WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 974/07

BEFORE:	B.L. Cook : Vice-Chair E. Tracey : Member Representative of Employers D. Gillies : Member Representative of Workers
HEARING:	April 26, 2007 at Toronto Oral Post-hearing activity completed on December 18, 2007
DATE OF DECISION:	February 29, 2008
NEUTRAL CITATION:	2008 ONWSIAT 625
DECISION UNDER APPEAL:	Appeals Resolution Officer P. Prummel, November 17, 2003

APPEARANCES:

For the worker:	Angelo Consiglio, Consultant
For the employer:	Not Participating
Interpreter:	Rodna Osmakovski, Macedonian

REASONS

(i) Introduction

[1] The worker was employed at a facility that manufactured car batteries. In approximately April 2000, the employer started to use recycled water instead of fresh water to clean the batteries. The worker developed some health problems. He went on to develop psychological symptoms which he related to the exposure to the recycled water.

[2] The Board concluded that the worker's ongoing problems were not work-related. The worker appealed to the Tribunal, seeking entitlement to benefits for psychological impairment and entitlement to loss of earnings (LOE) benefits subsequent to April 28, 2000.

[3] The worker's appeal was heard by the Panel on April 26, 2007. After hearing the worker's evidence, the Panel determined that we required further medical evidence. We asked the Medical Liaison Office of the Tribunal Counsel Office to make arrangements for a medical assessor to review the case materials and to answer questions posed by the Panel.

[4] We prepared a post-hearing memorandum, dated April 27, 2007 that set out the background facts to the case and the questions for the assessor. The memorandum forms the basis for this decision.

[5] Dr. A. Margulies was selected as the appropriate assessor. Dr. Margulies is a psychiatrist and an Adjunct Assistant Professor, Department of Psychiatry, University of Toronto. He felt that he could answer the Panel's questions without directly assessing the worker. He noted that in any event it appeared that the worker was too ill to provide any meaningful information.

[6] Dr. Margulies prepared a report, dated October 11, 2007. The report was forwarded to Mr. Consiglio and he was invited to make final written submissions. In a letter dated December 11, 2007, Mr. Consiglio advised that he had no further submissions.

(ii) Background

[7] At the time of the hearing, the worker was 67 years of age. He was born in Macedonia and immigrated to Australia at age 25 where he worked in a factory. He later moved to the United States for a few years where he again worked in a factory. In 1973, he moved to Canada, and started work with the accident employer shortly thereafter.

[8] The employer operated a factory that manufactured car batteries. The worker was employed there for 27 years. He was responsible for the process that charged the batteries. During the charging process, the batteries get hot and they were sprayed with water to cool them.

[9] In April 2000, the employer decided to recycle the water instead of using fresh city water.

[10] Unfortunately there is some confusion as to when this happened and for how long. It appears that the recycled water was used for the first time on April 17, 2000, which was a Monday. The employer indicated to the Board that it used the recycled water for only four days and that it then went back to using fresh water because of complaints from the workers. However, the worker testified that the recycled water was used for ten days. He noted that the

plant was closed for the Easter weekend, which was from Friday April 21 to Monday April 24. The worker testified that he worked from Friday to Monday of the Easter weekend. He was the only worker in the plant over the weekend and the Plant Manager and other senior personnel were in the US over the weekend and could not be reached. It could be, therefore, that the recycled water was used over the Easter weekend in addition to the four days before that weekend. We note that the Board never clarified the dates of the exposure with the employer. Nor did it do much investigation to determine what exactly the worker may have been exposed to.

[11] The employer contracted a private consulting firm who did some investigations in July 2000. The employer also provided a number of MSDS sheets. It does not seem that the full results of the investigations were provided. The consultants seem to have concluded that exposure to the recycled water would result in exposure to a number of chemicals that could cause "mild to severe irritation effects". These included "Caustic Soda, Lead-Acid Battery, Battery Acid, Sulfuric Acid and GP 100 Lubrication oil." It was noted that these chemicals would interact, leading to further irritants. Sodium sulfate was noted in particular. The degree of irritation would presumably depend on the concentrations of the chemicals in the water. The consultants appear to have assumed that workers who had such exposures would wear appropriate personal protective equipment which was not apparently provided in this case.

[12] The worker testified that he noticed problems immediately after being exposed to the recycled water. He experienced burning in his eyes and nose. After a day or two, his tongue was coated in white and began to crack. He complained about the fumes and was given a paper mask. This was not effectual and he was given a "rubber mask" but it also did not help.

[13] The employer advised the Board that other workers were also affected, but not to the degree that the worker was. It seems that the workers eventually refused to work. The workplace was unionized and it appears that the health and safety committee became involved. The employer then advised that it would stop using the recycled water. Again, it is not clear from the record when this was. However, the worker testified that even after the employer advised the workers that it was not using the recycled water anymore, he felt that there was still something in the water. He recalled that there was some change as he noticed that the batteries were no longer turning white as they had done at first. However, they were turning green. Normally, the batteries were black.

[14] The worker stopped work on April 27. On April 28, he went to a hospital Emergency Room with complaints of chest pain and dizziness. His family doctor referred him to the Occupational Health Services Program at St. Michael's Hospital, where he was assessed by a resident under the supervision of Dr. Michael Wills. On May 4, 2000, they reported that it appeared likely that the worker had been exposed to "acid mist" and recommended that he remain off work until the cause of the exposure had been corrected.

[15] The worker was referred to a cardiologist for investigation. That doctor's records are not available but it appears that there was no cardiac abnormality.

[16] The worker was re-assessed by Dr. Wills on June 15, 2000. He was complaining of dizziness, malaise, fatigue, and chest pain. Dr. Wills indicated that he did not think that the

worker's complaints were entirely work related, although he thought that the worker had likely experienced some mucous membrane respiratory tract irritation.

[17] The worker was seen by Dr. C.H. Rodriguez, a respirologist, in July 2000, but the results were not conclusive due to "very poor patient effort."

[18] At the time of the work-related accident in May 2000, the worker's family doctor was Dr. C. Baciowski. He had become the worker's family doctor shortly before the accident, after Dr. Markov, his previous doctor, retired. By June 2000, he had changed to Dr. Vasia Stefou, because he could communicate better with him. Dr. Stefou continues to be his family doctor. It appears that the records of Dr. Markov are not available.

[19] By August 2000, Dr. Stefou reported that the worker was suffering from "post-traumatic depression".

[20] On September 18, 2000, the worker was seen by Dr. Otto Veidlinger, a neurologist. He noted that the worker reported that he had fallen on several occasions due to dizziness and that he had suffered soft tissue injuries, particularly to his back. It is not clear whether the worker received medical treatment for these injuries. The record does include clinical notes from Dr. Stefou but they are not decipherable.

[21] The worker was seen by Dr. Morris Charendoff, an orthopaedic surgeon, who reported that the worker had suffered multiple soft tissue injuries.

[22] On October 19, 2000, the worker was seen for the first time by Dr. S.S.A. Waldenberg, a psychiatrist. Dr. Waldenberg reported that the Axis I diagnosis was major depression, and possible somatoform disorder. The Axis III diagnosis was "possible toxic reaction to chemicals." He indicated that the worker complained of hearing voices and that he appeared to have "some cognitive difficulties."

[23] Dr. Waldenberg continued to treat the worker on a regular basis after this initial assessment. There are numerous reports from him which indicate that the worker continued to suffer from symptoms related to depression, and pain in various areas.

[24] On June 13, 2001, the worker was assessed by Dr. Richard Finkel, a psychiatrist, at the request of the employer's insurer. Dr. Finkel indicated that the worker was "totally disabled as a result of his Somatoform Disorder, and to a secondary extent, as a result of his symptoms of Major Depression." He added:

> His Axis III diagnoses include hypertension as well as soft tissue injuries to his back and whatever residual reaction may persist as a result of the claimant's exposure to toxins.

[25] The employer's insurer granted the worker disability benefits. He also received a disability pension from the Canada Pension Plan and small disability pensions from Australia and the United States. Since turning 65, he receives his CPP pension and a pension from the employer.

[26] The worker testified that he had never experienced any psychological symptoms such as depression before the accident. He stated that he had not suffered from any significant illnesses in his life. He has had high blood pressure for several years, which is treated with medication. He does not have any other health problems. The worker has suffered a few minor work-related injuries over the years, but these do not appear to have been eventful and did not result in any lasting impairment. He testified that he used to have lots of energy and was very sociable. Now he has few friends, although he still attends Church.

[27] The worker's wife has not been well for several years. She testified that she suffers from fibromyalgia. This condition was established several years before the worker's accident. Before his accident, the worker had to take care of his wife. Now, she has to care for him, which is very difficult for both of them. They have children and grandchildren who visit and help out. However, the worker indicated that he is not really very sociable and finds it difficult to interact even with his children and grandchildren.

(iii) The Panel's request for further evidence

[28] In our post-hearing memo of April 27, 2007, the Panel set out the following findings and our request for further medical information:

> The issue in this appeal is whether the worker's ongoing disability is related to his exposure at work in April 2000.
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> It would, of course, be very helpful to have more evidence about the worker's pre-exposure personality and characteristics. During the hearing, the Panel explored various options to see if such information could be readily obtained, but we were unable to identify anything. Based on the evidence from the worker and his wife, there is no evidence of any pre-existing psychological condition.
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> While the course and extent of the worker's disability has been well documented in the reports from Dr. Waldenberg, he has not discussed causation in his reports. The worker advised that he has stopped seeing Dr. Waldenberg because the doctor felt that the worker's family doctor could prescribe the required medications.
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> There is some reference to cognitive problems in Dr. Waldenberg's first assessment, but this does not seem to feature in the later reports. The worker testified that he does have problems with concentration and no longer does things like banking, but it was not clear if this was due to a cognitive impairment or to the depression.
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> There is also some reference to potentially psychotic symptoms, such as hearing voices. The worker testified that this is still a problem, but it does not seem to be a major issue. He denied any visual hallucination.
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> Dizziness has been a persistent problem and has apparently contributed to several falls, some of which have resulted in physical injuries, contributing to a chronic pain problem.
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> Dr. C. Smith, the Board's Occupational Medicine Consultant felt that the worker had suffered exposure to chemical irritants and that this exposure could have caused some temporary respiratory irritation. She felt that all the other symptoms were not compensable.
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> We would like the Tribunal to appoint an appropriate medical assessor, who should be asked to review this memo and the case materials and to interview the worker. The Panel considered that it might also be helpful for the assessor to speak to Dr. Waldenberg, since he had a long association with the worker and likely formed impressions about the worker and the nature and cause of his difficulties which are not presented in his reports.

> The worker indicated that he would have no problem providing consent for this to happen.
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> We would like the assessor to address the following questions:
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> 1. What is the diagnosis in this case?
> 2. Is there evidence of any significant neurological impairment or is any such impairment overwhelmed by the psychological symptoms?
> 3. What factors appear to have contributed to the worker's impairment?
> 4. Is there medical support for the theory that the worker developed a psychological impairment following his work-related exposure to chemicals in the same way that a worker may develop a psychological impairment following a physical injury?
> 5. Is there any other information that may be helpful to the Panel in this case?

(iii) The opinion of Dr. Margulies

[29] In his report of October 11, 2007, Dr. Margulies reviewed the history of this case. In our view, his review of the history is accurate and accords with the history set out in our post-hearing memo. We are therefore satisfied that Dr. Margulies had an accurate understanding of the history and the facts of the case.

[30] Dr. Margulies indicated that it is clear that the worker has been suffering from a major depression. This condition has not improved after extensive anti-depressant medication. He points out that Dr. Waldenberg, the worker's treating psychiatrist, noted that the worker felt that his problems could be due to the chemical exposure at work, but that Dr. Waldenberg did not endorse that view or offer any opinion on the causation of the worker's condition.

[31] Dr. Margulies comments that the causes of a major depressive episode can be difficult to determine, although genetic and biochemical changes are often relevant. He makes the point that the fact that a condition arises after an event (for example, a workplace exposure) does not mean that it arose because of that event:

> It is by no means uncommon that an individual experiencing a depressive illness may retroactively misinterpret events and attribute etiological significance to them and while the individual may firmly believe such a relationship [exists], the reality is often otherwise.

[32] Dr. Margulies notes that the worker developed significant psychological symptoms very soon after the workplace exposure. He notes that it is possible that the significant symptoms developed as a result of the exposure. However, he feels that it is more likely that the worker's severe reaction was "reflective of an already developing depressive illness." He notes that within six months, the worker's symptoms were severe, with psychotic features.

[33] Dr. Margulies considered the possibility that the chemical exposure triggered the worker's mood disorder on a direct physiological basis. However, he notes that this possibility seems to have been rejected by Dr. Wills, who is a specialist in occupational medicine. He adds that "there is nothing in the psychiatric literature which implicates any direct physiological effect of the kind of irritating chemicals to which [the worker] had been exposed with the development of a specific mood disorder."

[34] Dr. Margulies summarized his opinion in the following terms:

> The most likely explanation is that [the worker] was exposed to certain irritating chemicals and, quite independently and coincidentally, was already developing and quickly went on to develop a major depressive episode. The incidence of depression increases with age when it is higher in men than in women and the sheer severity of this depressive illness is more suggestive of a spontaneously occurring one.

[35] In answering the Panel's questions, Dr. Margulies advised that the diagnosis is major depressive episode, severe, chronic. He indicated that this condition is likely the predominant cause of the worker's ongoing complaints of generalized pain and also the cause of the cognitive problems that the worker exhibits. In regard to the Panel's question about the factors that may have contributed to the worker's impairment, Dr. Margulies stated:

> The depressive illness which has now become chronic and which [the worker] has experienced for the past some seven years more likely than not spontaneously developed as is by no means uncommon. But for the industrial accident in which he was involved, he would have developed the same depressive illness although symptoms of it, in terms of sites of somatic complaints, may have differed. From a qualitative perspective, however, the depressive illness would be little different.

[36] The Panel had asked the question:

> Is there medical support for the theory that the worker developed a psychological impairment following his work-related exposure to chemicals in the same way that a worker may develop a psychological impairment following a physical injury?

[37] Dr. Margulies responded as follows:

> Theoretically speaking, a psychological impairment could conceivably be related to work-related exposure to chemicals in one of two ways: (a) a direct effect of the chemicals themselves; (b) the individual's emotional or psychological reaction to the meaning of the exposure. In terms of [the worker], there is no compelling evidence of either scenario.

(iv) Conclusions

[38] As we have noted, the Panel is satisfied that Dr. Margulies had an accurate understanding of the history of this case, based on the evidence that is available. He has answered the Panel's questions in a thoughtful and detailed manner. His opinion is that the worker was developing a depressive illness at around the time of the chemical exposure at work. The exposure resulted in some physical changes that were of short duration. The severe psychological symptoms that the worker subsequently developed were not caused by the exposure, but rather were the manifestation of the depressive illness which Dr. Margulies concludes would most probably have developed in any event. In his view, while the exact symptoms that the worker exhibited might have been somewhat different had it not been for the work-related exposure, the worker would likely have been as disabled by the features of the depressive illness.

[39] The Panel accepts the opinion of Dr. Margulies. We conclude that the worker's psychological disability is not work-related and the worker is not entitled to additional benefits for this disability.

[40] It is clear that the ongoing loss of earnings that the worker experienced after April 28, 2000 was due to the significant psychological disability that has been ongoing ever since. The worker's loss of earnings is therefore not due to the work-related accident and the worker is not entitled to additional LOE benefits.

DISPOSITION

[41] The appeal is denied.

DATED: February 29, 2008

SIGNED: B.L. Cook, E. Tracey, D. Gillies