



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 1021/09I

**BEFORE:** A. T. Patterson: Vice-Chair  
E. Tracey: Member Representative of Employers  
D. Broadbent: Member Representative of Workers

**HEARING:** May 22, 2009 at Toronto  
Oral

**DATE OF DECISION:** January 5, 2010

**NEUTRAL CITATION:** 2010 ONWSIAT 8

**DECISION(S) UNDER APPEAL:** WSIB ARO decision dated August 4, 2006

### APPEARANCES:

**For the worker:** Graham Williamson, Lawyer

**For the employer:** Did not participate

**Interpreter:** None

## REASONS

### (i) Introduction

[1] On July 20, 1998 the worker suffered a right knee sprain in a workplace accident. Initial entitlement was granted.

[2] On September 14, 2005 the worker underwent a total right knee surgery replacement and requested entitlement to Loss of Earnings (LOE) benefits for the surgery and the recovery. Because the surgery of September 2005 and the recovery period occurred after the 72<sup>nd</sup> month final LOE review, the Board operating level denied those benefits.

[3] The worker objected to the denial of benefits. Appeals Resolution Officer (ARO) A. Clark upheld the decision to deny LOE benefits for the periods of the September 2005 surgery and recovery in a decision dated August 4, 2006.

[4] The worker appeals that decision to the Tribunal.

[5] The worker seeks a declaration from the Tribunal that the Board's interpretation of Section 43 of the *Workplace Safety and Insurance Act* (WSIA) and of Bill 179 amendments (herein after referred to as *Government Efficiency Act*, or GEA amendments) is contrary to the Charter of Rights and Freedoms and the Ontario Human Rights Code. In accordance with section 109 of the *Courts of Justice Act* notice of the appeal was provided to the Attorney General of Canada and the Attorney General of Ontario.

[6] In accordance with the Tribunal Practice Direction entitled "Procedure When Raising a Human Rights or Charter Question" the merits of the appeal were heard first, on May 5, 2009. Therefore, the issue for the Panel's determination in this decision is whether the worker is entitled to LOE benefits from September 13, 2005 until March 20, 2006 the date on which he returned to full employment with no loss of earnings.

[7] As a preliminary matter the worker's representative provided the Hearing Panel with Board *Operational Policy Manual* (OPM) Document No. 18-03-06 entitled Final LOE Benefit Review and published July 3, 2007. The representative suggested that the Panel could have regard to that policy document in determining the appeal.

### (ii) Background

[8] The factual background in this appeal is simple and uncontested. On July 20, 1998 the then-62-year-old mechanic slipped while going under a conveyor and twisted his right knee. Although initially diagnosed with a right knee sprain he required surgery in February 1999.

[9] In a report dated May 3, 2000, Dr. Stewart, the orthopaedic surgeon who had performed the surgery, indicated that the worker had never fully recovered from the surgery. In a report dated December 27, 2001, Dr. Stewart prescribed a knee brace until his knee deteriorated until such time as a total knee replacement would be required. In a report dated November 9, 2004, Dr. Stewart indicated that the worker was going to require a total knee arthroplasty to control his symptoms.

[10] The 72 month final LOE review date was set on August 1, 2004. On that date the worker was employed on a full-time basis at no wage loss.

[11] On September 14, 2005, Dr. Stewart performed a total right knee replacement on the worker. The worker returned to part-time work on March 13, 2006. A week later, on March 20, 2006 he began working full-time at no wage loss.

[12] On December 6, 2006, the worker's right knee was assessed for a NEL by Dr. G. French. That assessment did not result in an increase of the worker's NEL rating.

[13] The worker was granted health-care benefits for medication, a raised toilet seat and a shower seat as related to the compensable claim. LOE benefits for the period of recovery between September 14, 2005 until March 20, 2006 were denied.

[14] As a preliminary matter, the worker's representative provided the Panel with copies of Board *Operational Policy Manual* (OPM) Document No. 18-03-06.

**(iii) Law and Policy**

[15] As the date of accident is July 20, 1998 the WSIA, as amended, applies.

[16] At the present time Section 44 stipulates with respect to the review of payments of LOE benefits:

Review re loss of earnings

44. (1) Every year or if a material change in circumstances occurs, the Board may review payments to a worker for loss of earnings and may confirm, vary or discontinue the payments. 1997, c. 16, Sched. A, s. 44 (1).

No review after 72-month period

(2) Subject to subsection (2.1), the Board shall not review the payments more than 72 months after the date of the worker's injury. 2002, c. 18, Sched. J, s. 5 (5)

[17] Section 44 contains a number of exceptions:

Exception

(2.1) The Board may review the payments more than 72 months after the date of the worker's injury if,

(a) before the 72-month period expires, the worker fails to notify the Board of a material change in circumstances or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan;

(b) the worker was provided with a labour market re-entry plan and the plan is not completed when the 72-month period expires;

(c) after the 72-month period expires, the worker suffers a significant deterioration in his or her condition that results in a redetermination of the degree of the permanent impairment under section 47;

(d) after the 72-month period expires, the worker suffers a significant deterioration in his or her condition that results in a determination of a permanent impairment under section 47;

(e) after the 72-month period expires, the worker suffers a significant deterioration in his or her condition that is likely, in the Board's opinion, to result in a redetermination of the degree of permanent impairment under section 47;

(f) after the 72-month period expires, the worker suffers a significant temporary deterioration in his or her condition that is related to the injury; or

(g) when the 72-month period expires,

(i) the worker and the employer are co-operating in the worker's early and safe return to work in accordance with section 40, or

(ii) the worker is co-operating in health care measures in accordance with section 34. 2002, c. 18, Sched. J, s. 5 (5); 2007, c. 7, Sched. 41, s. 3 (1, 2).

[18] The exceptions listed in subsection 2.1 were not all enacted at the same time. Exception (a) was enacted at the same time as the WSIA came into force. Exceptions (b) and (c) were enacted when the WSIA was amended by the *Government Efficiency Act, 2002* effective November 26, 2002. Exceptions (d) through (g) were enacted by amendment by the *Budget Measures and Interim Appropriation Act, 2007* effective July 1, 2007.

[19] In the present case, the exception that most closely fits the circumstances of this appeal is exception (f) given that loss of earnings claimed relates to a temporary deterioration of the knee as a result of the surgery.

[20] It would appear, however, that exception (f) is not applicable in the circumstances due the operation of subsection 44 (2.9), since the worker was no longer suffering a deterioration on his condition on or after July 1, 2007:

[\(2.9\)](#) Clause (2.1) (f) and subsection (2.4.3) apply with respect to a worker who, on or after July 1, 2007, is suffering a significant temporary deterioration in his or her condition that began after the 72-month period expired. 2007, c. 7, Sched. 41, s. 3 (5).

[21] The Workplace Safety and Insurance Board provided a number of *Operational Policy Manual* (OPM) Documents to the Tribunal, notably Document No. 15-03-01 entitled Recurrences, and Document No. 18-03-03 entitled Reviewing LOE Benefits. As noted above, the worker representative provided copies of Document No. 18-03-06 entitled Final LOE Benefit Review to the Hearing Panel.

[22] OPM Document No. 15-03-01 reads, in part, as follows:

### **Policy**

A worker is entitled to benefits for a recurrence of a work-related injury or disease.

A recurrence may result from an insignificant new accident, or may arise when there is no new accident. To identify a recurrence, the WSIB must confirm that there is clinical compatibility between the original injury or disease and the current condition, or a combination of clinical compatibility and continuity.

If a significant new work-related accident occurs, the WSIB establishes a new claim.

## **Recognizing a recurrence**

### **Clinical compatibility**

To establish clinical compatibility, a decision-maker compares the worker's current clinical condition to that following the initial accident. The decision-maker considers

- whether the parts of the body affected now are the same as, or related to, those affected initially
- whether the body functions affected now are the same as those affected initially, and
- the degree to which body functions are affected now (as compared to the effect of the initial condition).

Similar clinical conditions indicate that the current problem or problems may be a result of the original injury, whereas dissimilar or unrelated clinical conditions indicate that there is no compatibility, and therefore no recurrence.

### **Continuity**

To establish continuity (i.e., a connection between the original clinical condition and the most recent problem or problems), the decision-maker considers whether the worker has

- complained to supervisors, co-workers, or health care practitioners on an ongoing basis since the original injury
- demonstrated ongoing symptoms since the original injury
- required work restrictions or job modifications
- had ongoing treatment for the original condition, or
- experienced a lifestyle change since the original accident (e.g., has the worker become unable to participate in household duties, or social or recreational activities?).

In complex cases, the decision-maker may consult with WSIB clinical staff to assist in making this determination.

[...]

### **New accidents**

If a worker has a new accident (work-related or not), the decision-maker obtains full details of the accident, including names and addresses of witnesses, the injuries sustained, and the health care received. The decision-maker then assesses the significance of the new accident relative to the worker's overall condition, using the following guideline.

### **Insignificant new accident + compatibility + continuity = recurrence**

An insignificant accident is one involving an ordinary or routine event, such as stooping to fasten a shoe or reaching for something on a shelf. If the accident is insignificant and clinical compatibility and continuity are established, the worker is entitled to benefits for a recurrence of the original injury.

**Significant new work-related accident = new claim**

A significant accident is one of some consequence or importance, such as a fall from a ladder. If there is a significant new work-related accident, a new claim is established.

A new claim is also established if the worker's latest clinical problem or problems result entirely from a new accident.

**(iv) Submissions**

[23] The worker's representative suggested that the Board had "mechanistically" applied the applicable policies, ignoring the remedial and benefit conferring nature of the legislation. He noted that the Legislature has, on two occasions, enacted amendments to section 44 in order to expand the number of circumstances in which "final" LOE benefit determinations could be reviewed.

[24] The worker representative presented two principal arguments in support of the worker's appeal.

[25] The representative first submitted that it was open to the Hearing Panel to find that the worker had suffered a new accident to his right knee on a disablement basis. Such a finding would initiate a new 72-month period and thereby bypass section 44 (2) with regard to the LOE period in question.

[26] The representative's second argument was that the worker could have his payments reviewed pursuant to the exception subsection 44 (2.1) (c). The representative noted that subsection 44 (2.1) (c) of the Act does not make reference to a NEL increase as a necessary requirement for a review to take place. That condition is contained in Board *Operational Policy Manual* (OPM) Document No. 18-03-03, entitled Reviewing LOE Benefits, which states in part:

**Significant deteriorations post 72 months**

The WSIB may review the LOE benefit if the worker suffers a significant deterioration in his/her work-related condition after the 72<sup>nd</sup> month post-injury provided that

- the significant deterioration is confirmed through a NEL redetermination that occurred on or after November 26, 2002, and
- the LOE benefit is reviewed within 24 months from the date on which the WSIB redetermined the NEL benefit (i.e., NEL payment processing date).

[27] In short, the representative argues that all that is required is that a NEL redetermination take place not that the NEL redetermination result in a NEL increase.

[28] The representative suggested that OPM Document 18-03-06 could provide guidance in the matter before the Panel. The representative noted, in particular, that the policy document specifically permits the review of LOE benefits for periods of significant temporary deterioration after post-72 months, as is the case in the present appeal.

[29] The Panel noted that the last page of the policy includes the following notation: "This policy applies to all decisions made, with respect to wage loss entitlement periods on or after July 1, 2007, for all accidents on or after January 1, 1998." The representative submitted that the policy does not specify that it could not be applied with respect to wage loss entitlement periods

prior to July 1, 2007, particularly in the context of a merits and justice argument. In such a context, it was submitted, OPM Document 18-03-06 could have an “interpretative effect”.

[30] The representative requested in the Notice of Application:

In the alternative grant health care benefits under Section 33 of the Act equal to the loss of earnings from and after September 13, 2005, until the date that the Worker returned to full employment with no loss of earnings.

[31] The representative did not raise this argument during the hearing, however the Hearing Panel will address it in the decision.

**(v) Analysis**

**(a) Did a “new accident” on a disablement basis arise?**

[32] In the Hearing Panel’s view there is no basis to support a finding that the worker’s right knee surgery was the result of a new accident on a disablement basis.

[33] A review of the medical reporting on file reveals medical continuity from the worker’s original injury to the right knee in 1998 and his ongoing right knee condition. There is also clear compatibility between the right knee condition in 1998 and in 2005. The worker’s surgery to the right knee on September 14, 2005 was anticipated, as early as Dr. Stewart’s report of December 27, 2001, as a result of the worker’s right knee never having fully recovered from the first surgery.

[34] None of the medical reports on file suggest that the worker’s right knee problems and resulting surgery arose as a result of the nature of the worker’s employment. Dr. Stewart’s reports clear that his opinion, as succinctly summarized on a Health Professional’s Report (Form 8) dated January 26, 2006, is that the right knee replacement is related to the July 20, 1998 workplace accident:

[The P]atient had a total R knee replacement surgery on September 14, 2005. His knee replacement surgery was brought on as a result of old work injury.

[35] Moreover, there is no indication that the worker suffered any new accident, in the nature of a chance event which caused injury to his right knee after the original 1998 injury.

[36] In conclusion, there is no evidence on file to support a finding that the surgery of September 2005 was related to a new accident which would allow a new claim to be opened for the right knee under OPM Document No. 15-03-01. Rather, the evidence is clear that the worker’s right knee was subjected to a “recurrence”, as defined in that policy. The Panel is therefore of the view that the right knee surgery of September 14, 2005 is the responsibility of the 1998 claim.

**(b) Does subsection 44 (2.1) (c) apply?**

[37] The Hearing Panel does not agree with the representative’s suggestion that Board policy introduces a requirement that is not set out in the exception set out in subsection 44 (2.1) (c) of the Act. For the reasons which follow, the Hearing Panel concludes that subsection 44(2.1) (c) does not apply to the facts of this appeal.

[38] The Act states that the LOE payments may be reviewed more than 72 months after the date of the worker's injury if "the worker suffers a significant deterioration in his or her condition that results in a redetermination of the degree of the permanent impairment under section 47".

[39] In the Panel's view, the "policy" requirement that the "significant deterioration is confirmed through a NEL redetermination" is entirely consistent with the terms of subsection 44 (2.1) (c). It appears clear to the Panel that a deterioration which does not result in an increase of the NEL rating is, by that very fact, not a "significant" deterioration. The mere process of engaging in a NEL redetermination without any increase of the NEL rating cannot be said to confirm a significant deterioration. The Hearing Panel notes that *Decision No. 1033/04R2* (April 20, 2005) concluded that subsection 44 (2.1) requires a NEL redetermination based on a change in the degree of permanent impairment.

[40] In *Decision No. 1033/04* (July 19, 2004) a worker's NEL rating was confirmed but it was found that the permanent worsening date occurred in December 1999 rather than in April 2002. The change in the date of permanent worsening changed the dollar amount of the worker's NEL award. The Vice-Chair found that this amounted to a redetermination of the NEL benefit as a result of the decision, which was released after November 26, 2002. The Board requested a reconsideration of that Decision. *Decision 1033/04R* (November 29, 2004) concluded that the request met the threshold test, consequently the request was granted. *Decision 1033/04R2* concluded that the Board policy document must be interpreted in light of the governing legislation. The reconsideration decision noted that while the interpretation in *Decision No. 1033/04* was rational in relation to the policy, it went beyond the wording of subsection 44 (2.1) of the Act, which requires a NEL based on a change in the degree of permanent impairment.

[41] Given that the Panel does not find that the relevant Board policy is inconsistent with the Act, there is no reason to refer this issue to the Board pursuant to section 126 (4).

[42] Finally, the worker's representative suggested the 2007 amendments merely made explicit the exception introduced by subsection 44 (2.1) (f) which, he contended was implicit in Subsection 44 (2.1) (c) before the enactment of the exception. The Hearing Panel cannot agree with this argument, given the Legislature explicitly states, at subsection 44 (2.9) that exception (f) applies with respect to workers who "on or after July 1, 2007" suffer a significant temporary deterioration. Moreover, the Hearing Panel is of the view that if the Legislature's aim was merely to make explicit an element which had been implicit in subsection (2.1) (c) it would have amended that subsection rather than introducing the new subsection (2.1) (f).

[43] In reaching these conclusions the Hearing Panel has considered Tribunal *Decision No. 1860/06* (October 18, 2006) and *Decision No. 1596/08* (19 September, 2008). *Decision No. 1860/06* concerned a worker who underwent knee replacement surgery in 2005, after his final LOE review. Section 44 (2.1) (c) did not apply because there was no redetermination of the worker's NEL award. In that case the Vice-Chair also considered and rejected an argument, not submitted for our consideration, that section 43 and 44 are distinct and severable. *Decision No. 1860/06* applied section 44 and denied a further review of LOE benefits 72-months post-accident on the facts and time periods involved.

[44] *Decision No. 1596/08* considered whether LOE benefits could be reviewed during an LMR plan, begun more than 72-months post-accident. The Panel which considered that appeal concluded that a plain reading of the Act did not allow such a review. The Panel noted that after July 1, 2007, the worker would have been entitled to further LOE benefits but that the amendments were not applicable for the period from June 2006 to March 2007.

(c) **Can health care benefits equal to the loss of earnings from and after September 13, 2005, until the date that the Worker returned to full employment with no loss of earnings be granted?**

[45] Section 33 of the Act stipulates:

**33. (1)** A worker who sustains an injury is entitled to such health care as may be necessary, appropriate and sufficient as a result of the injury and is entitled to make the initial choice of health professional for the purposes of this section.

**(2)** The Board may arrange for the worker's health care or may approve arrangements for his or her health care. The Board shall pay for the worker's health care.

**(3)** The Board may establish such fee schedules for health care as it considers appropriate.

**(4)** If the Board does not receive a bill for health care within such time as the Board may specify, the Board may reduce the amount payable for the health care by such percentage as the Board considers an appropriate penalty.

**(5)** No health care practitioner shall request a worker to pay for health care or any related service provided under the insurance plan.

**(6)** No action lies against the Board to obtain payment of an amount greater than is established in the applicable fee schedule for health care provided to a worker. No action lies against a person other than the Board for payment for health care provided to a worker.

**(7)** The Board shall determine all questions concerning,

(a) the necessity, appropriateness and sufficiency of health care provided to a worker or that may be provided to a worker; and

(b) payment for health care provided to a worker.

[46] The Hearing Panel notes that the worker has already been granted health care benefits in relation to the September 2005 surgery, specifically for physiotherapy treatment and a raised toilet and shower seat.

[47] There is no basis in the statute to grant benefits for loss of earnings pursuant to section 33 except to the extent contemplated by OPM Document No. 17-01-05 entitled Wage Loss for Health Care Appointment. That policy, however, applies only after the worker has returned to normally scheduled working hours and misses time from work to attend medical appointments.

**DISPOSITION**

[48]           The appeal is denied.

[49]           The hearing will reconvene to hear arguments concerning the Charter and Human Rights Code.

DATED: January 5, 2010.

SIGNED: A.T. Patterson, E. Tracey, D. Broadbent.