

SUMMARY

DECISION NO. 1318/98

Aggravation (preexisting condition); Significant contribution (of employment to disability).

The worker had preexisting non-compensable psoriatic arthritis. In 1980, he suffered an attack of arthritis which resulted in hallux abductor valgus and clawed toes. The foot deformities did not cause him pain or limit his activities. In 1988, he started working for the employer. He was required to wear steel-toed boots. In 1991, he began to experience scraping of his toes against the inside of the work boots. His doctor recommended orthopaedic footwear with an extra depth toe box. The footwear was not provided, and the worker developed an infected ulceration on his toes. The worker was able to wear some adapted non-prescription shoes provided by the employer. But the shoes wore out in 1992. The worker stopped working until the prescribed boots arrived in 1993. The worker appealed a decision of the Hearings Officer denying temporary benefits in 1992 and 1993 while waiting for the specially prescribed boots.

The work boots were required to prevent an aggravation or recurrence of the ulceration of the worker's toes. The underlying condition played a role in the development of the ulceration. However, the work boots also played a significant role. The treatment of the ulceration included the orthopaedic boots. The failure to provide the boots in a timely fashion resulted in the worker's inability to work during the period in question. The worker was entitled to full temporary benefits. The appeal was allowed. [9 pages]

DECIDED BY: Gehrke; Felice; Nipshagen

DATE: 16/10/98

ACT: WCA

BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Documents No. 02-01-08, 03-03-13, 05-04-06, 08-01-05

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1318/98

[1] This appeal was heard in Toronto on September 3, 1998 by a Tribunal Panel consisting of:

L. Gehrke : Vice-Chair,
G. Nipshagen : Member representative of employers,
D. Felice : Member representative of workers.

THE APPEAL PROCEEDINGS

[2] The worker appeals the decision of C. Whittaker, Hearings Officer dated September 5, 1995. That decision concluded that the worker had no entitlement to compensation benefits for layoffs in July and October, 1992, while awaiting specially prescribed workboots.

[3] The worker appeared and was represented by H. Kawaguchi, lawyer. The employer was represented by J. Morgante, lawyer.

THE EVIDENCE

[4] The Panel considered the material included in the Case Record prepared by the Tribunal Counsel Office (Exhibit #1). In addition, we considered Addendum #1 (Exhibit #2), Material submitted by the worker (Exhibit #3), a letter from Ms. Kawaguchi dated June 1, 1998 (Exhibit #4), a letter from J. Martinez of Tribunal Counsel Office dated June 11, 1998 (Exhibit #5) and letters from Ms. Kawaguchi and J. Oulton, Tribunal Appeals Administrator, dated August 31, 1998 and September 1, 1998 (Exhibit #6)..

[5] The Panel also heard oral evidence from the worker. Submissions were made by Ms. Kawaguchi and Ms. Morgante.

THE ISSUES

[6] The issue in this appeal is whether the worker is entitled to benefits under s.37 of the pre-1997 Act during the periods in 1992 and 1993 that he laid off while awaiting specially prescribed workboots.

PRELIMINARY MATTERS

[7] Ms. Kawaguchi informed the Panel that the worker had a medical appointment on September 8, 1992. She requested the Panel to receive the report from this appointment post-hearing. Ms. Morgante questioned the relevance of the report, since the time period in issue is now past. The Panel stated that it would determine the need for this evidence after the hearing. In light of our decision to grant the worker's appeal, which is set out below, the Panel determines that it is not necessary to receive any further medical reports.

THE REASONS

(i) Facts

- [9] The Panel finds the following facts, based upon the material in the Exhibits and the worker's testimony at the hearing of this appeal.
1. The worker suffers from a pre-existing condition of psoriatic arthritis. In 1980, he suffered an attack of arthritis which resulted in hallux abductor valgus and clawed toes. The worker testified that his foot deformities resulting from the 1980 psoriatic arthritis attack did not cause him pain, nor did it limit his activities.
 2. The worker started working for the employer as a garbage labourer in 1988, at first part-time, then full-time. He was required by the employer to wear steel-toed and steel-shanked workboots.
 3. In or around September, 1991 the worker began to experience scraping of the tops of his toes against the inside of his workboots. On October 31, 1991 the worker attended his family physician, Dr. Lowe. Dr. Lowe completed a "Medical Authorization for Special Footwear" (a form of the employer). Dr. Lowe stated that the indication for modified footwear was hallux abductor valgus and clawed toes (caused by the psoriatic arthritis flare-up) with resultant callosities. Dr. Lowe recommended orthopaedic footwear with extra depth toe box and stated this would be an ongoing problem. The form indicates that a specialist was consulted. The worker testified that he was told that if he did not wear special footwear, he would develop serious problems with his feet.
 4. The special boots were not provided by the employer and the worker continued to work wearing the boots that caused the scraping of his toes. As a result, in December 1991 an infected ulceration developed on the worker's fourth toe of his right foot. He laid off work and was treated with antibiotics. His family physician, Dr. Lowe noted in the Physician's First Report dated December 12, 1991, Dr. Lowe diagnosed ulceration of the right 4th toe secondary to improper footwear. Initial entitlement for lost time benefits was accepted by the Board.
 5. On January 23, 1992 Dr. Lowe advised the Board that the worker's infection was gone. However the worker could not wear regular shoes or work boots because friction would aggravate his injury. Special shoes were prescribed but had not yet arrived.
 6. In February 1992 the worker saw Dr. Barrington, an orthopaedic specialist. Dr. Barrington reported:

This man has psoriatic arthritis with multiple deformities in his feet. He has had problems wearing his steel capped work boots and has developed an ulcer over the PIP joint of his right 4th toe. This infection is now under control .

Clinically he has very marked psoriatic lesions about his feet and ankles. Pulses are okay.

Metatarsus primus varus, hallux valgus , clawing of all his toes. Really the only thing that is troubling him is hammering of his 4th toe.

I have ordered him some deep last boot with steel caps and he is going to try these for a while. If he is still having trouble with the 4th toe he will get in touch and we will do an excisional arthroplasty.

He is off work. He is getting his shoes the first week or two of March. He should come back to see me around the 3rd week of March.

7. The prescribed boots were not provided to the worker until March 1993. After seeing Dr. Barrington and obtaining the prescription for special boots described above, the worker states and the Panel accepts that the company nurse told him to attend the employer's regular workboot supplier, not to have the prescription boots ordered but to see if they could provide him with an adapted boot. The worker complied with this request. He obtained boots from the employer's boot supplier which were adapted, but were not the orthopaedic footwear prescribed for him by Drs. Lowe and Barrington. He paid for these boots himself and was later reimbursed by the employer's insurance plan. The employer described these in a letter dated January 30, 1995 as:

regular boots with some adjustments made because he was unable to wear the regular footwear.

The adjustments included building the toe box on the outside and shaving the heel to elevate the toe. Mr. Wilson understood these to be an interim measure until the custom-made boots could be arranged.

8. The worker returned to work on March 16, 1992 wearing the adapted, non-prescribed boots from the employer's regular boot supplier. The adapted non-prescription shoes wore out in July, 1992 and the worker laid off on July 17, 1992. He had not yet received the prescribed boots. It was also discovered at about this time that the adapted shoes did not meet the requirement of the employer for steel shanks. The supplier was unable to provide a similar shoe with steel shanks, nor could it repair the worn out ones.
9. The worker returned to Dr. Lantos, the employer's physician, on August 11, 1992. At that time, Dr. Lantos completed a Report of Reopened Claim to the Board, stating that the worker was being treated with medication for psoriasis and prescribed customized foot wear. Dr. Lantos stated further that the worker was able to work at all times provided he had customized boots to wear and that this was a permanent restriction.
10. At this time, the worker had still not received the prescribed boots. The worker testified that on the employer's nurse's advice, he obtained a pair of non-prescription loafers from the company's regular boot supplier and returned to work on August 13, 1992. He worked until October 2, 1992. He was in increasing foot pain as a result of the wearing of the loafers to do his regular work as a garbage labourer. He laid off again from October 2, 1992, until he received the prescribed boots in February 1993, at which time he returned to work.
11. Dr. Lowe reported on December 8, 1992 that the worker had an underlying problem and was supposed to be supplied with proper footwear but that this had never occurred, leading to repeated ulcerations.
12. The worker received the prescribed boots on February 8, 1993, at which time he returned to work. The worker testified that he has not had problems with his feet relating to work since then. He pays for repairs for the resoling of the boots every 3 to 4 months. The boots are replaced under the employer's insurance plan once per year.

(ii) Submissions of the representatives

- [10] The worker's representative submitted that the worker's underlying problems did not interfere with his ability to work. The clawed toes which resulted from the psoriatic arthritis attack in

1980 have not caused pain. His infected blisters were caused by the rubbing of the safety boots, which he was required to wear. The prescribed treatment for the infected blisters was orthopaedic boots. Since receiving the boots, he has returned to work without problems. From December 1991 to February 1993, the worker did everything he could to return to work. He accepted boots he knew weren't proper, he made his own arrangements to get the boots and he paid for them out of pocket. His ongoing problems due to the accident were a compressed and raised toe. His actions show his high motivation to return to work. The medical evidence is consistent with respect to the cause of the problems between 1991 and 1993, and the need for customized boots.

- [11] The employer's representative submitted that the medical evidence showed that the worker's ulcer healed by February 12, 1992. There was no evidence of a further injury to the feet. There was no basis under the Act to request payment for customized footwear for life. The worker required special boots for his non-compensable condition. This was an employment issue, not a compensation issue. Ms. Morgante referred to the Board policy on non-work-related conditions. Benefits are payable for disability as a result of a work-related injury. There was no evidence of a further work-related injury. The foot deformities predated the injury. The October 1991 prescription for special boots pre-dated the injury. Therefore the need for special footwear was due to a non-work-related condition. The worker sought no medical attention from March to July 1992. In July 1992 Dr. Lantos referred him for special boots due to the underlying condition, not the work-related injury. There was a lack of medical continuity, other than the continuing need for special boots due to non-compensable problems. The worker had foot problems in September 1992 but delayed seeing a doctor until December 1992. This delay alone was sufficient to deny benefits. The April 1997 assessment at the Orthopaedic and Arthritic Hospital supports ongoing problems due to the pre-existing condition. There is no mention of any ongoing effects of the December 1991 skin ulceration.

(iii) Law and Policy

- [12] Since the worker was injured in 1990, the *Workers' Compensation Act*, R.S.O. 1990 (the WCA) applies to this appeal. Since the hearing of this appeal occurred in 1998, certain provisions of the *Workplace Safety and Insurance Act* (WSIA) also apply. In particular, the WSIA provides for the continued application of the WCA to pre-1998 injuries. As well, the WSIA provides that the Tribunal must apply Board policy in determining this appeal. In accordance with this provision, the Board has provided a package of policies (Exhibit #2).
- [13] "Infected blisters" are listed as an occupational disease in Schedule 3 of the WCA. The relevant part of Schedule 3 appears as follows:

COLUMN 1	COLUMN 2
Description of Disease	Process
...	...
Infected blisters	Any process involving continuous friction

[14] Section 134 of the WCA Act provides:

134(1) Where a worker suffers from an occupational disease and is thereby impaired or his or her death is caused by an occupational disease and the disease is due to the nature of any employment in which the worker was engaged, whether under one or more employments, the worker is or his or her dependants are entitled to compensation as if the disease was a personal injury by accident and the impairment was the happening of the accident, subject to the modifications hereinafter mentioned or contained in the regulations, unless at the time of entering into the employment the worker has wilfully and falsely represented in writing as not having previously suffered from the disease.

...

(9) If the worker at or before the date of the disablement was employed in any process mentioned in the second column of Schedule 3 and the disease contracted is the disease in the first column of the Schedule set out opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved.

[15] “Occupational disease” is a defined term in the Act. Section 1(1) provides:

1(1) "occupational disease" includes,

- (a) a disease resulting from exposure to a substance relating to a particular process, a trade or occupation in an industry,
- (b) a disease peculiar to or characteristic of a particular industrial process, trade or occupation,
- (c) a medical condition that in the opinion of the Board requires a worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an occupational disease, or
- (d) any of the diseases mentioned in Schedule 3 or 4.

[16] Section 4(1) of the WCA provides:

4(1) Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the worker and the worker's dependants are entitled to benefits in the manner and to the extent provided under this Act.

“Accident” is also a defined term under the Act. Section 1(1) provides:

“accident” includes,

...

“disablement arising out of and in the course of employment”.

[17] The Panel concludes that the worker’s injury, an ulceration of the fourth toe caused by friction with his workboot, was originally compensated by the Board either as a “disablement” or as an “occupational disease” under the Act. In either case, the worker is entitled under the Act to compensation for disability resulting from that injury. Section 37 of the WCA provides that where injury to a worker results in total or partial temporary disability, the worker is entitled to compensation under the Act.

[18] “Disability” is defined in the WCA section 1(1) as follows:

“disability”, in relation to an injured worker, means the loss of earning capacity of the worker that results from an injury;

[19] Tribunal decisions have adopted the test of “significant contribution” with respect to the requirement that the disability “results from” an injury. In this respect, the WCA takes the worker as it finds him. The fact that the worker had a pre-existing condition does not disentitle him from receiving benefits under the Act, provided that the injury continued to be a significant contributor to the disability.

[20] Board *Operational Policy* Document No. 08-01-5 provides the following with respect to a temporary disability with a pre-existing condition:

A claim for an occupational injury involving a pre-accident disability is allowed for the acute episode only and entitlement to payment of compensation ceases when the worker’s condition has returned to the pre-accident state. In a claim where there is a pre-existing condition but the worker is symptom-free at the time of the work-related accident there is no limitation of benefits throughout the period of temporary disability.

[21] Board *Operational Policy* Document No. 02-01-08 defines “temporary total disability” as

...the complete inability to earn full pre-accident wages for a limited period of time as a result of the physical and psychological effects of the injury and the necessity for medical treatment. A worker who is unemployable as a result of a combination of a work-related injury and a number of personal and vocational (non-injury-related) factors is not considered totally disabled.

[22] The same policy defines “temporary partial disability” as

...a reduction in the ability to earn full pre-accident wages for a limited period of time as a result of the labour market’s inability to accommodate the worker with the remaining physical effects of the injury. This includes workers who are partially disabled but unemployable without medical and vocational rehabilitation services and those who are not in need of rehabilitation services to return to work.

[23] Board *Operational Policy* Document No. 03-03-13 provides for compensation for infected blisters as follows:

When the worker *must* wear specific footwear, (e.g. safety boots), as a condition of employment, or when it is appropriate and reasonable for the worker to do so given the nature of employment, and the footwear causes injury to the worker’s feet, including infected blisters, such an injury constitutes a work-related personal injury.

...

Situations which do not meet these guidelines will be individually judged having regard for the real merits and justice of the case.

[24] Document No. 03-03-13 refers to section 3 (the predecessor of s. 4) and Schedule 3 of the Act.

[25] The Board policy with respect to non-work-related conditions (05-04-06) is also relevant. It provides in part:

If any non-work-related condition ...is preventing a worker from undergoing treatment for the work-related disability, compensation benefits may be reduced or suspended until the worker is available for treatment of the work-related disability.

(iv) Findings and Conclusions

- [26] The Panel has carefully considered the evidence, the law and policy described above , and the submissions of the representatives. We find based upon all of the evidence, including the testimony of the worker and the reports of Drs. Lowe, Barrington and Lantos, that the specially prescribed workboots were required in order to prevent an aggravation or a recurrence of the ulceration of the worker's toe. Thus, there is in our view a direct, causal link between the work injury (the infected blisters) and the need for the boots. The boots were the treatment for the blisters.
- [27] No doubt, the underlying condition played a part in the etiology of the ulceration, in the sense that it was the structure of the worker's foot, coming into contact with the workboot , that resulted in the ulceration. However, as stated above, the Act takes the worker as he is at the time of the injury. The workboots played a significant role in the development of the ulceration. The treatment for the ulceration included special orthopaedic boots. The prescription for orthopaedic boots was necessary as a result of the injury. The failure for whatever reason to provide the boots in a timely fashion resulted in the worker's inability to work during the periods in question. The inability of the worker to work while awaiting the prescribed boots was a direct effect of the injury. The worker is therefore entitled to temporary total benefits for his complete inability to work during the periods in question.
- [28] With respect to the worker's request in his appeal form, that the cost of his special boots be paid for life, the Panel notes that the Board has not determined the worker's entitlement for health care benefits as a result of the injury. The Panel finds in this decision that the prescription for orthotic boots was necessary as a result of the injury. The worker may wish to raise this issue with the Board, in light of this decision.
- [29] We cannot agree with Ms. Morgante's argument that this is an employment matter and not a worker's compensation matter. This appeal concerns the worker's entitlement to benefits as a result of a workplace injury. The Tribunal's exclusive jurisdiction over this appeal is clear under section 123(1)(a) of the Workplace Safety and Insurance Act (WSIA) which provides:
123. (1) The Appeals Tribunal has exclusive jurisdiction to hear and decide,
- (a) all appeals from final decisions of the Board with respect to entitlement to health care, return to work, labour market re-entry and entitlement to other benefits under the insurance plan; . . .
- [30] Section 123 applies with necessary modifications to pre-1997 appeals whose hearings commenced after January 1,1998. In addition, section 124 of the WSIA requires the Tribunal to decide this appeal on its merits and justice.

THE DECISION

- [31] The appeal is allowed. The worker is entitled to temporary total disability benefits for the periods of time in 1992 and 1993 when he laid off work while awaiting specially prescribed work boots.

DATED: October 16, 1998

SIGNED: L. Gehrke, G. Nipshagen, D. Felice