WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1452/18

BEFORE: L. Petrykowski: Vice-Chair

HEARING: May 11, 2018 at Toronto
Written

DATE OF DECISION: June 22, 2018

NEUTRAL CITATION: 2018 ONWSIAT 2067

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer dated April 13, 2017

APPEARANCES:

For the worker: Not participating

For the employer: R. Fink, Lawyer

Interpreter: N/A

REASONS

(i) Introduction to the appeal proceedings

[1] The employer appeals a decision of the Appeals Resolution Officer ("ARO") of the Workplace Safety and Insurance Board ("Board") dated April 13, 2017, which concluded that the employer was entitled to 50% Second Injury and Enhancement Fund ("SIEF") cost relief as related to an injured worker's claim (accident date: June 14, 2013). The ARO rendered a decision based upon the written record and without an oral hearing at that time.

[2] The employer's appeal was selected to proceed through the written hearing process in accordance with the Tribunal's Practice Direction entitled "Written Appeals". The employer participated in the appeal and was represented by Mr. Fink, a lawyer. The Tribunal invited the worker to participate in the proceedings in May/June 2017. However, the worker did not indicate an interest in participating in the proceedings.

(ii) Issue

[3] The only issue to be decided in this appeal is as follows:

1. Whether the Second Injury and Enhancement Fund (SIEF) relief has been correctly calculated with respect to the costs of the worker's claim.

(iii) Background

[4] I have carefully considered the totality of the documentary record as it applies to this case and briefly note the following background facts.

[5] The now 45-year-old worker began employment with the accident employer on February 25, 2013. On June 24 2013, he was working as a pipe layer when he injured his left knee after his right foot slid down uneven ground. The Board's operating level granted the worker initial entitlement for this workplace injury.

[6] The employer's representative requested SIEF cost relief in the worker's claim. On October 27, 2016, the Board's Case Manager granted the employer 50% SIEF cost relief in the worker's claim.

[7] The employer objected to the quantum of SIEF cost relief. The matter was referred to the Board's Appeals Branch for further review and consideration. The ARO confirmed the Board operating level's determination when the matter was reviewed at the Board's Appeals Branch on April 13, 2017. The ARO's decision included the following conclusion:

> CONCLUSION
>
> I conclude the worker was involved in an accident of moderate severity and his recovery was prolonged due to a pre-existing condition of' moderate significance. The employer is entitled to claim cost relief of 50% under the SIEF policy.
>
> The employer' s objection is denied.

[8] The employer's objection to the above-described ARO determination is now before the Tribunal in the present appeal.

(iv) Law and policy

[9] Since the worker was injured on June 24, 2013, the *Workplace Safety and Insurance Act, 1997* (the WSIA) is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[10] The Board's authority to establish the Second Injury and Enhancement Fund derives from section 98 of the WSIA, which states:

> **98(1)** The Board may establish a special reserve fund to meet losses that may arise from a disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class.

[11] 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, Tribunal *Decision No. 280.*

[12] 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: #247 and 299.

[13] I have considered these policies as necessary in deciding the issue in this appeal, in particular *Operational Policy Manual* ("OPM") Document #14-05-03, entitled "Second Injury and Enhancement Fund". This policy provides, in part:

> **Policy**
>
> If a prior disability caused or contributed to the compensable accident, or if the period resulting from an accident becomes prolonged or enhanced due to a pre-existing condition, all or part of the compensation and health care costs may be transferred from the accident employer in Schedule 1 to the SIEF.
>
> Both physical and psychological disabilities are included.
>
> **Guidelines**
>
> There is no provision in the Act for the Fund to apply to Schedule II employers.
>
> In situations where alcoholism plays a role in the causation of an accident, it is not considered to be a pre-existing condition with regard to the application of SIEF relief.
>
> The objectives of this policy are to provide employers with financial relief when a pre-existing condition enhances or prolongs a work-related disability. It thereby encourages employers to hire workers with disabilities.
>
> **Definitions**
>
> Pre-accident disability is defined as a condition which has produced periods of disability in the past requiring treatment and disrupting employment.
>
> Pre-existing condition is defined as an underlying or asymptomatic condition which only becomes manifest post-accident.
>
> (…)

SIEF-application to employer costs

Medical significance of pre-existing condition*	**Severity of accident****	**Percentage of cost transfer*****
Minor	Minor Moderate Major	50% 25% 0%
Moderate	Minor Moderate Major	75% 50% 25%
Major	Minor Moderate Major	90%-100% 75% 50%

NOTES

***** The medical significance of a condition is assessed in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person. An associated pre-accident disability may not exist.

With psychological conditions, the possibility of prior psychic trauma resulting from life experience could be considered as evidence of vulnerability, and justify recommending relief to the employer, even in the absence of pre-existing psychological impairment.

****** The severity of the accident is evaluated in terms of the accident history and approved definitions.

Accident History Components

- mechanics (lift, push, pull, fall, blow, etc.)
- position (kneeling, standing, sitting, squatting, bending, etc.)
- environment (lighting, temperature, weather conditions, terrain, etc.)

Definition – "Severity of Accident"

Minor: expected to cause non-disabling or minor disabling injury

Moderate: expected to cause disabling injury

Major: expected to cause serious disability probable permanent disability

******* The percentage of the total cost of the claim transferred to the SIEF…

[14] As can be seen from the table of SIEF cost relief found in the Board's SIEF policy, the amount of relief granted is dependent on two variables: the severity of the accident and the severity of the pre-existing condition.

[15] Board policy requires that accidents be characterized as either "minor" (expected to cause non-disabling or minor disabling injury), "moderate" (expected to cause disabling injury) or "major" (expected to cause serious disability, probable permanent disability). In addition to these definitions, the policy suggests that the severity of the accident is to be evaluated in terms of the "accident history components," which include "mechanics" (lift, push, pull, fall, blow,

etc.), "position" (kneeling, standing, sitting, squatting, bending, etc.) and "environment" (lighting, temperature, weather conditions, terrain, etc.). In determining the severity of accident, Tribunal *Decision No. 1021/12* confirmed that the actual injuries are not considered but rather the extent of disability the mechanics of the accident would reasonably be expected to cause.

[16] With respect to the matter of the pre-existing condition, Board policy requires that it be characterized as minor, moderate or major. The policy does not define these terms and indicates only that the medical significance of a condition is assessed "in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person". These provisions were interpreted as follows in Tribunal *Decision No. 1582/07*:

> I interpret the policy to mean that the medical significance of a pre-existing condition should be considered to be "minor" if it made the worker slightly more liable to develop a disability of greater severity than a normal person, and that it should be considered "major" if it made the worker extremely liable to develop a disability of greater severity than a normal person. If the extent to which the pre-existing condition made the worker more liable to develop a disability of greater severity than a normal person was more than slight, but less than extreme, the medical significance of the pre-existing condition could be considered moderate.

(v) Submissions of the employer's representative

[17] On behalf of the employer, Mr. Fink provided written submissions dated September 26, 2017, as follows:

> The following are my Submissions in regards to the Accident Employer's appeal for 90% Second Injury and Enhancement Fund Relief. The ARO, in a Decision of April 13, 2017, at page 8 and 9 of the Case Record, allowed 50% Second Injury and Enhancement Fund Relief on the basis that the injury was moderate, and the pre-existing condition was moderate.
>
> We are relying on the opinion of Dr. Ford in his Report of October 10, 2016, at page 139 of the Case Record. Dr. Ford views the accident as "minor". The reasons for this are in part, because the Worker himself was not sure how exactly he had injured himself previously in 2009, prior to the Work injury of 2013, Furthermore, the type of event the Worker's knee suffered in 2013, was in the opinion of Dr. Ford, a very rare type of injury to have suffered from the description of the accident that the Worker gave, which was his foot sliding into a trench.
>
> Dr. Ford is further of the opinion that the Worker's pre-existing condition played a major role insofar as the Worker had pre-existing ACL insufficiency. Dr. Ford indicates the pre-existing ACL insufficiency can itself have caused the bucket-handle tear of the medical meniscus, which disabled the Worker for a significant time after the event.
>
> Please find enclosed a copy of Dr. Ford's Curriculum Vitae. At page 42 of the Case Record, in WSIAT *Decision 2201/14*, the Vice-Chair indicates that she respects the opinion of Dr. Ford, and in WSIAT *Decision 1311/13*, at page 52 paragraph 30, Dr. Ford is accepted as an expert in Orthopaedics, and sufficient to provide an opinion in that matter.
>
> Dr. Ford has been accepted as an expert by the Appeals Tribunal, in dealing with Orthopaedic issues in several other decisions. His Curriculum Vitae indicates he is a Senior Doctor in Orthopaedics at a teaching Hospital, and has been in that position for several decades. One will also note from his Curriculum Vitae that he sub specialized in knee surgery.

> The test for the severity of the pre-existing condition is outlined on page 42 from WSIAT *Decision 2201/14* to be: "the Tribunal's test is the extent to which the medical condition would be expected to render the Worker more liable to develop an injury of greater severity in comparison to the Worker without that condition". Dr. Ford believes that the ACL insufficiency rendered this Worker more liable to develop the injury to a major degree.
>
> In WSIAT *Decision 1311/13* at page 51 paragraph 27, the test for whether an injury is minor or moderate receives the following dicta: "to find that an accident history is of moderate severity, the reasoning of these decisions is that the possibility of more than minor disabling injury must be of a sufficient degree to mean that the disability is not "unexpected". Many outcomes would be possible but unexpected. They would not meet the test".
>
> Dr. Ford indicates that what would be expected in the Worker's description of the accident would be no disability, or a minor strain that would have resolved "fairly quickly". Therefore, it is our Submissions based on Dr. Ford's Report, that the accident itself was "minor". No disability or an extremely short one that would have been the truly expected result.
>
> These are our Submissions, and we thank you for your consideration.
>
> Finally, the Appeals Tribunal is requested to also direct in this decision, that any additional SIEF be applied to the Experience Rating of the Accident Employer retroactively, insofar as the Application of Experience Rating would be skewed by the passage of time. The passage of time has not been the fault of the Accident Employer, as SIEF has been under request for several years. [sic]

(vi) Analysis and conclusions

[18] Having reviewed the totality of evidence before me, alongside the employer representative's submissions and applicable Board policy and the WSIA, I have allowed the employer's appeal for the following reasons.

[19] I firstly note that in analyzing a SIEF appeal, Tribunal *Decision No. 1404/11* states:

> The standard of proof in a Tribunal appeal is the balance of probabilities. In a SIEF appeal, this means that the evidence must demonstrate that it is more likely than not that the underlying condition prolonged or enhanced the worker's disability resulting from the workplace accident. The severity of the accident and the significance of the pre-existing condition must also be determined based upon direct evidence or reasonable inferences which may be drawn from the evidence. In a SIEF appeal, there is often a lack of direct evidence, and the parties may be drawn into relying upon unsupported assertions and arguments. I find it necessary to emphasize, however, that entitlement for SIEF relief must be demonstrated on the basis of valid evidence or reasonable inferences drawn from the evidence.

[20] I further note that in Tribunal *Decision No. 585/08*, it was noted that "medical evidence is necessary to establish that the worker's condition was prolonged or enhanced by a pre-existing condition. This finding cannot be made based only on the assertions of the employer's representative."

[21] I begin my analysis on the sub-issue of "accident severity" by noting that the worker was injured on June 24, 2013 while working as a pipe layer. The Worker's Report of Injury/Disease ("Form 6") dated July 2, 2013 noted the worker's "right leg slipped on uneven ground and [his] left knee twisted". The Employer's Report of Injury/Disease ("Form 7) dated July 2, 2013 explained that the worker was "walking along top of open trench, lost footing on uneven ground.

Right food slid down slope, left foot was planted and did not move…". These accident descriptions were confirmed by the Board in conversation with the worker and employer on July 3, 2013 (Board Memorandum #1). The accident description provided at the Board's Hip and Knee Specialty Program on September 30, 2013 was similarly that the worker's "right foot slipped on excavated dirt. His left foot was planted and his left knee twisted to the right in a valgus position. He heard a grinding and landed on his bottom". The precipitating action that led to the worker's compensable left knee injury was him walking along the ground when his right foot slid a short distance into a nearby trench. The worker did not fall into the trench but rather landed on his buttocks.

[22] With respect to the mechanics at the time of accident, I note the worker was not affected by any force other than gravity pulling him downward due to loose soil/ground beneath his right foot/leg. This encompassed a right-sided descending motion from the standing position. The distance of this motion was not great and this did not involve any significant fall from height. There was no significant transmission of force in this accident. There was no blow from an external force nor was the worker pushing or pulling anything at the time of the accident. There was no object or equipment involved in the accident and none impacted the worker. The worker was also not lifting at the time of the accident nor was he carrying any objects of significant weight. All of this suggests that the accident should be viewed as minor in severity.

[23] With respect to the worker's position at the time of accident, I note that the worker was in the standing position when the sequence of accident began. The worker was aware of his surroundings. The worker was moving forward during his walking motion, which means that the direction of his movement was anticipated and known to him. Conversely, the worker was not in an awkward or strained position when the sequence of accident began. All of this suggests that the accident should be viewed as minor in severity.

[24] Finally, with respect to the worker's environment at the time of accident, he was aware of his construction/excavation-related surroundings. There was no added element of risk/peril in his sequence of accident other than some loose soil/ground. This also suggests that the accident should be viewed as minor in severity.

[25] In my view, the accident of June 24, 2013 was of "minor" severity, when assessing its mechanics, position, and environment, in that it would only "be expected to cause non-disabling or minor disabling injury". With the above-described circumstances in mind, I do not accept that an accident involving such mechanics, position, and environment would be "expected to cause disabling injury". This accident-related descending motion was a rather innocuous event. The described sequence of accident would have been expected to result in a minor strain without any disabling features or no discernable injury at all.

[26] In this vein, I cannot ignore that Dr. Ford, an independent orthopedic specialist/surgeon, reviewed the worker's file and described the accident as "minor" in his report dated October 10, 2016 (discussed further below) and that "one would have expected either no injuries or a minor sprain that would have resolved within a very short period of time" in relation to this accident history. All of this dovetails with my conclusion that the severity of the accident in the worker's case was "minor" rather than moderate in scope for the purposes of OPM Document #14-05-03. Therefore, in my view, the nature of the accident at issue in this appeal would not be reasonably expected to cause any form of disabling injury. As such, I accept the submissions of

the employer's representative and ultimately find that the accident was of minor severity, rather than moderate severity, for the purposes of the SIEF-related adjudication in the present appeal.

[27] As to the sub-issue of the existence and medical significance of a pre-existing condition affecting the worker in this case, I first note that OPM Document #14-05-03 directs that this is to be "assessed in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person". I accept that the worker was affected by a significant pre-existing condition at the time of his workplace accident in relation to the disability that he later sustained. While the extant medical evidence in the documentary record suggested the presence of a pre-existing condition, the employer's representative provided Dr. Ford's report which is the clearest opinion about the overall significance of the worker's pre-existing medical condition.

[28] I give significant weight to Dr. Ford's opinion about this matter as he is an orthopedic specialist/surgeon with a sub-specialty in knee surgery. Dr. Ford provided a medical review of the documentary record and was asked to provide his analysis/opinion and answer a number of questions from the employer's representative, which he did in the following manner:

> This now 44-year-old pipe layer incurred an injury to his left knee on June 24, 2013. He is described as walking on dirt above a trench. His right foot slid into the trench twisting his left knee. He was unable to weight-bear. He was taken to the emergency room where x-rays did not demonstrate any fractures. He was subsequently seen by Dr. Nicolas Yardley on July 2, 2013. The worker was noted to have a locked knee lacking the last 30 degrees of extension. An MRI was carried out which demonstrated a meniscal tear and a chronic anterior cruciate ligament tear (ACL tear). An arthroscopy was carried out by Dr. Yardley on July 18, 2013. This demonstrated a large bucket-handle tear of the medial meniscus and a chronic ACL tear,
>
> By history this man incurred an injury to his left knee in 2009. An MRI had documented an ACL tear. For reasons that are unclear this man states that he could not recall how he injured his knee but states there was possibly soccer or a work related injury. This is a very common soccer injury. Had this been a work related injury it would have been associated with significant disability and it would have been reported immediately. He apparently was able to cope and returned to work after his 2009 injury but we do not have any details at all prior to the June 24, 2013 event.
>
> **Impression**
>
> A bucket-handle tear of the medial meniscus is a common sequela of chronic ACL insufficiency. It is extremely rare for a bucket-handle tear to occur given this man's mechanism. There is distinct possibility here that, in fact his knee gave out on him resulting in the tear. This is a common history in an individual with chronic ACL insufficiency.
>
> There is no question this man had a significant pre-existing condition. I disagree with the case manager M. Damoff in his letter dated January 12, 2016. Unfortunately this case manager is not familiar with the natural history of chronic ACL insufficiency. Because of instability, minor events can result in a bucket-handle tear resulting in the knee being locked. This individual had a significant pre-existing condition, it was a minor injury. One would have expected either no injuries or minor strains that would have resolved fairly quickly. Pre-existing ACL insufficiency resulted in a bucket-handle tear of the medial meniscus.
>
> **Answers to Specific Questions**
>
> *1. Was the work accident minor, moderate were major?*
>
> The work injury was minor.

> *2. Is the preexisting condition minor, moderate or major objectively?*
>
> It is a major pre-existing condition. This man's chronic ACL insufficiency is directly responsible for the development of a bucket-handle tear.
>
> *3. Did the pre-existing condition play a minor, moderate or major role in the outcome of the workers disability?*
>
> It has played a major role. The combination of ACL insufficiency and a significant loss of the medial meniscus after a bucket-handle tear significantly increases the instability associated with these pathologies.
>
> *4. Is the accident, as seen outside of the pre-existing condition, one where a time loss would be a probability?*
>
> As stated, in the absence of this man's anterior cruciate ligament insufficiency, one would have expected either no injuries or a minor sprain that would have resolved within a very short period of time.

[29] I find Dr. Ford's report to be significant in the following respects. Firstly, he opines that the worker's "pre-existing ACL insufficiency resulted in a bucket-handle tear of the medial meniscus" and that it was "directly responsible for the development of a bucket-handle tear". Secondly, Dr. Ford explicitly described the medical significance of this pre-existing condition as "major". Thirdly, he explicitly opined that the worker's pre-existing condition "played a major role" in the worker's ensuing disability. I give significant weight to this specific medical opinion as Dr. Ford had a correct understanding of the accident history and pre-existing clinical history, and due to the fact that his extensive credentials/experience afford him extensive expertise in making conclusions about knee pathology.

[30] I accept Dr. Ford's medical opinion that the scope of the pre-existing condition was "major". In the face of the preponderance of medical evidence, I can only conclude that the pre-existing condition greatly prolonged the injury that the worker sustained and greatly contributed to the need for a surgical intervention. I find that this clearly meets the requirement for SIEF cost relief in OPM Document #14-05-03, which necessitates there to be a disability "period resulting from an accident [that] becomes prolonged or enhanced due to a pre-existing condition".

[31] As noted earlier with reference to the Board policy related to SIEF cost relief, Tribunal *Decision No. 1582/07* states: "If the extent to which the pre-existing condition made the worker more liable to develop a disability of greater severity than a normal person was more than slight, but less than extreme, the medical significance of the pre-existing condition could be considered moderate". I adopt this same rubric in finding that the medical significance of the worker's pre-existing condition in the instant case to be "major", aligned to Dr. Ford's explicit medical opinion, as the worker was far more liable to develop a disability of greater severity than a normal person in the circumstances of his case.

[32] Having reviewed the totality of evidence before me, I find that the employer is entitled to 90% SIEF cost relief. According to OPM Document #14-05-03, where the accident severity is determined to be minor in scope and where the medical significance of the pre-existing condition is found to be major in scope, an employer is entitled to 90% SIEF cost relief by the due application of the above-described matrix entitled "SIEF-application to employer costs". As such, since I have determined that those particular characteristics apply to the worker's claim, the employer in this case is entitled to 90% SIEF cost relief. The employer's appeal is allowed in this regard.

[33] I have also considered whether the employer should be entitled to a manual retroactive adjustment to reflect my earlier SIEF cost relief determination. This was touched upon at the conclusion of the submissions of the employer's representative, although no reference was made as to what experience-rating system applied in this case and if the applicable experience-rating window has expired. Where SIEF cost relief is granted by the Tribunal under such circumstances, Tribunal *Decision No. 708/07* has established that the Tribunal has the jurisdiction to consider a request for a retroactive adjustment of the employer's experience-rating account, where necessary to give full effect to SIEF cost relief granted by the Tribunal.

[34] I note that in Tribunal *Decision No. 708/07*, the Vice-Chair concluded that the evidence indicated that there were circumstances warranting a retroactive adjustment of the employer's experience-rating account to reflect the SIEF cost relief that had been granted. In the present case, I similarly find that the circumstances militate in favour of granting the retroactive adjustment, if necessary, of the employer's experience-rating account to reflect the SIEF cost relief that has been granted above. In my view, the employer has pursued SIEF cost relief diligently and reasonably in the worker's claim. A considerable amount of time has been consumed by the appeal process, both at the Board and subsequently at the Tribunal. I accept that these are circumstances that justify a manual retroactive adjustment of employer's experience-rating account, as may be necessary in this case. The employer's appeal is also allowed in this regard.

DISPOSITION

[35] The employer's appeal is allowed.

[36] The employer is entitled to 90% SIEF cost relief under the worker's claim.

[37] The employer is entitled to a retroactive adjustment to reflect the above-described determination, as may be necessary.

DATED: June 22, 2018

SIGNED: L. Petrykowski