



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 2296/16

**BEFORE:** E. Kosmidis: Vice-Chair

**HEARING:** September 6, 2016 at Toronto  
Written

**DATE OF DECISION:** September 22, 2016

**NEUTRAL CITATION:** 2016 ONWSIAT 2557

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

**APPEARANCES:**

**For the worker:** Not participating

**For the employer:** M. Pannunzio, Paralegal

**Interpreter:** N/A

## REASONS

### (i) Introduction

[1] The employer appeals a decision of the ARO, which concluded that the employer was not entitled to Second Injury and Enhancement Fund (SIEF) cost relief.

[2] The ARO rendered a decision based upon the written record without an oral hearing.

[3] The Tribunal has determined that this appeal is suitable to proceed by way of written submissions. The employer provided written submissions dated March 24, 2016.

[4] The worker is not participating in this appeal.

### (ii) Issue

[5] The sole issue in this appeal is whether the employer is entitled to SIEF relief with respect to the costs of this worker's claim.

[6] The employer is seeking 100% cost relief.

### (iii) Background

[7] The worker was employed as a driver for a waste management company. He was hired on June 3, 2006.

[8] The worker was injured on April 13, 2015 while driving a truck in the course of his employment. He was taken by ambulance to a hospital where he was diagnosed with an L1 fracture and other injuries

[9] According to the Form 7, the employer has indicated that the worker lost consciousness while driving. The Form 7 states that the worker lost control of the truck striking multiple posts, an SUV and several trees.

[10] Details of the accident are also contained in the Trauma Services Assessment Report. The report states that the truck veered into a ditch and that the worker could not remember the details of the accident or the cause of the accident.

[11] The worker's wife advised the Board that her husband did not remember the events leading up to the accident but that he believed that he may have lost consciousness prior to losing control of his vehicle. She also confirmed that that worker had no history of fainting, or losing consciousness and did not suffer from any pre-existing underlying conditions.

[12] While in the hospital, the worker was investigated for epilepsy with negative results. However, the worker was diagnosed with severe obstructive sleep apnea (OSA). The diagnostic report dated April 22, 2015 noted that the worker suffered from severe insomnia and sleep apnea.

[13] In a letter dated April 23, 2015, the employer requested 100% cost relief relating to the costs of this claim.

[14] In a decision dated May 13, 2015, the case manager denied the employer's request concluding that there was no evidence to support that the worker had lost consciousness due to a non-work related condition which caused the accident.

[15] The employer appealed this decision. In a decision dated September 25, 2015, the ARO concluded that there was no evidence of a pre-existing condition which caused or contributed to the accident.

[16] The employer now appeals this decision.

#### (iv) Law and policy

[17] Since the worker was injured in 2015, 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.

[18] 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.

[19] 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*.

[20] Pursuant to section 126 of the WSIA, the Board provided the policies applicable to this appeal. I have considered these policies as necessary in deciding the issues in this appeal, including *Operational Policy Manual* (OPM) Document No. 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.

(...)

**100% Relief**

Full relief of a claim's cost (compensation, health care, permanent impairment) is charged to the SIEF when

- a prior non-work-related condition is the cause of the accident, e.g., epilepsy
- the wearing of an artificial appliance, either work or non-work-related, is the cause of the accident
- a worker has been placed in industry, or is participating in a WCB sponsored Vocational Rehabilitation (VR) program, and suffers
  - an extension of the original disability through minor accident
  - an accident during an on-the-job training program
  - an accident in a trade school or other type of formal training facility

**NOTE**

"Other type of formal training facility" may also include a Schedule II training facility.

- a worker is participating in a training and/or assessment program approved by the WCB and the work-related disability is the sole cause of an accident to another employee of the training and/or assessing employer
- a worker sustains injuries while on a work station training program.

**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.

#### **(v) Analysis**

[21] As indicated above, the policy provides that an employer may be entitled to 100% SIEF relief when it is established that a prior non-work related condition is the cause of the accident e.g. epilepsy.

[22] The employer’s appeal is granted for the reasons set out below.

[23] The Tribunal’s Medical Liaison Office supplied articles relating to OSA at it may be of assistance to the parties and adjudicators. A Vice-Chair is not bound by any information or opinion expressed in a discussion paper, but may consider and rely on the general medical information provided by the paper. Every Tribunal decision must be based upon the facts of the particular appeal. It is always open to the parties to rely upon these articles, or to distinguish or challenge it with other evidence.

[24] In the Paper entitled “Overview of obstructive sleep apnea in adults” by Dr. Kingman Strohl, it is noted that OSA is a common chronic disorder with clinical manifestations such as snoring and daytime sleepiness. Dr. Strohl states:

OSA is associated with excessive daytime sleepiness, inattention, and fatigue which may impair daily function, induce or exacerbate cognitive deficits, and increase the likelihood of errors and accidents. Motor vehicle crashes are two to three times more common among patients with OSA than without; this represents an impact on morbidity and mortality that is similar to the cardiovascular sequelae of OSA. Importantly all patients should be warned about an increased risk in motor vehicle crashes associated with untreated OSA and the potential consequences of driving or operating other dangerous equipment while sleepy.

[25] *Decision No. 526/08* considered the question of what is meant in the policy by “the cause of the accident”:

The reference to the “cause” in this provision of the policy also cannot mean only that the pre-existing condition is one of several causes in the chain of causation. The question of SIEF arises only when there is more than one cause of an injury. It arises when there is a work-related cause, with the result that the injury is compensable, but there also is a non-work related cause. In SIEF cases, a pre-existing condition is also a causative factor because it has enhanced or prolonged the extent of the injury. Therefore if the word “cause” were interpreted to mean that the pre-existing condition need only be one of several causative factors, the provision would apply in every case.

Because the word “cause” cannot be interpreted to mean the sole cause, or “a” cause of the injury, I have considered what the word does mean. I understand it to be a reference to the precipitating or triggering cause of the injury. I consider it intended to distinguish

between two types of cases. In the first type of case, the workplace incident is the precipitating cause of the accident. For instance, a worker may slip and fall on a wet floor. However, underlying degenerative disc disease may affect the severity of the injury. In that case, the employer is not entitled to 100% cost relief. It is entitled to SIEF relief based on the Board's rating schedule for the importance of each of these factors. The underlying condition was not the causal factor that triggered the injuring process.

In the second type of case, it is the pre-existing condition that precipitates or triggers the injury. The Board gives the example of epilepsy. A worker may suffer an injury at work because he has an epileptic seizure that causes him to fall. The injury from the fall may be compensable because workplace factors also contributed. For instance, it is possible that the worker fell off a ladder on which he was working, and suffered more severe injuries than might otherwise have been the case. This is the type of case in which I understand that 100% SIEF applies.

[26] The employer bears the evidentiary burden of establishing its case on a balance of probabilities. After considering all of the information before me, I find, on a balance of probabilities, that the employer ought to be granted 100% SIEF relief from the costs of this worker's claim. I find that the evidence establishes, on a balance of probabilities, that it was the non-compensable sleep apnea which led to the accident on April 13, 2015.

[27] In coming to this conclusion I note that the worker had been employed as a driver with the accident employer for almost nine years and that there were no concerns about the worker's driving record. There is no evidence before me that the worker had any previous motor vehicle accidents while driving for the accident employer.

[28] According to the worker's spouse and the information in the hospital records, the worker could not remember the circumstances surrounding the accident. The worker stated that he believed that he lost consciousness prior to losing control of his vehicle.

[29] As the cause of the accident was unknown, hospital medical staff undertook a series of investigations in order to try and determine whether the worker suffered from any medical condition that would have caused the worker to lose consciousness.

[30] The worker underwent a sleep study. This study determined that the worker suffered from severe OSA. The hospital Discharge Summary states:

At discharge from hospital, the most likely diagnosis for his black out prior to the MVC was falling asleep secondary to untreated OSA.

[31] I accept this conclusion. I find that the worker lost consciousness as a result of his previously undiagnosed OSA and that this pre-existing non compensable condition caused the motor vehicle accident which resulted in his injuries. I find that this prior non-work related condition is the "cause" of the accident and that the employer is therefore entitled to 100% cost relief.

[32] The employer's appeal is allowed.

**DISPOSITION**

[33]           The appeal is allowed.

[34]           The employer is entitled to 100% SIEF relief.

DATED: September 22, 2016

SIGNED: E. Kosmidis