dismissed.

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References:

Act Citation
- WSIA 119(2), 124(2)

Other Case Reference
- [w2308s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 11-01-04, 11-01-13
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 2275/00 (2002), 63 W.S.I.A.T.R. 73 refd to

Neutral Citation: 2008 ONWSIAT 842

Decision No. 732 08 27-Mar-2008 R. McClellan

- Earnings basis (long-term)
- Board Directives and Guidelines (earnings basis) (non-permanent or irregular employment) (break in employment pattern)

The worker suffered a compensable injury in August 2003. The worker appealed a decision of the Appeals Resolution Officer regarding the worker's long-term earnings basis.

In 2001, the worker had been working in permanent employment as a foreman in a window factory, until he was laid off. He then received employment insurance benefits for 10 months. In 2002, he found permanent work as a waiter in a coffee shop for $400 per week. In March 2003, he took the job with the accident employer as a plasterer's helper, at $10 per hour. This was a seasonal job. He intended to return to work in the coffee shop when the seasonal job ended.

The Board based long-term benefits on earnings during the two years prior to the accident, including employment insurance benefits. The worker submitted that there was a break in his employment pattern in March 2003 when he switched from permanent employment to part-time

employment.

The work in the window factory and in the coffee shop were both permanent employment. The non-permanent seasonal job was a break in the employment pattern. Accordingly, the long-term benefits should be calculated using earnings from the time the worker changed to the seasonal employment in March 2003. The appeal was allowed.

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References: Act Citation
- WSIA

Other Case Reference
- [w2308s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 18-02-03, 18-02-04

Neutral Citation: 2008 ONWSIAT 831

Decision No. 758 08 I 27-Mar-2008 M. Crystal

- Time limits (appeal) (length of delay)
- Time limits (appeal) (related issues)

The Appeals Resolution Officer allowed the worker an extension of time to appeal a decision of the Claims Adjudicator regarding his D1 FEL award, and granted the worker a FEL sustainability award at D1. The ARO also determined the worker's FEL entitlement at R1 and R2. The employer appealed.

In this decision, the Vice-Chair considered the employer's appeal of the decision to grant the worker a time extension.

The Vice-Chair disagreed with the employer's submission that the Act and Board guidelines should be applied strictly in relation to time limits. The Act actually provides for the alternative of such longer period of time as permitted by the decision-maker.

In this case, the issue of the D1 FEL award was closely related to the issue of the R1 and R2 FEL awards. It was appropriate to consider the appeal regarding all the FEL awards together.

The employer's appeal regarding the time extension was dismissed.

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References: Act Citation

- WSIA

Other Case Reference
- [w2308s]

Reporter Citation
- 85 W.S.I.A.T.R. (online)

Neutral Citation: 2008 ONWSIAT 838

Decision No. 719 08 26-Mar-2008 J. Noble

- Time limits (appeal) (diligence of applicant)

The worker appealed a decision of the Appeals Resolution Officer denying an extension of the time limit to appeal a decision of the Claims Adjudicator.

The decision of the Claims Adjudicator was dated June 10, 2003. The worker's objection was filed on May 31, 2004, almost one year after the decision.

The Board does not have a policy on time limit extensions but it does have practice guidelines. These guidelines are not binding on the Tribunal but they are reasonable criteria and they are helpful.

The Board guidelines provide broad discretion to extend the time limit when the appeal is brought within one year of the decision. In this case, the worker's objection was filed within 10 days of being more than one year after the date of the decision of the Claims Adjudicator. This is a significant delay. The worker provided no reason for the delay.

The worker was not entitled to the extension. The appeal was dismissed.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2308s]
- BOARD DIRECTIVES AND GUIDELINES: Appeal System - Practice and Procedures, Appendix A, Guidelines for Dealing with Appeal Time Limits

Neutral Citation: 2008 ONWSIAT 814

- Construction
- Earnings basis (long-term)
- Board Directives and Guidelines (earnings basis) (non-permanent or irregular employment)

The worker was a labourer for a residential construction company. She was injured in August 2006. The worker appealed a decision of the Appeals Resolution Officer basing long-term benefits on a calculation of the earnings basis for a worker in non-permanent or irregular employment.

The fact that the worker was hired through a union hiring hall was not relevant to the issue of whether the employment was permanent or non-permanent. The worker's employment was not designated as seasonal. The worker worked inside homes that were under construction, cleaning and removing debris. Residential construction in the Greater Toronto Area is no longer subject to seasonal shutdowns. It has became a year-round operation, subject only to temporary stoppages for severe storms.

The worker was entitled to long-term benefits using the earnings basis calculation for a permanent employee. The appeal was allowed.

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References:

Act Citation
- WSIA

Other Case Reference
- [w2308s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 18-02-03

Neutral Citation: 2008 ONWSIAT 819