

*Case Name:*  
**Decision No. 2192/05**

**[Names of Parties are Not Published]**

[2005] O.W.S.I.A.T.D. No. 2670

2005 ONWSIAT 2745

Decision No. 2192/05

Ontario Workplace Safety and Insurance Appeals  
Tribunal

**B. Kalvin (Vice-Chair)**

Heard: November 14, 2005.

Decision: December 7, 2005.

(55 paras.)

*Aggravation (preexisting condition) (disc, degeneration) -- Credibility.*

Statutes considered:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16.

**Appearances:**

D. Ublansky, for the worker.

A. Van Kralingen, for the employer.

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DECISION NO. 2192/05

1 This appeal was heard in Toronto on November 14, 2005, by Tribunal Vice-Chair, B. Kalvin.

#### THE APPEAL PROCEEDINGS

2 The worker appeals the decision of the Workplace Safety and Insurance Board (the "Board") rendered by Appeals Resolution Officer, D. McParland, on April 29, 2004. That decision concluded that the worker is not entitled to workers' compensation benefits for a back condition.

3 The worker appeared and was represented by D. Ublansky. The employer was represented by A. Van Kralingen.

#### THE RECORD

4 I considered the material in the Case Record prepared by the Office of the Vice-Chair Registrar, two addenda to the Record, the Hearing Ready Letter, and two medical reports filed at the hearing.

#### THE ISSUE

5 The only issue which arises for determination on this appeal is whether the worker is entitled to benefits for a back condition which prevented her from working for certain periods of time.

#### THE REASONS

##### (i) Background

6 The background to this appeal is as follows. The worker is 50 years old. She is originally from China, and came to Canada in 1990. In July 1999, she began working for a company which manufactures wiring for various kinds of appliances, such as microwave ovens, water heaters, and fireplaces. Beginning in February 2003, the worker missed various periods of work due to a back condition. She made a claim to the Board for benefits to compensate her for income which she lost during the time that she missed from work. The Board denied the worker's claim for benefits on the ground that the worker's back condition was not caused, or aggravated by her work, but rather was the result of a pre-existing degenerative problem. Appeals Resolution Officer, D. McParland, concluded her decision as follows:

I conclude that [the worker's] back problems are due to a well documented pre-existing condition, which has been symptomatic intermittently. The balance of evidence does not support proof of a work related accident in August 2001, or that her work duties aggravated or worsened this condition.

7 The worker now appeals to this Tribunal.

##### (ii) Evidence at the Hearing of the Appeal

**8** In 1985, prior to coming to Canada, the worker suffered from back problems. After coming to Canada, and before she started her job with the accident employer in 1999, the worker had sought treatment for her back condition. She saw orthopaedic surgeons in 1995 and 1997. The worker was diagnosed with spinal stenosis, which is a narrowing of the spinal canal and openings through which the spinal nerves emerge. Spinal stenosis is a degenerative condition and is not caused by trauma. These facts are not in dispute.

**9** However, as will be discussed below, there was conflicting testimony at the hearing of this appeal with respect to the nature of the worker's duties at the accident employer, what and when information about the worker's condition was provided to the employer, and what the employer's response to that information was.

(iii) The worker's version of events

**10** At the hearing of this appeal the worker testified that at the time when she began work with the accident employer in 1999, her back was symptom-free. She said that she had not had problems with her back since 1997.

**11** The worker testified that until August 2001 she worked as an assembler. She was seated all day while she did this job and it did not cause her any back problems. The worker testified that in August 2001, she was switched to a packing job.

**12** The worker testified that in order to do the packing job she had to walk to a pile of boxes which was between six and 16 meters from her workstation. She said that the boxes weighed between 60 and 80 pounds. The worker testified that she had to carry or drag a box to her work station. She would then take wires out of those boxes and place them on racks. She then put various combinations of wires into plastic bags and then placed those bags in a smaller box. When the smaller box was full the worker had to tape it shut and place it on a skid which was about a foot away from her workstation. The worker testified that the smaller completed boxes weighed about 30 pounds. She said that during the course of a shift, she would have to carry or drag about 20 of the heavier boxes to her workstation, and would complete about 10 of the lighter boxes to be placed on the skid. The worker testified that she had to meet production quotas and that her supervisors would monitor and time the speed at which she worked, often urging her to go faster.

**13** The worker testified that about two weeks after starting the packing job, her back began to flare up. Accordingly, she visited her family doctor in September 2001. She testified that she told her doctor that her back was bothering her as a result of moving heavy boxes at work. She says that her doctor told her that they should monitor the situation.

**14** The worker testified that in September and October 2001, because a machine needed to do the packing job was broken, she went back to doing the assembling job. In November, however, she says that she was transferred back to the packing job. She testified that a week after she started the packing job again, her back became very painful. Accordingly, she went back to her family doctor

in November. Her family doctor referred her to a specialist, whom she saw on December 6, 2001.

**15** The worker testified that in both August and November 2001 she made her supervisor aware that the packing job was bothering her back. She testified that she asked if she could be moved to a different job, or at least be rotated through various jobs rather than doing the packing job all the time. The worker testified that her supervisor was unsympathetic to her complaints and did not move her from the packing job.

**16** The worker testified that after about two weeks on the packing job in November 2001, there was, again, a machine malfunction which resulted in the worker being sent back to the easier assembly job. She worked there until January 2002, when the employer wanted to transfer her back to the packing job again. This time the worker produced a note from her doctor, dated December 6, 2001, which said that she needed to do modified work. Once the note was shown to her supervisor a meeting was called which was attended by the worker, her supervisor, as well as other persons in management. The worker testified that at that meeting she was told by a manager that she would be transferred from the packing job, but that in fact this only happened two or three days after the meeting. The worker says that she was transferred to a different assembly job which also required her to lift boxes, although not as heavy as the ones involved in the packing job.

**17** The worker testified that she continued to have back pain throughout 2002 for which she sought medical treatment and which provided only temporary relief. The worker testified that twice in 2002, once in July and once in August, she was put back on the packing job. The worker testified that her back never got better during 2002 because she was required to do packing and because even the assembly jobs she was doing required her to do lifting.

**18** The worker testified that over the course of 2002, her back became progressively worse. She testified that in January 2003, she needed to take time off work. In March 2003, the worker went to see her family doctor and then filed a claim with the Board for benefits. The worker missed various periods of work in 2003 and 2004 because of her back, and subsequently included those in her claim for compensation.

**19** The worker testified that her back bothered her periodically in 2003. She testified that in September 2003, it was so bad that she went to the emergency department of a hospital. An appointment was arranged for her to see a specialist in October. The worker testified that when she told her supervisors in October 2003 that she needed to see a specialist, she was told that if she was unable to manage the work at the factory then she should leave.

**20** The worker alleges that the lost time she has suffered from work since 2003 is the result of an aggravation, in August 2001, of her pre-existing, asymptomatic back condition.

(iv) The employer's version of events

**21** Two witnesses for the employer testified at the hearing of this appeal. The first, I.H., is the

production manager. The second, D.B., is the human resources manager.

**22** I.H. testified that the packing job which the worker did, and which she alleges caused an aggravation of her pre-existing back condition, did not require workers to carry or drag large boxes weighing 60 to 80 pounds to their work stations. I.H. testified that workers do not carry boxes of materials. He testified that the boxes from which the packers take wires and place them on their workstations are brought to the packer's workstations by a skid or a "two-wheeler." I.H. testified that after the material boxes are brought to a worker's station, the worker would pack wires into a small plastic bag and then place the bag into a cardboard box. Once the box was full, the worker would tape it shut and place it on a skid, which was no more than three feet from the workstation. I.H. testified that a full box would contain 75 packages of wires and would weight between 10 and 15 pounds. He testified that a worker would pack and place on the skid about two or three of those boxes an hour. I.H. testified that the employer does not have, and in 2001 did not have quotas which employees were expected to meet. He testified that in 2001, he never heard from anyone that the worker was having job-related back problems.

**23** D.B. testified that in addition to being the human resources manager, he is responsible for safety training at the plant. He is also responsible for filing with the Board the employer's response to any injuries reported by workers. He testified that in 2001, neither the worker, nor any supervisor, told him that the worker was experiencing job-related back problems. He testified that as far as he was aware the worker never discussed her visits to her doctor in 2001 with anyone in management and that no request for modified work was made in 2001.

**24** D.B. testified that the first time he became aware of the fact that the worker was having problems with the job because of her back was on January 2, 2002, when he was asked by the business manager to attend a meeting. Also at the meeting were other management representatives and the worker. The purpose of the meeting was to discuss a note which the worker had produced from her doctor saying that she needed modified work.

**25** D.B. testified that he asked the worker how she hurt her back and that she did not mention any work-related activity. D.B. testified that the worker told him that she did not know how she had hurt her back. He testified further that he was surprised that the note had only been produced by the worker on that day, since it was dated December 6, 2001, that is almost a month earlier. D.B. said that since the note was not detailed with respect to the kind of modified work that the worker needed, he decided that he would immediately place the worker on modified work which involved no lifting or bending. He testified that she was put on modified duties that day.

**26** D.B. testified that he met with the worker again on January 18, 2002. He says that at that meeting he again asked the worker if she had suffered a workplace accident and that she told him she had not. He testified that he asked the worker to get more detailed information from her doctor with respect to the kind of modified work she needed. He testified that she eventually produced a letter saying that she should not lift weights above 10 pounds for one month. There was no

indication that the restrictions were permanent. He testified that he received no communication from the Board in 2002.

**27** D.B. testified that the first correspondence he got from the Board with respect to a workplace injury suffered by the worker was on March 27, 2003. The Board's letter indicated that the worker had reported, on March 10, 2003, that she had suffered a workplace injury, not in 2001, but rather, on February 27, 2003. D.B. testified that he investigated the matter and determined that no workplace accident involving the worker had taken place on February 27, 2003. He testified that he discovered that in fact the worker had not been at work on February 27, 2003. He reported the results of his investigations to the Board.

**28** D.B. testified that the worker returned to work, after an absence, on April 28, 2003, and that this was the first time he learned that the worker was alleging that she had suffered a workplace injury in August 2001. He said that, accordingly, he made investigations about the matter and determined that nobody could remember the worker suffering a workplace accident or injury in August 2001.

(v) Assessment of the evidence

**29** To the extent that the version of events provided by the worker conflicts with that provided by the witnesses for the employer, I prefer the evidence of the latter. I say this for two reasons.

**30** First, I found the worker to be a cautious and reluctant witness, who often seemed unwilling to give straightforward answers to straightforward questions. For instance, the worker testified that when she visited her family doctor in August and November 2001, she told the doctor that her back pain was the result of having been required to move heavy boxes at work. When asked, if her family doctor filed a report with the Board following those visits, the worker replied that she did not know. I found her answers in this regard to be disingenuous. The worker is an intelligent woman, who remembers dates and details with some precision, and who is well apprised with the history of her workers' compensation claim. The record is clear that the worker's family doctor never filed a report following either of the worker's visits in 2001, and in my view, the worker was fully apprised of that fact when she answered that she did "not know." In my opinion, the worker often answered questions in a guarded and cautious manner which did not enhance her credibility. I am cognizant of the fact that the worker testified through an interpreter and that this can pose added difficulties for a witness. Nevertheless, I am of the view that the guarded nature of the worker's testimony was not a function of difficulties or complications flowing from the fact that she did not testify in English.

**31** By contrast, I found the testimony of the employer's witnesses, and in particular that of D.B., to be given in an open and straightforward manner. In my view, both witnesses gave their testimony in an unguarded and cooperative manner.

**32** Second, and more important, is the fact that there were numerous inconsistencies between the evidence provided by the worker and information contained in Record. For instance, the worker

testified that prior to August 2001, her back had been asymptomatic since 1997. However, a report written on October 30, 2002, by Dr. P. Wong, orthopaedic surgeon, indicates that he "saw her in 1999 with low back pain and right sided leg pain."

**33** Similarly, the worker testified that in 1985, while in China, she had a back problem which resolved after two or three months. She testified that she had no further problems with her back until she sought treatment in Canada in 1995. The reports of her doctors, however, paint a somewhat different picture and suggest that the worker has suffered with chronic back pain ever since 1985. Dr. R. Chow, for instance, who practises physical and rehabilitation medicine, writes in a report dated March 11, 2003, that the worker "had chronic low back pain since 1985." And Dr. Wong, in the report referred to above, writes that

she has a long history of low back problems that started in 1985 when she was diagnosed with having a L5-S1 disc herniation. Ever since then she has been having intermittent episodes of low back pain.

**34** In my view, these reports bring into question the worker's testimony that she was symptom free between 1985 and 1995, and raise questions about her credibility generally.

**35** There are other examples of inconsistencies between the worker's testimony and information contained in the Record. The worker testified that approximately two weeks after being assigned to the packing job, in August 2001, her back began to bother her. She says that when she went to her family doctor in September 2001, she told the doctor that she her back had started to bother her as a result of moving heavy boxes at work. She testified also, that when she went back to her family doctor in November 2001, she again indicated that moving heavy boxes at work was bothering her back. It is telling, however, that the clinical notes made by her family doctor at the time of the worker's visits in September and November 2001, while difficult to read, appear to make no reference to moving heavy boxes or work-related difficulties. In my view, the fact that no reference to moving boxes or any other work-related cause appears to be recorded by the worker's family doctor, raises serious doubts about several aspects of the worker's testimony. It raises doubts not only about whether the worker told her doctor that she was moving heavy boxes at work, but also about whether the worker herself really regarded her work activities as the cause of the flare up of her back condition in late 2001. It also raises doubts about whether the worker was, in fact, moving heavy boxes, which the employer denies.

**36** For the reasons set out above, I find that I prefer the evidence of the employer's witnesses to that of the worker to the extent that they are in conflict. Assessing all of the evidence presented at the hearing of this appeal, I make the following findings of fact:

**37** The worker has suffered on and off with back pain caused by a degenerative condition known as spinal stenosis since 1985.

**38** In August 2001, the worker's employer moved her to a new job on a packing line.

**39** That job did not require the worker to carry or drag boxes to her workstation.

**40** The packing job did require the worker to pack and seal boxes, which, when full, weighed between 10 and 20 pounds. The worker was then required to place the full box on a skid which was between one and three feet away from her workstation. The worker would place either two or three full boxes on the skid per hour.

**41** In August or September 2001, the worker's back pain flared up. She did not attribute the pain to her work duties and accordingly, did not tell her family doctor that her pain was work-related. For the same reason, she did not tell her family doctor that her back pain was work-related when she visited her family doctor in November 2001.

**42** The worker did not report to her supervisor or anyone else in management that she was having work-related back problems in 2001.

**43** The first time the worker's employer was made aware that the worker was having job-related back problems was at a meeting on January 2, 2002, when the worker presented a note from Dr. Chow saying that the worker needed modified duties.

**44** The employer provided the worker with modified duties in response to the note from Dr. Chow.

**45** The worker suffered intermittently with back pain throughout 2002, for which she sought medical treatment.

**46** In February 2003, the worker had to take time off work because of her back condition. She returned to work on April 28, 2003, but there have been subsequent periods of back-related absences from work.

(vi) Analysis

**47** The worker's claim for benefits is based on a claim that in August 2001 her work duties caused an aggravation of a pre-existing back condition. Because the worker claims that the aggravation occurred in 2001, her claim for benefits is governed by the Workplace Safety and Insurance Act, 1997 (the "WSIA"). Under that statute, a worker is entitled to benefits if the worker "sustains a personal injury by accident arising out of and in the course of employment." The definition of "accident" includes "a disablement arising out of and in the course of employment." There is no question, in this case, that the worker was absent from work for various periods of time because of a back disablement. The question is whether her back disablement was one which arose "out of and in the course of employment."

**48** The fact that a worker has a pre-existing condition is not a bar to entitlement to benefits. In order to determine whether a worker with a pre-existing condition is entitled to benefits, this



Tribunal applies a "significant contribution test." Under that test, the workplace accident need not be the sole cause of the worker's condition, as long as it is a "significant contributing factor." In Decision No. 280<sup>1</sup> the Tribunal defined "significant contributing factor" as follows:

A "significant contributing factor" is a factor of considerable effect or importance or one which added to the worker's pre-existing condition in a material way to establish a causal connection.

**49** Accordingly, the question on which this appeal turns is whether the work which the worker did for the accident employer significantly contributed to the aggravation in 2001 of her pre-existing back condition.

**50** Having considered the evidence and submissions presented at the hearing of this appeal, I find, on a preponderance of the evidence, that the work which the worker did for the accident employer did not significantly contribute to her disablement. I have come to this conclusion for the following reasons.

**51** First, as noted, when the worker sought medical treatment for the flare-up of her back condition on September 10, 2001, her doctor's notes of that visit make no mention of any work-related trigger. Similarly, when the worker visited her family doctor for continuing back pain on November 2, 2001, the doctor's notes do not contain any reference to moving boxes or any other work-related cause. In my view, when the worker visited her doctor for a flare-up of back pain on those two occasions, she did not, contrary to her testimony at the hearing of this appeal, regard her work as the cause of the pain, but rather, she regarded the pain as part of a chronic back condition which she had been dealing with since 1985. In my view, this is a much more likely explanation as to why there is no mention of a work-related trigger in her doctor's clinical notes, than the explanation that her doctor simply did not record the worker's complaint that her back pain was work-related. The fact that her doctor did not report the condition to the Board at that time, confirms, in my view, that neither the worker nor her doctor regarded work-related factors as the cause of the aggravation of her back condition.

**52** Second, when the worker's family doctor, Dr. E. Tai, did eventually file a report with the Board, on March 10, 2003, Dr. Tai, makes no mention of any work-related trigger in describing the "Patient's history of injury/disease." All that is noted is that the worker has low back pain radiating down her right leg and that she has a past history of that condition.

**53** Third, and most important, is the fact that there is not a single medical opinion in the record of this appeal which supports the worker's claim that her work caused, or significantly contributed to the aggravation of her back condition in the fall of 2001. The only medical opinion which speaks to that issue is that of Dr. Scullion, a Board consultant, who, on September 10, 2003, seems to express the view that the worker did not suffer an aggravation or deterioration of her back condition, but rather that she had a pre-existing condition which was prone to acute flare-ups. It is telling, in my view, that none of the worker's treating physicians, that is, Drs. Tai, Wong, or Chow, have provided

an opinion suggesting that the worker's back problems were caused by her duties at work. At most, she has been provided with notes indicating that she needs modified work. In my view, this suggests that her treating physicians regarded the worker as having a significant pre-existing back condition, which by its nature, caused periodic bouts of pain. When she was having such a bout of pain, she required modified duties for a period of time. In this case, the worker has been ably represented by competent counsel since the time she brought her claim to the Board. In my view, the fact that no medical opinion from any of her treating physicians has been provided which suggests that her work for the accident employer was the cause of her back flare-up or aggravation in 2001, or subsequently, is important.

**54** For all these, reasons I find, on a balance of probabilities, that the work which the worker did for the accident employer did not significantly contribute to her disablement. Her disablement is therefore not one which arose out of and in the course of employment and accordingly, the worker is not entitled to benefits under the WSIA for that condition.

#### THE DECISION

**55** The worker's appeal is denied.

cp/ci/e/qlala