

[Decision No. 1058/13, \[2013\] O.W.S.I.A.T.D. No. 792](#)

Ontario Workplace Safety and Insurance Appeals Tribunal Decisions

Ontario Workplace Safety and Insurance Appeals Tribunal

Toronto, Ontario

Panel: L. Petrykowski, Vice-Chair; E. Tracey, Member Representative of Employers; R.J. Lebert, Member Representative of Workers

Heard: June 4, 2013.

Decision: July 11, 2013.

Decision No. 1058/13

[2013] O.W.S.I.A.T.D. No. 792 | 2013 ONWSIAT 1496

[Names of Parties are Not Published]

(55 paras.)

Case Summary

On appeal from:

WSIB Appeals Resolution Officer (ARO) dated April 29, 2011.

Appearances

For the worker: A.G. Sciacca, Lawyer.

For the employer: E. Kosmidis, Lawyer.

E.I., Human Resources.

Interpreter: None.

DECISION NO. 1058/13

REASONS

(i) Introduction to the appeal proceedings

1 The worker appeals a decision of the Appeals Resolution Officer (ARO), Mr. D. Mosser of the Workplace Safety and Insurance Board ("Board"), dated April 29, 2011 which denied initial entitlement for a low back injury claimed to

have been sustained in the course of the worker's employment. The ARO rendered a decision following an oral appeal hearing at the Board's Appeals Branch.

2 The worker attended the Tribunal hearing with his representative, Mr. Sciacca, a lawyer. The employer attended the Tribunal hearing with its representative, Ms. Kosmidis, a lawyer.

(ii) Issue

3 The only issue to be decided in this appeal is whether the worker suffered an injury to his lower back while in the course of his employment such as to entitle him to benefits under the *Workplace Safety and Insurance Act, 1997*.

(iii) Background

4 The now 49 year-old worker started work with the accident employer as of May 25, 2006 as a bus fleet maintenance service person. On March 18, 2010, the worker attended a hospital and sought treatment for a low back injury.

5 According to the Worker's Report of Injury Disease (Form 6) dated April 6, 2010, the worker identified 10:00 a.m. on March 18, 2010 as the date/time of accident and the time of reporting to his employer. He identified upper back, lower back, right thigh, and right lower leg as the areas of injury and indicated his injury occurred in the "Tire Shop." He also identified that he first started to have problems with this injury/condition on December 2009. The reason for late reporting was identified as "I thought that it was sore muscles and that it would go away with time." The worker also explained the history as follows: "Dec.09-Back and leg pain/numbness. Jan/Feb-tried orthotics, no relief. Mar-Chiro. No relief Mar. 18 told by Dr. go to emerg MRI done. Work I do is install bus tires. Lifting caused my injury [sic]."

6 According to the Employer's Report of Injury Disease (Form 7) dated March 29, 2010, they identified a reporting of the injury at 3:00 pm on March 23, 2010. The area of injury was identified as upper back and lower back. A description was provided as follows: "On Mar 18/10, I/W rec'd call from Dr. to go to hospital. I/W spoke to sup. on Mar. 19/10, indicating preexisting back injury. I/W reports doing tire work (building and installing tires) over time. [sic]" The employer also attached correspondence indicating the following:

1. There was no known injury at the workplace.
2. [The worker] did not report a workplace injury to his supervisor. [The worker] reported on March 19, 2010, that he had a pre-existing back condition and would not be in to work.
3. We have no knowledge of a pre-existing back condition. [The worker] has been performing his regular duties, without complaints.
4. [The worker] reported that he had an MRI done at the hospital. According to [the worker] the MRI indicated that he has "over 13 bad discs". Surgery apparently is not an option?
5. Up to this point, [the worker] has been performing his full and regular duties, without complaint. My question is how can this worker perform his regular duties, and have 13 bad discs?
6. Coincidentally enough, [the worker]'s shift was changed, and once it was changed, [the worker] reported his back injury?
7. The doctor at the hospital put [the worker] off for one week -- for 13 bad discs? When [the worker] went to his family doctor, his family doctor has now put him off until at least May 3, 2010, when [the worker] sees a specialist.
8. No medical has been provided at this time. I am sending [the worker] a FAF to take to his doctor.

Currently, [the worker] is on sick leave, pending a decision from WSIB

7 The worker spoke with the Board's Eligibility Adjudicator on April 6, 2010 and this was documented in Board Memorandum #1 as follows:

Worker stated that there was no specific incident or accident that caused the injury to his back.

Worker stated that he did not tell his employer that he has a pre-existing back condition..

Worker stated that he started to feel back pains near the end of Dec/2009 and sought medical care near the end of Jan/2010.

Worker stated that by the end of Jan/2010 he also started to have complication with his bowel movements and other issues so at this time he sought medical care.

Worker stated that there was no specific incident or accident that caused the back injury and that the injury is due to repetitive lifting.

Worker was informed that to date there is no medical on file or diagnosis.

Worker stated that he will inform his doctor to provide the medical information ...

8 The Board's Eligibility Adjudicator reviewed the worker's case and denied initial entitlement in correspondence dated April 13, 2010. The Board explained that they were unable to establish a causal relationship between the worker's medical condition and his job duties. The correctness of this determination was objected to by the worker at the Board's Appeals Branch. The ARO confirmed the Board operating level's determination when the matter was reviewed at the Board's Appeals Branch on April 29, 2011. The ARO's decision concluded the following:

The worker claimed to have experienced an onset of work-related back pain In December 2009, but he continued on his regular duties until March 2010 and did not report the condition as work-related until March 2010.

Under the circumstances, considering the degenerative nature of the worker's back condition as well as the lack of a production quota and the varying duties that the worker performs, 40 per cent of which do not involve lifting, I am unable to conclude that the worker's back problem arose out of the work duties, and as such there is no basis to grant entitlement

9 The correctness of the ARO's determination is the issue for adjudication in the present Tribunal appeal.

(iv) Law and policy

10 Since the worker claimed to be injured as a result of his work duties in 2009 and 2010, 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.

11 Subsection 2(1) of WSIA defines accident as:

- (a) a wilful and intentional act, not being the act of the worker,
- (b) a chance event occasioned by a physical or natural cause, and
- (c) disablement arising out of and in the course of employment.

12 Subsection 13(1) of WSIA states: "A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan."

13 Pursuant to section 126 of the WSIA, the Board stated that the following policy packages; 1, 107, and 300 -- Revision #8, would apply to the subject matter of this appeal.

14 We have considered these policies as necessary in deciding the issues in this appeal, in particular:

- * *Operational Policy Manual* ("OPM") Document #11-01-01, "Adjudicative Process"; and
- * OPM Document #15-02-01, "Definition of an Accident."

(v) The testimony of the worker

15 The worker testified that he is now 49 years old. He is married with six children. He went to college after high school. He took some technical/automotive courses and received an "auto" diploma. Prior to working with the accident employer, he worked in the retail flower industry for about twenty years. This was a family business and he would do flower shop duties, including taking out the garbage which was the heaviest work. This business came to an end due to competition from other retailers.

16 In May, 2006, the worker began work with the accident employer. He first worked as a service person (SP)/custodian on a part-time contract basis. He would be responsible for cleaning stations. Six months later he was offered a permanent part-time SP position working as a cleaner. He then successfully wrote a test for the SP 1 position which led to full-time employment in 2008 at the S.R. facility.

17 With respect to the job description in the documentary record, he agreed that it described what he did at S.R. With respect to the physical demands analysis (PDA), he only saw it at the Board hearing. He disputed the characterization therein that he was lifting 5 kg and noted he was lifting more towards the maximum weight for 8-10 hours per day. The tire rim weighed 60 pounds. The tire rubber weighed 150 pounds and 200 pounds when filled with air. The total tire would weigh about 250 pounds. There were eight of these tires on a bus. The worker noted the pulling that he did was closer to the maximum weight over 8-10 hour shifts indicated on the PDA.

18 The worker built tires by installing rubber on the rim and rolling them into a cage at the S.R. facility. He would take the rims off a pallet and have to roll them to an installation machine. The cage protected workers from a tire explosion during the inflation process therein. Once inflated, he would roll the tire to the balance machine which required going over a hump. The balancing machine had a pneumatic lift that would raise the tire and he had to clamp it to the machine by grabbing and tightening the clamp device to the tire. He spent three days per week in the tire room but sometimes four to five days per week. He always had tire removal duties and building up a stock of tires. He would spin the tire on the balancing machine and unclamp it once completed. He would use the lift to bring it down and put it away in storage by rolling, which was 15 to 20 feet away. He could build a tire every 15 minutes and built 20 to 25 tires per day.

19 The worker was also responsible for taking old tires off the buses. These buses were 300 to 400 meters away and he would jack up the bus and put new tires on using a manual lever. He would typically roll the tires over this distance. While at the S.R. facility, he had no back problems. They moved to a new facility, S., in January/February 2009. There was no tire equipment there initially, so the worker had to take a cube van to get tires from the S.R. facility. He did this for three to four weeks until tire equipment arrived at the new S. facility. The equipment was new and the tire inflation equipment was "completely different."

20 At the S.R. facility, the worker did safety inspections, bus repairs, driving good buses to the location of broken buses but mostly tire related building and installation work. He estimated it was 75% tire work and 25% other work. He would inspect bus batteries using a tool and had to replace the batteries (40 pounds) more often in the winter season. He also rebuilt other bus components. There was pulling, lifting, and stooping work involved in the inspection work. The cube van had a lift at the rear that would allow him to roll tires onto it when he was doing the tire delivery work.

21 At the S.R. facility, the tire inflation cage was different. At first, he did the work after another SP 1 showed him how to use the machine. He was later trained by a safety officer on how to do it. The tire equipment came to the new facility in March 2009. He would roll the tire in, pull the cage down and it would lock. Then automatic inflation

would begin and it would beep, indicating it was safe to open the machine. There was one operator for this machine and his training indicated this task was to be done by himself. The training officer confirmed the work could be done by the worker himself. The worker understood there were complaints from SP 1 staff that the machine was very difficult to operate. It required "great exertion" relative to the old machine at the S.R. facility. The employer and union were informed of the situation. The worker stated that 90% of his work at the S.R. facility involved tire-related work. When there was no tire stock available, he could spend 8-10 hours in the tire room to replenish it. Sometimes the night crew would use it up and not replenish the tire stock.

22 The worker also explained that he was the "low man on the totem pole" due to the seniority system. There should have been rotation in the duties and change-offs but this did not happen. The employer was asked to test the safety of the machine and the worker stated this happened eight months later. The employer said it was okay. A laminated safety sheet was attached to the machine in October or November 2008. The tire balancer at the S. facility was a "somewhat difficult machine" as well. At the old facility, it used light plastic clamping but at the new facility there was a heavier metal clamping. The worker had difficulty with these clamps. The worker had a heavy tire, heavy clamp and had to do a "long reach" to hold everything in place.

23 By December 2009, he had a lot of pain in the back. He had a shooting pain down the right leg and a limp. The worker brought up his concerns at a meeting with the employer in early 2010, as documented in the meeting minutes in the documentary record. The supervisor said the machine was okay. By February 17, 2010, the worker was trying to figure out why he was having the back difficulties. He noted there was double-stacking of the tire components. In February 2010, his back was "very sore" and he was in "constant pain". He went to his doctor about this. He would only see his doctor about two times per year, for things like colds or viruses. On February 16, 2010, he had sciatica. He had orthotics but his pain got worse with them. On February 22, 2010, the doctor referred him to a chiropractor and the worker had never been to a chiropractor before. As to July 14, 2009, he had an increase in pain in his knees and back. He was taking Arthrotec for his arthritis and had been taking it for a few years.

24 The worker had been a runner in the past. He hurt his knee ligament while playing soccer in 2005. The knees were the problem in 2005. He had no back pain in 2005. With reference to a "get the message" reference in the clinical notes, the worker did not know which area that referred to but it was "maybe" the knees. Between 2003 and July 14, 2009, he had no complaints of back pain. At that time, it could have been early symptoms of work-duties due to pulling, pushing, and lifting work. Sometimes a tire would fall on its side and he had to get it back up. This occurred once per day. He never complained of health problems at work until he went to the hospital. He noted to a union representative in March 2009 that the work was harder and cannot remember complaining to anyone else. He saw the chiropractor, Dr. Foudy, on February 24, 2010 and complained about lots of back pain. He would undergo spinal manipulations and use a back-stretching machine. He saw the chiropractor seven times in two months. He lost continence in a spinal manipulation that happened on March 17, 2010. He was instructed to go to emergency room right away but since he had soiled pants, he went home and called his family doctor. The office was closed and so the next day he went to work. He then called the doctor's office and the secretary later called the employer, Mr. W. The worker then went to the emergency room right away. An MRI scan was arranged and herniated discs with nerve impingement were identified. The worker called the employer, Mr. W., a few days later and explained that his back was herniated and he had to stay off work. The worker's family doctor said that the worker's work caused this. He saw a specialist, Dr. Woolford, who also said it was work-related. He also saw Dr. Ahn and Dr. Patich and no doctor said it was not work-related. The worker wrote to the Ministry of Labour about safety-related issues once he was off work.

25 The worker continuously worked through the knee pain, anxiety and depression that was identified in the clinical notes. There were no back complaints preceding the clinical reference in July 2009. Now there is something seriously wrong in his back with constant pain. Dr. Anh recommended back surgery but later changed his mind about that recommendation. The first time he mentioned the work-related component to his family doctor was February 2010. The doctor initially did not think the worker's condition was severe and thought it was sore muscles. The worker has been granted CPP disability benefits. The worker went back to school for automotive administration.

26 The worker testified that he was six feet tall and that the doctor advised him for years to control his weight. The worker was always 20-30 pounds overweight. He walked his dog but did not have a gym membership. He had a treadmill in his basement and did not lift weights. At age 35, he began having problems with his knees and his sports participation diminished. In 2006, he had a "pick-up" non-organized soccer game where he was charged with assault. He played soccer whenever he felt up to it. With respect to a massage reference in the clinical notes, he noted it was a "relaxation massage" for his anger, not his back. He had physiotherapy for his knee and arthroscopy. He did not have referred pain from knee to feet. He could not recall about harassment issues in 2008. He cut grass in 2008. He had a registered company with the word "landscaping" in it but this had to be shut down after his back injury. He would cut grass, sometimes with the assistance of his children, but did no snow-plowing or landscaping. The clinical reference of 60 to 70 hours per week was a combination of the work with the accident employer and his business. He used a self-propelled mower and cut hedges as well. He did this work in the summer of 2009 and did not operate the business after March 18, 2010. The last work was carried out in the September or October 2009. He would cut, trim, and turn soil on a bed.

27 The worker testified that he did not initiate a civil action against the chiropractor nor did he complain to the college of chiropractors nor was there a civil settlement: The worker understands the chiropractic manipulation may have triggered a bowel movement. He did not go back to that chiropractor after the incident.

28 The worker's job duties were eight hours per day, Monday to Friday and he had three weeks of vacation. He had two 10-minute breaks and a thirty minute lunch. There was no quota or set production amount in the tire room. The tire room was physically closed from the rest of the maintenance area. He could do other duties, as assigned to him. He could drive a forklift but it was usually busy as there was only one of them. Four tires could fit on a forklift. The worker disagreed that 10 to 12 tires were the maximum that could be built in one day. The worker disagreed that 30% of the worker's work was in the tire room. The worker noted he could get help to pick up a tire if it fell on its side.

29 The worker testified that there were other SP1s and SP2s, but the latter worked in a different department. He noted there would be three SP1s per day and did not know how many SP1s were on at night. The worker would help other workers pick up tires and he would get such assistance himself, but only if it were available. The worker did not lower the inflation cage with anyone's assistance and did not ask for anyone's assistance. The worker's business began in the summer of 2006 and continued until summer 2009. The hours changed over the years but his main priority was his work with the employer. The business was a secondary priority. This was only three to four hours per week. The worker had no quota at work and he could work at his own pace. If there was no tire stock, he would have to build one on an emergency basis and install it on the bus. It was unusual to use the forklift to carry stuff in the workplace and he could not use if it was unavailable. He built twenty tires on one shift on "many" occasions. Mr. N. was his supervisor for one part of the week while Mr. W, was the supervisor for the remainder of the week. There was usually an SP 1 dedicated to doing the tire work. Another SP 1 would be dedicated to do inspections and sometimes he would do that work or change-offs. When another worker was on vacation, he would do more of the work that did not involve tires. The worker was the "tire-guy" on his shift.

(vi) The testimony of the employer's witness, Mr. N.

30 Mr. N. testified that he was the bus fleet manager for fifteen years. He worked at both locations -- the S.R. and the S. facilities. He worked Sunday to Wednesday, 5:00 a.m. to 2:00 p.m. He was there for the first shift in the new S. facility in 2009. The morning shift would work 5:00 a.m. to 3:00 p.m. and the later shift would work 3:00 p.m. to 1:00 a.m. He spent 25% of his time supervising the maintenance floor area. He would assign work to the workers on a daily basis "as needed." He was a mechanic by trade. He was one of the worker's supervisors, and supervised the worker three days per week. The worker's hours changed once to align with a mechanic's work schedule. There was a mechanic, body person, SP1 (tire man) and SP2 (sweep, park, fuel) in the shop. There were four to five SP1s on the day shift in 2009. SP1 duties involved the tire room, inspections with a coach technician (mechanic), and shop work. The tire room involved checking tire wear. Inspections involved minor repairs and maintenance, including battery testing, lubricating, checking lights/seats, and replacing head lights and wiper blades. Repair work

orders were assigned to the mechanic. There were six inspections per day. The SP1 could assist with tires and minor repairs.

31 Mr. N. testified that the tire room was a closed-off area with a loading door and a man door. The tires/wheels were on a pallet. They were partially inflated and would be rolled into a cage. From the resting location, the worker would roll it over to the tire machine and use a lever. Once the tire was on, it was rolled five feet to the cage, which had a safety feature. They would pull the gauge, release a latch, and lift up the handle. The force on the cage was significant because it was a "substantial piece." There were shocks there to assist and then the tire would go to the adjacent tire balancing machine, where the tire would be lifted up. The tires would be stored in a metal apparatus and would be rolled out or taken out by forklift when needed. Installation of tires would occur in the shop and the bus was on a hoist. Tires would be rolled over to this area. A forklift could bring four of the tires. The forklift was "generally available," including in 2009. The tires were stored 10 to 12 feet behind the tire working area. No physical lifting was involved and there were no closures to the storage area. The wheel was five inches off the ground and installing tires would involve lining it up to the studs using a lever/fork. It would be pumped up to meet the studs in place. The tire man would usually do tire installation.

32 Mr. N. also stated that the tire man was not working exclusively in the tire room. A variety of other duties would be assigned to the tire man. The tire man could be working for eight hours straight making tires. The worker could make eight tires per day in 2009 or 2010. The tire man or mechanic could take tires off the bus. Taking tires on/off the hub was the most physically demanding aspect of the SP1 job. The worker's estimation that he could make 20 to 25 tires in a day is an overestimation. It takes one hour to make a new tire, or six to eight tires with balancing in one shift. The tasks were assigned based on the foreman's report and work assignments would be prioritized. A worker's seniority did not factor into the assignments. The worker was not always in the tire room as inspections were a "big part" of the job.

33 Mr. N. stated that the worker was treated like any other SP1 worker. Fifty percent of the worker's work was inspections and 50% was shop work including the tire-related work and deliveries and change-offs. Mr. N. was "very confident" that the worker's work tasks, as he saw them between Monday and Wednesday, were representative of the work done on Thursday and Friday. He also stated that when a tire drops on its side, a worker would have to get help which was "very easy" to get. A two-man lift was the recommended protocol and he never saw one worker lift up a tire on its side by himself. With respect to the February 17, 2010 meeting minutes, action was taken with respect to the supplier in question. The supplier was told to stop that procedure and the problem was corrected "within days." With respect to orders from the Ministry of Labour, he does not recall if he was there. He would not be involved in those aspects. He was aware of a concern with the cage and the plant/quality assurance people were involved in that. There was a component modification to make it more accessible to be put down. It did not go as high, which made it easier for the workers.

34 Mr. N confirmed that the tire room was not initially operational at the S. facility. A van would bring the tires from the old location and the worker would do a lot of this work. A forklift or rear lifting gate would be used at the van to load the tires. The procedure was for workers to report injuries and complete forms. There was no report of a back injury from the worker in 2009 or 2010 until Mr. W. got a call from the worker's doctor's office.

35 Mr. N. further testified that "tire man" was the name given to the position, a title that had been there for many years. One forklift was available at the S.R. facility and one at the S. facility. There was "usually no huge rush" to deal with things like tires on their sides. Mr. N. could do all the mechanic and SP1 work as he has the credentials for it, but he does not do that work as a manager. He cannot tell how many pounds of force is needed to jiggle the tires. Eight hours of tire work was possible. He was not there with the worker 2 days per week. He does not think it is possible to make 20-25 tires per day. He spent 25% of his time in the floor, 75% in the office. There was no written practice about the two-man lift procedure. With respect to the double-stacked pallets, this was corrected in a day or two. He did not correspond with the vendor about that as the compliance officer would have handled that, He could not say for sure about safety of one versus two persons operating the cage machine in 2009. The tire machines were tested in 2009. Machines were tested when they were installed in March 2009. He did not know when the laminated safety protocol sheet was attached to the machine. He cannot recall any machine-related

complaints. There are records concerning the quantity of tires that were built each day by workers.

(vii) The submissions of the worker's representative

36 On behalf of the worker, Mr. Sciacca submitted that the legislation and Board policy apply to the circumstances of the worker's appeal in the form of a disablement. He relied on the medical documentation that supported a work-related connection to the worker's low back injury. He particularly stressed that there were no medical opinions to rebut this. He also noted the worker did not have a pre-existing back condition and no impairment leading up to his disablement. The worker's condition gradually emerged over time and proof of accident has been established. The clinical notes from the family physician and the February 2010 meeting minutes support the worker's version of events. The worker's presentation of the low back injury has remained consistent from the beginning. The worker did not delay in reporting as he only informed his employer of the circumstances once it had been diagnosed. He also relied on Tribunal *Decision Nos.* 329/08, [\[2008\] O.W.S.I.A.T.D. No. 2376](#), 277/10, [\[2010\] O.W.S.I.A.T.D. No. 2673](#), and 2019/10, [\[2011\] O.W.S.I.A.T.D. No. 459](#) in support of his position. The worker indicated that the usual physical demands of the position were closer to the maximums identified on the PDA. The worker's job was heavy. The Ministry of Labour confirmed there were risk factors in the operation of the machines.

(viii) The submissions of the employer's representative

37 On behalf of the employer, Ms Kosmidis submitted that the worker had been working three and a half years in the SP1 position. He worked regular duties until March 18, 2010. He did not report any injury to the employer in December 2009. She referred to the family physician's clinical notes in noting the worker's medical status in 2009. She noted the worker's problem started with a visit to the chiropractor, which led to the worker's bowel incontinence. It was only after this episode that the worker reported an injury to his employer. The MRI scan shows the worker had problems everywhere along his spine, which is a significant pre-existing condition. Dr. Ahn did not comment on causality. Dr. Wu was advocating for the worker. Dr. Woolford presented a sloppy report, noting the worker did not smoke when he actually did smoke according to the documentary record. Dr. Woolford's description of the worker's installation duties was inaccurate. The Ministry of Labour report was based on eight hours of tire work but the worker's duties were varied in that he does not work all day in the tire room. There was an incorrect reference in Dr. Woolford's report to the left side, when it was actually the right side of the back. Mr. N.'s testimony confirmed that the worker had a variety of duties and that the heaviest part of the job was not the inflation cage. She also relied on the Tribunal's medical discussion paper suggesting that age-related changes can cause symptomology in the worker's case. The worker's spinal problems were not related to the work duties.

(ix) Analysis

38 The Panel needs to determine in this appeal whether on a balance of probabilities an accident involving the worker's lower back occurred in the course of his employment. The Panel has considered the totality of evidence presented in this appeal including the documentary record and the testimony from the worker and the employer's witness, Mr. N.

39 The worker's appeal has been advanced on the basis that the onset of his lower back injury was due to an accident in the nature of a disablement at work that should be compensated for by the WSIA. The Panel first notes that it is required to apply WSIB policy in the adjudication of this appeal as a result of the applicable provisions of section 126 of the WSIA. OPM Document #15-02-01, *Definition of an Accident*, indicates the definition of "disablement" to include "a condition that emerges gradually over time" and "an unexpected result of working duties."

40 In order to establish that an accident in the nature of a disablement occurred, proof of accident is required. The standard of proof required in Tribunal proceedings is proof on the balance of probabilities. Tribunal case law has held that in disablement claims the presumption does not apply. In a claim for an accident in the nature of a disablement, there may be many factors contributing to the impairment but it must be shown on the balance of

probabilities that the workplace factors played a "significant contributing" role in the cause of the impairment. See Tribunal *Decision Nos.* 1672/04; [\[2009\] O.W.S.I.A.T.D. No. 162](#), 1386/03; [\[2004\] O.W.S.I.A.T.D. No. 2414](#), 426/07; [\[2007\] O.W.S.I.A.T.D. No. 517](#), and 583/07, [\[2007\] O.W.S.I.A.T.D. No. 911](#).

41 In making our determination that proof of accident has been established in this appeal, the Panel has first considered OPM Document #11-01-01, "Adjudicative Process," which sets out a five-point check system for ruling on initial entitlement to claim benefits and states that an allowable claim must have "proof of accident." On the issue of "proof of accident," this applicable Board policy notes:

Some points adjudicators consider when examining proof of accident are:

- * Does an accident or disablement situation exist?
- * Are there any witnesses?
- * Are there discrepancies in the date of accident and the date the worker stopped working?
- * Was there any delay in the onset of symptoms or in seeking health care attention?

42 The Panel finds on the balance of probabilities that the worker's work duties were a significant contributing factor to his low back injury for the following reasons.

43 There is an unbroken stream of documentary evidence that points to the worker claiming the development of lower back difficulties within the temporal context of December 2009. The worker's testimony was clear that by December 2009, he had developed significant low back pain. This was also consistent with his testimony provided at the Board's Appeals Branch. It was also consistent with his account on the Form 6, which noted "Dec. 09-Back and leg pain/numbness."

44 More so, the December 2009 onset of the worker's low back symptomology was also specifically mentioned in the worker's initial conversation with the Board on April 6, 2010. According to the clinical notes of Dr. McAlister (family physician), a reference was made on 'February 16, 2010 that the worker had "sciatica" and orthotics was prescribed. The next notation dated February 22, 2010 noted "Dec ... sciatica," further pointing to a December 2009 onset. Dr. Ahn's (orthopedic specialist) consultation report dated March 26, 2010 also provided that the worker presented with "low back pain since December 2009". Dr. Woolford (orthopedic specialist) also noted on May 3, 2010 that the worker "was complaining of problems with pain in his back and right leg which started in December and has got progressively worse up to March." Dr. Belchetz, a doctor at the hospital who assessed the worker on March 18, 2010 completed a Form 8 and noted the date of accident as "dd ? / mm 12 / yyyy 2009," further suggesting a December 2009 onset. Dr. Solanki's initial (physiotherapy and chiropractic) assessment dated November 1, 2010 noted the worker's "right lower back" symptomology "Began in: Dec 2009". Dr. Paitich's (orthopedic and reconstructive surgeon) solicited report dated September 27, 2010 noted the worker's "onset of symptomatology was December 2009." Dr. Foudy's (chiropractor) clinical notes also initially noted "O -- DEC 2009" as of the initial February 24, 2009 visit. The Panel finds it significant that there is no deviation of substance in the documentary record from the December 2009 onset of the worker's low back symptomology.

45 The worker related this back pain to the physically demanding work that he was responsible for in his SP1 position with the employer. The worker was employed as a SP1 employee in December 2009, at the time of the above-described onset of back symptomology. According to the worker's testimony, he was not engaged in his seasonal grass-cutting business since September/October 2009 and therefore the Panel finds on a balance of probabilities that this seasonal work was not a factor in the development in the worker's back symptomology in December 2009.

46 The Panel has closely assessed the nature of the work duties that the worker was responsible for with the accident employer. The Panel finds on a balance of probabilities that risk factors for the development of a low back injury were present in the worker's SP1 duties. According to the job description dated entitled "Serviceperson 1"

dated August 31, 2006, the position was described as:

... Under the supervision of the Supervisor, Fleet Maintenance, to set-up and operate a brake lathe and tire mounting and balancing machinery, diagnosis, repair and rebuild of bus components, mount, balance, repair and inspect tires, and to assist a Coach Technician as directed.

POSITION MANDATE

This position is responsible for:

Setting up and operating the brake lathe and rebuilding brake drums and linings.

Rebuilding detached bus components,

Performing tire repairs, inspections, mounting and balancing.

Assisting Coach Technicians with repairs, the assembly and disassembly of bus brake rebuilds and inspections

47 According to a Physical Demands Analysis for the "Service Person 1" position dated June 2, 2008, the position's maximum lifting weight was described as 45 kg and the usual weight was 5 kg. With respect to carrying, the position's maximum lifting weight was described as 30 kg and the usual was 5 kg. Both of these were described as "minor daily activity" in frequency, requiring less than one hour per day. A "major job demand," requiring "frequent repetition for more than 3 hours daily," applied to pulling, handling and gripping where the position's maximum lifting weight was described as 45 kg for each task, and the usual weight was 10 kg for pulling/handling and 5 kg for the gripping. The "working environment" was also described therein as having major job demands applying to "exacting, demanding, repetitious, active, heavy" aspects of the job. The Panel considers this significant evidence that the job was heavy and repetitive in nature. The Panel also considers it significant evidence that a substantial portion of the work involved pulling, handling and gripping weights that could be heavy. The Panel also accepts the worker's testimony that his "usual" work involving lifting was more than 5 kg in weight. Although there would have been some variation in the work duties, the Panel finds on a balance of probabilities that the worker's work in the Tire Room was a significant component of his work duties and that from time to time it was his exclusive work over the course of an entire work-day. Mr. N's testimony noted it was possible that a "tire man could be working for eight hours straight making tires," although this was not a typical day.

48 The Panel also places significant weight on the Ministry of Labour's assessment of the work environment that the worker actually worked in. According to a report completed by their Ergonomist Consultant of the Ministry of Labour on July 8, 2011, the following was captured with respect to the employer's "Tire Room":

A visit was made to this workplace to perform an ergonomic inspection. The Tire Room was the focus of this review due to the physical nature of the work performed in this area.

It was learned that 1 or 2 workers are normally assigned to the Tire Room. These workers can complete a maximum of 14-18 tires in a shift. Each tire cycles through the 3 machines in this room which include the wheel/tire install machine, the tire inflating cage and the tire balancer. These workers are also responsible for removing the tires from and installing tires onto the buses.

Findings:

1. Workers are required to lift the 50 lbs. rim up onto the post of the Rim machine. In a worst case scenario the worker would be required to assemble 18 tires which would include 14 lifts of the rim onto the post. This results in one lift every 23-30 minutes.

The physical demands of manual handling tasks are influenced by many work task factors including; the frequency of handling, the duration of handling, size of the load, how close the load can be maintained to the body, the initial position of the load, the final position of the load and how the load is moved: All of these factors must be considered when determining what weight or forces can be safely handled in a given situation.

The article "The design of manual handling tasks: revised tables of maximum acceptable weights and forces" authored by Stover Snook and Vincent Ciriello in 1991, studied manual materials handling. Snook (1991) has developed tables that identify lifting, lowering, pushing, pulling and carrying capabilities for various percentages of the population. Snook determined that when a task is not within the capabilities of 75% of the workers, there is a three times greater risk of back injury associated with that task.

The Ministry of Labour expects tasks to be designed within the capabilities of this percentage of workers.

This task is acceptable according to Snook and the Ministry of Labour. The maximum acceptable weight for males at a frequency of one lift every 23-30 minutes is 24-29 kg

2. The tire inflation equipment is covered by a counterbalanced cage. This cage must be lifted and lowered allowing the loading and unloading of the tire. An upward force is exerted to lift the cage while a downward force is exerted to lower the tire cage. The upward force to lift the cage was measured and found to be 20-25 lbs. while the downward force exerted to lower the cage from a point 58-59" above the floor was found to be 70-80 lbs.

The University of Michigan 3 Dimensional Static Strength Prediction (3DSSP) program (Version 6.0.4) was used to perform static 3 dimensional postural analyzes of this task. An average male performing a downward pull of 80 lbs. (36 kg) was analysed. Biomechanical postural analyses were used to provide information on the muscular demands (and spinal compression at the lower back) during the performance of this downward pull at a height of 58" above the floor. It was found that this task exceeds the strength capacity for the average male worker. At the time of the visit the employer was aware that this task was identified as physically demanding and was to be carried out by two workers. However, it was learned that there are times when this may not be occurring. Therefore, an order is written under Section 25(2) (h) to ensure that the downward pull involving a lone worker is discontinued and procedures for this task are written documenting the control to be used to ensure downward pull forces are not exceeded. This can involve but is not limited to the mandatory use of two workers. The employer is reminded that administrative controls must be documented, trained and carefully supervised.

4. Workers are also required to balance each tire. A worker at the tire balancing machine was observed to reach to the controls on the right while holding the tire with his left hand. The reach was measured to be 108 cm. A repetitive forward reach with two hands extended should not exceed 36 cm while a one handed reach should not exceed 46-51 cm (Eastman Kodak, 1983). The reach at the balancer is excessive. At the time of the visit, a quick review of the owner's manual was carried out. All depictions of the balancer in the owner's manual showed a shorter distance between the controls and the tire. The employer agreed to safely shorten the reach. One order is issued to safely reduce the distance of the reach at the balancer [sic]

49 The Panel finds this assessment to be reliable and significant in that risk factors for injury in the employer's Tire Room were identified by the Ministry of Labour. This assessment took place over one year after the worker left the workplace (March 18, 2010) but nonetheless it does objectively describe some of the work-related tasks, from an ergonomic viewpoint, that the worker would have been responsible for during his work in 2009 and 2010. Importantly, the Ministry of Labour noted that the work was "physically demanding" when using the tire inflation equipment and that two workers should be doing this work together. The Ministry of Labour "learned that there are times when this may not be occurring" in reference to two workers not actually using the machine in tandem. This was consistent with the worker's testimony that he was doing this type of work alone and that the safety officer trained him to use the machine in that manner. The Panel finds the worker's work duties were a significant contributing factor in the development of his lower back injury around December 2009.

50 The worker related his back symptomology to the physically demanding work that he was responsible for in his SP1 position. The Panel has found on a balance of probabilities that there were several aspects of the SP1 duties that were heavy, repetitive and predisposed to contributing to a musculoskeletal injury. The Panel finds it significant that Dr. Belchetz's assessment on March 18, 2010 that resulted in a Form 8 noted the accident history as "back pain after lifting at work." Dr. McAlister's Form 8 dated March 23, 2010 noted the worker's "condition [secondary] to

heavy lifting at work over the years". According to Dr. Woolford's report, dated March 2, 2012:

... SUMMARY: This patient strained his back at work, and has been experiencing symptoms in his lower back right leg -- typical of a nerve root impingement associated with underlying degenerative changes and spinal canal stenosis causing sciatic symptoms.

This resulted entirely from his employment in a heavy manual job for which two workers are considered to be necessary (according to a report prepared by the Ministry of Labour inspection) -- a recommendation with which [the employer] often did not comply.

As a result of this the patient sustained a posterolateral disc protrusion at the L4-5 level on the left side resulting in severe back pain and sciatic symptoms. As a result of this the patient has not been able to return to his occupation. He still remains disabled.

PROGNOSIS:

Taking into account the amount of time that this patient has been off work, the prognosis or returning to work is not good. I am enclosing for you an algorithm published in the Canadian Medical Association Journal in which the prognosis for return to work was discussed. It is clear from this that the patient is very unlikely to return to this type of work, and requires help in a retraining programme for a light sedentary job.

It was noted that the patient did have some underlying degenerative changes that would be considered a co-morbidity, but he had not suffered any significant back pain, or sciatica prior to the WSIB claim for his back injury at work.

If it were not for this patient injuring himself at work he would have been unlikely to have suffered this disability.

Degenerative disc disease is very common in the general population, and does not necessarily cause any symptoms. That is until a slip, strain, fall or accident occurs.

In this patient a repetitive strain, or even a single case of heavy lifting without assistance would be sufficient to cause his disability

51 This report, written by an orthopedic specialist, suggests that the worker's employment, which the Panel has found to be heavy and repetitive in several aspects, was related in its entirety to the development of the worker's back injury. While the report earlier noted that the worker "did not smoke," which appears incorrect from elsewhere in the documentary record, and identified a left-sided protrusion at L4-5 (the MRI dated March 18, 2010 noted a right-sided problem at that level), it cannot be simply discarded on those accounts. The presence or absence of a smoking history is not relevant to establishing whether "proof of accident" has been met in this appeal. In the Panel's view, Dr. Woolford was also simply mistaken in his interpretation of a left-sided L4-5 intervertebral protrusion. Otherwise, his report is reliable and objective in its findings and based on an actual physical examination of the worker.

52 In this light, the Panel has further considered OPM Document #11-01-01, "Adjudicative Process," which states that an allowable claim must also have "compatibility of diagnosis to accident or disablement history." The Panel accepts the evidence of Dr. Woolford in his report dated March 2, 2012 and finds that the worker's employment was a significant contributing factor in the development of his lower back injury. The Panel has also not been provided with any medical evidence that refutes compatibility between the worker's diagnosis and his work-related history. The documentary record has medical information that supports that the worker had no significant underlying and pre-existing lower back pathology, other than a July 2009 reference in the clinical notes to an increase in the pain to the knees/back and the MRI report dated March 18, 2010 that noted the existence of multi-level degenerative disc disease of the lumbar spine, which the Panel does not find to be significant. The worker continued to work in 2009 and 2010 without interruption until he realized the extent of his difficulties following admission to hospital in March 18, 2010. Therefore, the Panel finds on a balance of probabilities that the worker's lower back symptomology that manifested in December 2009 and progressively worsened in the following months was compatible to the work-related disablement history provided by the worker.

53 In accepting the worker's accident/reporting-related descriptions and overall testimony, the Panel relies on the fact that the worker's testimony at the hearing was clear, straightforward, forthright, and internally consistent. The worker's testimony was aligned with the documentary record. Therefore, the worker's version of events was in harmony with the preponderance of the probabilities when carefully reviewed alongside the documentary evidence, and the testimony of Mr. N., which was available to this Panel. As such, the Panel concludes that the quality and volume of documentary evidence, of a medical and non-medical nature, along with the reliable testimony of the worker supports a finding that his low back injury unexpectedly arose out of and in the course of his employment duties in the form of a "disablement."

54 On the basis of the totality of the evidence considered, having regard to applicable law and Board policy, the Panel concludes that the worker has established initial entitlement to benefits on a "disablement" basis under the WSIA for a workplace injury affecting his lower back. The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication.

DISPOSITION

55 The worker's appeal is allowed. The worker has established initial entitlement to benefits for an injury to his lower back sustained in the course of his employment on a disablement basis. The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication, subject to the usual rights of appeal.

DATED: July 11, 2013

SIGNED: L. Petrykowski, E. Tracey, R.J. Lebert