WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2018/03

This appeal was heard in Toronto on October 24, 2003 and October 15, 2004 by a Tribunal Panel consisting of:

S. Martel : Vice-Chair,

B. Wheeler : Member representative of employers, J.A. Crocker : Member representative of workers.

THE APPEAL PROCEEDINGS

[2] The worker appeals the decision of the Appeals Resolution Officer dated July 24, 2001, which denied the worker entitlement for a psychiatric disorder arising from his isocyanate sensitivity.

[3] Mr. Fink, a lawyer, represented the worker. The employer where the worker worked when first sensitised to isocyanates is no longer in business.

The hearing in this appeal was begun on October 24, 2003, following which the Panel released an interim decision, *Decision No. 2018/03I*. In that decision, we set out some of the evidence, submissions and findings. We also requested an additional medical opinion. The additional medical opinion was obtained and the hearing reconvened on October 15, 2004 for final submissions.

THE RECORD

In addition to the exhibits listed in *Decision No. 2018/03I*, we considered the following additional documents entered as exhibits:

Exhibit #10: Post-Hearing Addendum No. 1, dated March 8, 2004,

Exhibit #11: Post-Hearing Addendum No. 2, dated May 31, 2004,

Exhibit #12: Post-Hearing Addendum No. 3, dated September 24, 2004, and

Exhibit #13: A Record of Employment, dated January 7, 1997.

[6] At the October 24, 2003 hearing, the worker's spouse testified with the assistance of an English/Italian interpreter. Two co-workers testified. The worker was called as a witness but was unable to provide any testimony. At the October 15, 2004 hearing, Mr. Fink made additional oral submissions.

THE ISSUE

[7] The worker seeks entitlement for a psychiatric disorder as a result of his isocyanate sensitivity.

THE REASONS

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(i) Background

The worker was born in 1945. He worked as a spray painter in the auto body trade. Around February 1989, he became sensitised to isocyanates and the Board accepted entitlement for his sensitivity. The worker changed jobs to become a prep man with the accident employer. He had no further respiratory symptoms while working as a prep man. The Board eventually awarded the worker a 5% permanent disability for his isocyanate sensitivity.

The worker continued working as a prep man with the accident employer until the employer went bankrupt in 1992. A few months later, the worker found another job as a prep man with a different employer. In September 1996, he again found employment with another employer as a prep man. In December 1996, the worker experienced breathing problems that he related to his isocyanate sensitivity. His employer provided temporary modified work but eventually terminated the worker on January 6, 1997 because the employer was unable to permanently accommodate the worker. The Board allowed entitlement for health care benefits as a result of the aggravation of the isocyanate sensitivity.

After being terminated on January 6, 1997, the worker received employment insurance benefits. He did not look for other employment until June 1997 after a conversation with the Board Claims Adjudicator. The Board provided vocational rehabilitation assistance and paid the worker a supplement from June 27, 1997 until November 17, 1997. By November 1997, the worker's vocational rehabilitation caseworker concluded that the worker would not likely regain his pre-injury earning capacity and recommended a 147(4) supplement, which was granted. In the fall of 1997, the worker also began to develop severe psychiatric difficulties. He then sought entitlement for his psychiatric difficulties as a result of his isocyanate sensitivity.

The Appeals Resolution Officer ultimately held that the worker's severe psychological distress was out of proportion and inconsistent with the circumstances and relatively minor effects of the worker's isocyanate sensitivity.

(ii) **Decision No. 2018/03I**

In *Decision No. 2018/03I*, we outlined the testimony and submissions heard at the October 24, 2003 in addition to referring to some of the documentary evidence relating to this appeal. We made some findings and requested a medical assessor opinion. We requested that the Tribunal's Medical Liaison Office refer this file to a psychiatric assessor. The Panel was interested in obtaining additional information relating to the worker's psychiatric diagnosis and the clinical course that has characterized his psychiatric condition. We also invited the assessor to comment on any relationship between the worker's psychiatric disorder and his isocyanate sensitivity, his work layoffs and any other possible pre-disposing and underlying factors.

(iii) Medical assessor opinion

At the Tribunal's request, Dr. A. I. Margulies, a psychiatrist, provided a report on February 26, 2004 in response to our questions. Dr. Margulies prepared his report based on the documentary evidence and the information and findings contained in *Decision No. 2018/031*. Dr. Margulies' opinion is as follows:

On the basis of a review of the provided documentation, the likely diagnostic impression is that [the worker] is and has, for a number of years, been experiencing a major depressive disorder of moderately severe proportions. Symptoms thereof have included a generally depressed mood, crying, withdrawal, marked irritability, agitation, apparent feelings of uselessness, insomnia, fatigue, probable anorexia with uncertain weight loss, anergia, amotivation and non-specific cognitive difficulties. Overall, his psychiatric status would appear to have been little different than or possibly even more severe than what was noted by Dr. Canella at the time of initial evaluation in November, 1999 (and as outlined in a report dated December 4, 1999). More likely than not, this depressive illness had onsetted sometime during 1997 and, while initially relatively mild compared to current expression, had been apparent at the time of psychiatric evaluation by Dr. Gotkind in October, 1997 and Dr. Arbitman in February, 1998. The diagnosis of an adjustment disorder with anxiety and depression, made both by Dr. Gotkind and Dr. Arbitman, likely reflected what was considered to have been the reactive influence of environmental factors. By the time of evaluation by Dr. Canella in early 1999, a more obvious picture of a major depressive episode was apparently (details of which were noted above). [The worker] would appear to have been resistant to the therapeutic interventions undertaken by various health care providers, in particular Dr. Canella. His current status, while uncertain in view of the absence of the absence of contemporaneous reporting, has been assumed to be little different.

Reasons for the development of this depressive illness are by no means clear. It has been indicated that in the past [the worker] had difficulties in coping with periods of unemployment and he is reported to have felt "nervous" in an unspecified manner, to have experienced sleeping difficulties, to have cried, to have become irritable and withdrawn, and to have developed coughing symptoms similar to that which had been manifest during asthmatic episodes secondary to isocyanates exposure and sensitivity. While in the absence of a more detailed account of his emotional state relative to periods of enforced unemployment, there is much to suggest, with the benefit of hindsight, that these were mild depressive episodes, likely reactive or secondary to unwelcome unemployment. Taking into consideration [the worker's] good work history, it is likely, but nonetheless, speculative to some degree, that his ability to work, to be the breadwinner for his family, was a major source of his self-esteem and that in order to maintain his role as a man, he had to be employed. When unable to do so, from whatever cause, there is much to suggest that he experienced mild depressive episodes, likely reactive in nature, and hence an adjustment disorder with depressed mood, to what he perceived to have been a threat to his integrity, self esteem and sense of self. Assuming that these factors apply to [the worker] it is noteworthy that the cause of his unemployment would be relatively unimportant in comparison to the fact of his unemployment. In an individual to whom his ability to work formed a major source of his self esteem and identity, any loss of work would have been a sufficient precipitant. There is nothing to indicate that exposure to isocyanates per se, or his sensitivity to it, would have been relevant to the development of what currently has become a depressive illness. To the best of my knowledge, there is nothing in the literature which suggests a cause and effect relationship between isocyanates and a mood disorder and while theoretically it may be possible, the likelihood is very remote.

Perpetuating factors likely include the threat of an asthmatic attack if he were to be exposed to isocyanates, and, in all likelihood far more importantly, the fact of his appeal and the necessity that he prove himself to be disabled.

(iv) Additional opinion from the worker's treating psychiatrist, Dr. Canella

Following receipt of Dr. Margulies' report, Mr. Fink obtained an additional opinion from Dr. Canella who is the worker's treating psychiatrist. In his report dated March 26, 2004, Dr. Canella provided an update with respect to the worker's condition. Dr. Canella reported that

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the worker's symptoms have persisted and there has been little change from his initial presentation four and a half years ago. The worker continues to worry constantly and excessively about his health and future. He remains socially withdrawn, spending all day sitting alone and showing no interest in anything including his family. The worker presents as a frail, thin, psychomotor-retarded man who is anxious and depressed. For the most part, he is mute staring off in the air. Attempts to engage him usually result in his becoming agitated and weepy.

Dr. Canella also had the opportunity to review Dr. Margulies' report. With respect to that report, Dr. Canella opined:

[Dr. Margulies] indicates that his review of the documentation suggests to him that the patient has been "experiencing a major depressive disorder of moderately severe proportions."

It is unclear to me how one could use a qualifier "moderately" in this case. I would direct you to the accompanying copies of letters I have sent to the Workplace Safety and Insurance Board as well as consultation notes, copies of which were apparently also sent to the Board.

With respect to the comments that a perpetuating factor is "the fact of his appeal and the necessity that he prove himself disabled." I wish that this case were that simple. Please be aware that it was [the worker's spouse] who applied for Canada Pension Plan Benefits and who has been the driving force behind the WSIB appeal. I wish to emphasize the fact that [the worker] has been completely oblivious to the process and that he showed absolutely no reaction when he was, in fact, granted a disability pension. Currently, he does understand that something is going on with "Compensation", but his one and only concern, four and a half years after our initial meeting, remains that his "life is over".

(v) Mr. Fink's submission

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Mr. Fink provided both written submissions (found in Exhibits #11 and #12) and oral submissions at the October 15, 2004 reconvened hearing. In his written submissions, Mr. Fink questioned Dr. Margulies' objectivity. Mr. Fink referred to past Tribunal decisions in which Dr. Margulies provided a psychiatric opinion. Mr. Fink submitted that in all of these decisions, Dr. Margulies appeared to make conclusions based on his own philosophy of work-related psychiatric disability where the causes rest with the worker himself rather than a neutral approach. Some of the Tribunal decisions referred to accepted and others rejected Dr. Margulies' opinion.

In his oral submissions, Mr. Fink concentrated on the worker's unemployment and its relationship with the worker's isocyanate sensitivity. Mr. Fink agrees that the worker's inability to obtain employment is a significant factor in his disability. He submits, however, that the loss of employment in the worker's case is directly related to his sensitivity. Mr. Fink reviewed the evidence, in particular the 1997 events, and submitted that the worker's significant psychiatric disability only began after he started job searching through vocational rehabilitation services. The worker did an extensive job search starting in the summer of 1997 but could find no employment. He discontinued the job search in September 1997 and had a breakdown in October 1997. Mr. Fink submitted that this extensive job search, where the worker obtained at least 260 business cards, drove home to him his inability to find work. This inability to find work then lead to a severe depression to the point where the worker is now totally incapacitated. Mr. Fink submitted that the loss of work was playing a major role in the worker's disability but

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in addition, there is also the worker's perception that he is sick. While there may be no literature suggesting a causal relationship between isocyanates and a mood disorder, Mr. Fink submitted that there is a relationship between sickness and psychiatric disability. Mr. Fink submitted that the worker saw his situation as debilitating because he was prevented from earning a living.

(vi) Conclusions

Operational Policy Manual, Document No. 03-03-03 provides for pyschotraumatic disability entitlement when the following circumstances exist or develop:

- Organic brain syndrome secondary to
 - traumatic head injury
 - toxic chemicals including gases
 - hypoxic conditions, or
 - conditions related to decompression sickness
- As an indirect result of a physical injury
 - emotional reaction to the accident or injury
 - severe physical disability, or
 - reaction to the treatment process
- The psychotraumatic disability is shown to be related to extended disablement and to non-medical, socio-economic factors, the majority of which can be directly and clearly related to the work related injury.

As reported by Dr. Margulies, there does not appear to be any medical literature linking isocyanate sensitivity to a mood disorder. The basis for entitlement in this case, however, is not that isocyanate sensitivity directly caused the worker's disability but rather, that the sequelae of that sensitivity was a significant contributing factor to the worker's psychiatric disability. The worker is seeking entitlement for psychotraumatic disability in accordance with part three of the Board's policy, which provides for psychotraumatic disability when the disability is shown to be related to extended disablement and to non-medical, socio-economic factors, the majority of which can be directly and clearly related to the work related injury.

Interestingly, one of the manifestations of worker's psychiatric illness is an incessant cough. All of the respirologists who have assessed the worker agree, however, that the worker's pulmonary function is normal. They are of the opinion that the worker's current symptoms are not related to a respiratory problem but are likely psychiatric in origin. The worker has no ongoing pulmonary respiratory impairment. He currently receives a 5% permanent disability award essentially because he cannot be exposed to isocyanates. He has severe symptoms when exposed to isocyanates but once he removes himself from that exposure, he is not left with any organic permanent respiratory impairment.

While Mr. Fink is not in complete agreement with Dr. Margulies' opinion with respect to the causes and severity of the worker's psychiatric illness, he agrees that the worker's unemployment is a significant factor in his psychiatric disability. Mr. Fink submits, however, that the worker's unemployment is directly related to the work injury, that of isocyanate sensitivity.

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We accept that while there was testimonial evidence of past episodes where the worker had not reacted well to unemployment, there was also no evidence of medical attention being required during those past episodes. The worker was able to deal with the short periods of unemployment without seeking medical attention and was able to obtain other employment within his trade, in the auto body field. After his recurrence in late 1996 when he was again exposed to isocyanates, it became apparent that the worker would not be able to work in the auto body trade anymore either as a painter or as a prep man. This view is confirmed by Dr. Kabir, a Board Occupational Hygienist, who indicated that 90% of body shops in Canada use primer with isocyanates to some extent and that most would use it extensively. Dr. Kabir felt that it would be difficult to find a body shop not using primer with isocyanates. It was therefore clear to the Board and to the worker that after his 1996 recurrence, the worker would be unable to return to auto body work in any capacity. Furthermore, the worker had very little transferable skills. At the time of the vocational rehabilitation closure report in 1997, the worker was 52 years of age, he had been working in the auto body shop trade since approximately 1968, he had been earning \$16.00 per hour and he only had a grade 5 level of education. Consequently, the vocational rehabilitation caseworker felt that the worker would not likely be able to approximate his earnings close to pre-accident level. She referred the matter to the Claims Adjudicator who allowed the worker entitlement to section 147(4) benefits (pre-1997 Act). Even though vocational rehabilitation services ceased due to the worker's psychiatric condition, the Board nevertheless acknowledged that even if the worker had been able to continue participating in vocational rehabilitation, he would have been unable to approximate his pre-injury earnings.

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We have also considered whether there are non-compensable factors at play in the worker's appeal. Dr. Margulies opined that the fact of the worker's appeal and the necessity to prove himself disabled is likely a perpetuating factor in his disability. In this regard, we agree with Dr. Canella's opinion. Dr. Canella has been treating the worker on an ongoing basis. He has emphasised that it is the worker's spouse who has applied for Canada Pension Plan disability benefits and who is the driving force behind the WSIB appeal. The worker is completely oblivious to the process and understands very little with respect to his Tribunal appeal.

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The only other factor that Dr. Margulies has raised as the main cause for the worker's psychiatric disability is "the fact of his employment". While we agree with Dr. Margulies that the worker's unemployment remains the most significant factor in the worker's psychiatric disability, in our view, the worker's unemployment in this case is a socio-economic factor directly related to his isocyanate sensitivity. As a result of the isocyanate sensitivity, the worker is unable to obtain employment in the auto body trade, which is the only field of employment he has known since at least 1968. Both the Board and the worker realized in 1997 that the worker was unlikely to find alternative employment and be able to approximate his pre-injury earnings due to his poor vocational prospects.

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We find that the in the unique circumstances of this case, the worker's psychotraumatic disability is related to extended disablement and to non-medical, socio-economic factors (namely unemployment from his medical condition), the majority of which are directly and clearly related to his isocyanate sensitivity. We therefore find that the worker has entitlement for psychotraumatic disability.

THE DECISION

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The worker's appeal is allowed. The worker has entitlement for psychotraumatic disability. Benefits are remitted to the Board.

DATED: December 7, 2004

SIGNED: S. Martel, B. Wheeler, J.A. Crocker