

Workers' Compensation Appeal Tribunal

Decision #150

Claim No.: 3000-0095

Date Notice of Appeal Received: September 2, 2008

Date of Oral Hearing by Appeal Committee: October 9, 2008

Date Hearing Closed: October 9, 2008

Date of Decision: November 13, 2008

Appeal Committee Members appointed under s. 64 (1) of the *Workers' Compensation Act*, S.Y. 2008, c. 12

Committee Chair:	E. Sumner
Member representative of employers:	C. Alexander
Member representative of workers:	W. C. Gryba

In attendance: The Worker
The worker's representative – Susanne Barva
Observer – Rebecca Anderson
Recorder - Vernna Johanson

Location: Boardroom 1B, 419 Range Road
Whitehorse, Yukon Territory

Introduction

This 48-year-old man was employed as an operation supervisor for a recycling agency. On February 27, 2007 he claimed a lower back injury with Yukon Workers' Compensation Health & Safety Board (the "board") when he slipped on a piece of cardboard which was covering an icy floor and fell backwards. He was provided medical aid and loss of earnings benefits for acute low back strain.

The worker was informed by letter on September 6, 2007 that the board would be responsible for the acute injury to his lumbar spine as a result of the February 27, 2007 slip and fall at work. The board would not compensate him for his pre-existing degenerative disc disease and sciatica. A further May 7, 2008 letter by a board adjudicator notified the worker he was no longer entitled to compensation for his low back sprain; his claim for compensation was concluded. The worker appealed the adjudicator's decision to a hearing officer who subsequently denied the worker's appeal in a decision dated August 15, 2008.

Jurisdiction

- [1] The workers' advocate office, on behalf of the worker, forwarded the appeal on September 2, 2008 of the hearing officer's decision with the tribunal under s. 54 of the *Workers' Compensation Act*, S.Y. 2008 (the "Act"). Therefore, the review (appeal) should be determined according to the *Workers' Compensation Act*, S.Y. 2008, c. 12. Section 65(1) of the *Act* gives the appeal tribunal jurisdiction to hear and decide this appeal.
- [2] The board provided the following policies as relevant to this appeal under the authority of section 64 (4) of the 2008 *Act*:
 - Policy IN-03, Transition Policy – *Workers' Compensation Act* 2008, effective July 1, 2008;
 - Policy AP-03, New Evidence at Reviews & Appeals, effective July 1, 2008;
 - Policy CL-47, Pre-Existing Conditions, effective date 94-04-01;
 - Policy GC-07, Role of the Medical Consultant, effective January 26, 1995.
- [3] The appeal committee considered these policies, the worker's testimony, the deputy workers' advocate's submission, and the entire record as provided by the board.
- [4] The worker attended the hearing and testified under oath. He was represented by the workers' advocate. An observer from the workers' advocate office was in attendance. The proceedings were recorded. The employer was notified of the appeal but did not participate.
- [5] The worker filed a claim for an injury which occurred on February 27, 2007. Policy IN-03, Transition Policy – *Workers' Compensation Act* 2008, effective July 1, 2008, directs how the Act and policies apply to claims made before the effective date of the legislation. Section 2 of the policy speaks to predecessor legislation as follows:

Where a previous *Workers' Compensation Act* is repealed the normal rule of interpretation is to use the most current *Act*. The only exception is the

transition part of a *Workers' Compensation Act*, which directs that entitlement of a worker to compensation is determined pursuant to the *Workers' Compensation Act* in force at the time of the worker's injury.

Hearing Officer's Decision

- [6] The hearing officer's August 15, 2008 decision denied the worker's appeal. He found the evidence supported the adjudicator's May 7, 2008 and July 25, 2008 decisions that found it was not probable the worker was suffering from an acute strain 14 months after the injury.

Evidence from the Record

- [7] The Worker's Report of Injury/Illness, dated February 28, 2007 claims the worker injured his lower back on February 27, 2007 when he stepped on a piece of cardboard on an icy floor and it slipped which caused him to fall backwards. The Employer's Report of Injury/Illness, dated March 6, 2007, provides the same information.

- [8] The file contains two CT scans undertaken on July 20, 2006, which pre-date the injury at work. A CT scan of the lumbar spine reveals mild to moderate degenerative disc disease and mild to moderate bilateral facet osteoarthritis at L3-4, L4-5 and L5-S1 of the spine. "Impression" states:

At L3-4 and L4-5, there is moderate to severe canal stenosis. At L5-S1 there is a focal central disc protrusion resulting in a moderate canal stenosis and effacement of lateral recess bilaterally causing probable impingement of traversing S1 nerve roots. There is mild displacement of exiting right L3 and L4 nerve roots secondary to disc bulge.

- [9] The CT scan of the cervical spine, dated July 20, 2006 notes:

At C5-6, there is moderate degenerative disc disease and bilateral facet OA [osteoarthritis]. There is moderate canal stenosis secondary to disc bulge with effacement of the anterior thecal sac and minimal impression upon the anterior cord.

- [10] Dr. Tadepalli's first report of February 28, 2007 diagnoses back sprain and notes "known history of sciatica, spinal stenosis" as factors which might complicate recovery.

- [11] The worker sees Dr. Abdelmalek on March 1, 2007. The doctor states the worker is complaining of back pain that radiates down both limbs with difficulty bending his trunk. The diagnosis is "muscle spasm of the back" with complicating factor "osteoarthritis of back".

- [12] A lumbar spine x-ray conducted on March 6, 2007 states in part:

An S1 spondylosis is suspected, similar to the previous examination. There is no evidence of significant spondylolisthesis. There is evidence

of mild degenerative disc disease with mild disc space narrowing at L3-4, L4-5 and L5-S1.

- [13] The worker attends Dr. Abdelmalek on March 6, 2007 complaining of constant pain down his left hip and leg. Dr. Abdelmalek changes his diagnosis to “back muscle spasm with early degenerative disc disease at L4, 5 and L3, 4”. New x-rays are ordered.
- [14] An adjudicator notifies the worker by letter dated March 8, 2007 that his claim for compensation for a back sprain has been accepted.
- [15] Dr. Abdelmalek’s March 16, 2007 progress report states the worker is complaining of pain down his left hip and leg. X-rays of the lumbar spine “showed only osteoarthritis”. Dr. Abdelmalek notes the worker “was laid off work”.
- [16] A March 21, 2007 note to file by the adjudicator states she contacted the worker’s supervisor to gain more information with respect to the worker’s lay-off. The supervisor explained that over time the worker could not physically manage some of his duties so these were delegated to other staff. New duties were added to justify the worker’s salary but eventually an imbalance occurred with respect to his duties and salary. There was a slow-down in volume of work and the worker was laid off. The worker injured his back on February 27, 2007; he was formally laid off on March 7, 2007.
- [17] A CT scan of the lumbar spine completed on March 29, 2007 states:
- Impression: Central spinal stenosis, which is moderate to severe at L3-4 and moderate at L4-5. L4-5 mild central disc protrusion causing a mild extradural impression on the thecal sac. L5-S1 central and left-sided disc protrusion/herniation impinging on the thecal sac and left S1 traversing nerve roots.
- [*Dorland’s Pocket Medical Dictionary*, 25th ed. defines “stenosis” as narrowing or contraction of a duct or canal.]
- [18] Dr. Abdelmalek reports on May 5, 2007 the worker attended with decreased range of motion of his lower back. The CT scan revealed multiple level disc prolapses and osteoarthritis of the spine. The worker is referred to a specialist and for physiotherapy treatments.
- [19] An initial assessment report by physiotherapist Shelley Gellatly notes objective findings which include “lumbar spine range of motion – limited in all directions with pain down both legs in extension”. Clinical impression is “muscle guarding and tightness due to disc protrusions L3-L5.”
- [20] The worker attends Dr. Abdelmalek on May 28 and 31, 2007. He reports the worker is very frustrated after knowing that he cannot see a specialist. Dr. Abdelmalek reports it was a misunderstanding and he will speak to WCB about a specialist consultation as well as the need for an MRI.

[21] A June 1, 2007 note to file by the adjudicator states the worker's doctor called and requested a specialist consultation be arranged by the board. When she asked what the nature of the referral should be, Dr. Abdelmalek requested a neurologist because of concern the worker has a disc bulge at L5-S1. She explained that she was in receipt of the CT scan which showed significant lower spine changes and a bulge at L5-S1. The adjudicator states she will have an MRI referral sent to the doctor and proceed with a referral. She notes she explained to the worker that the board cannot be responsible for his spine degeneration.

[22] An MRI of the lumbar spine taken on July 26, 2007 states:

Impression: Small central disc herniations are present at the L3/4 and L4/5 levels, and at each level are superimposed on central acquired spinal stenosis. There is also a small to moderately sized central disc herniation at the L5/S1 level.

[23] The worker sees Dr. Sahjpaul, neurosurgeon, at the Specialist Referral Clinic on July 26, 2007. Dr. Sahjpaul reports:

[The worker] has severe multilevel lumbar discogenic disease with relative spinal stenosis at L3-L4, L4-L5 and L5-S1. In my opinion, the L4-L5 and L5-S1 disc herniations are primarily responsible for his left sciatica in that he has lateral recess stenosis and L5 and S1 nerve root compression.

Dr. Sahjpaul notes that surgical treatment has been explained to the worker who understands and would like to proceed.

[24] The board medical consultant reviews the file and reports on August 13, 2007 that the CT scan of 2006 is almost identical to the CT scan of July 20, 2007, with some improvement in the level of stenosis of the L3 and L4 region. Following in part, is the consultant's report:

Combining all the investigations including CT scan of 2006, CT scan of 2007, and MRI of 2007 it appears that [the worker] has moderately severe disease of the lumbar spine. The disease has been existing since at least, and most likely longer than, 2006. The extent of the degenerative disease of the spine and the consequent thickening of the ligamentum flavum as well as the bulging of the disc in several places is a diagnosis of chronic disease. There is no evidence whatsoever that [the worker] sustained an acute disc prolapse injury on the day of his injury 27th of February 2007.

. . . The CT scan evidence showed clearly that there is significant pre-existing lumbar spinal disease and pre-existing disc prolapse and pre-existing left S1 nerve compression.

- [25] The worker is notified by the adjudicator in a September 6, 2007 letter that the evidence indicates he sustained an acute injury to his lumbar spine at work on February 27, 2007. The board will provide compensation benefits for the acute back strain only; they will not compensate him further for his pre-existing condition of degenerative disc disease and associated sciatica.
- [26] Dr. Abdelmalek's September 11, 2007 progress report states that arrangements will be made for the worker to be seen by a spine clinic or a neurosurgeon via the health insurance system. A further progress report dated December 11, 2007 notes the worker is expecting to see a specialist at Whitehorse General Hospital "in a few months".
- [27] A fax dated December 12, 2007 from the adjudicator to Dr. Abdelmalek states the worker's file is still active pending a decision regarding suitable occupation although they deny responsibility for the worker's back surgery. The adjudicator requests an update on the worker's condition so the board can proceed with determining a suitable occupation.
- [28] An adjudicator poses the following question to the medical consultant on April 18, 2008:

Is it plausible that the worker is still suffering from an acute low back strain approximately 415 days after the work-related incident?

The medical consultant responds on April 29, 2008 as follows:

The prognosis for acute low back pain associated with acute back sprain is excellent. Only approximately 1/3 of patients with back pain seek medical care, therefore most apparently improve on their own. Up to 90% of patients seen within 3 days of onset recover within the first 2 weeks. Having said this, the prognosis appears less favourable among many patients who have chronic or recurring pain. These patients are also the category of patients who have moderate to severe degenerative disease of the back. . . . Evidence shows that 1/3 of patients who suffer acute back strain substantially improve after just one week and 2/3's after seven weeks. I can therefore state that it is my opinion that it is not reasonable and not probable that the worker is still suffering from an acute low back strain approximately 415 days after the work related incident. It is likely because the worker has a degenerated lumbar spine, that he has had recurrences as expected of his back pain. This again, should not be attributed to the back strain that he sustained over 14 months earlier.

- [29] An adjudicator writes to the worker on May 7, 2008 noting the worker's claim was accepted for an acute back strain and since there has been no further medical reporting indicating the presence of a low back strain, his claim for compensation is closed.
- [30] On July 24, 2008, the deputy workers' advocate provides further diagnostic and physiotherapy reports to the hearing officer. As directed by Policy AP-03, New Evidence at Reviews and

Appeals, the hearing officer advances the new information to the adjudicator for reconsideration. Following is a list of documents provided as new evidence:

- a) Physiotherapy chart notes and an initial assessment report dated from May 24, 2007 to July 19, 2007.
- b) Therapy services outpatient referral from dated May 7, 2007. The reason for referral is central spinal stenosis of the lumbar spine – moderate to severe at L3-4 and moderate at L4-5 with central disc protrusion. L5-S1 central and left sided disc protrusion/herniation impinging on the thecal sac and left S1 transversing roots.
- d) May 29, 2007 CT scan of the lumbar spine.
- d) March 6, 2007 x-ray of the lumbar spine.
- e) Initial assessment report from Riverfront Physiotherapy dated October 30, 2002 which states in part:

I ½ years ago low back pain began – injured while at work jarring on fork lift. Progressively worse over last year and a half. General low back pain right greater than left. Pain in both hips. Numbness in right greater than left – whole leg feels asleep.
- f) September 23, 2002 physiotherapy report states the worker has had low back pain for 3 days which radiates into his thigh on the right side. No history of trauma.
- g) An x-ray of the thoracic spine dated May 9, 2002 states, “There is mild scoliosis of the lower 2/3rds of the thoracic spine convex to the left. There is no evidence of disc or synovial joint degeneration.”
- h) An x-ray of the cervical spine dated May 9, 2002 notes, “mild degenerative narrowing of the C5-6 disc, associated with 1mm posterior subluxation of C5 on this basis. There is no evidence of facet joint degeneration.”
- i) A December 6, 2001 x-ray of the lumbar spine notes “disc space narrowing at L4-5 and L5-S1 without significant findings.”

[31] On July 25, 2008 the adjudicator renders his decision on the new information. He concludes the new information strengthens his May 7, 2008 decision that the worker is no longer suffering from an acute low back strain as a result of the prior work-related incident. The adjudicator notes the orthopaedic surgeon felt the worker was suffering from the effects of sciatica due to disc herniations at L4-L5 and L5-S1. These findings were present prior to the February 27, 2007 work incident.

[32] The hearing officer asks the medical consultant for assistance in answering questions he has with respect to a change in diagnosis, degenerative disc disease and a muscular injury

affecting a pre-existing condition. On August 8, 2008 the medical consultant, provides a "Patient Education Handout on Lumbar Degenerative Disc Disease" and a reprint from UpToDate, titled, "Lumbar Spinal Stenosis". Following is an excerpt from the medical consultant's response:

A simple muscle injury would not be expected to produce any structural changes to the spine. The effect would be similar to a superficial bruise. Temporarily, there might be a change in symptoms, as the muscle spasm might prevent the person from stretching or getting into a more comfortable position. The natural history of the muscle injury is resolution of spasm and symptoms, while the underlying structural changes remain unchanged. From a medical perspective, it is not reasonable nor probable to suggest that a superficial muscular injury can have a lasting effect on an underlying pre-existing condition such as a degenerative disc disease or spinal stenosis.

- [33] The hearing officer renders a decision on August 15, 2008 denying the worker's appeal. He found the evidence supported the adjudicator's May 7 and July 25, 2008 decisions that it was not probable the worker was suffering from an acute strain 14 months after the injury. "He may be incapacitated from work due to the proven degenerative condition of his low back."

Worker's Testimony

- [34] The worker explained the incident at work on February 27, 2007. He said he was checking on the guys before the end of the shift. He walked into the warehouse to ensure everything was going smoothly. There was ice on the floor. He went to the baler where two employees were working and told them to sand the area once they had cleared it. They agreed. He turned around and started to walk back to the other side of the warehouse. There was a piece of boxboard on the floor. The worker explained boxboard is smooth on one side. He never realized there was ice on the floor underneath the boxboard and when he stepped on it, he "completely did a flip". His legs came out and he landed flat on his behind. He put his arms out to break the fall. He said his hips hit really hard on the cement. He lay there for a few minutes because he was in a lot of pain. Once he had recovered a little, he rolled over and got up on his knees, walked around and crouched against the wall for approximately 5 minutes. The worker said it was close to the end of the shift so he went back to his office and sat for a few minutes and tried to do some paperwork and then went home. He thought he would be better in the morning or the pain would ease up during the evening. In the morning, he said, the pain was not going away.
- [35] The worker testified the following day it took him at least half an hour to 45 minutes to get out of bed because as soon as he moved he had a lot of pain. He called into work and then went to the hospital.
- [36] The worker independently provided the board with two pre-injury CT scans of his cervical spine and lumbar spine dated July 20, 2006 which identified pre-existing findings. The worker said

his symptoms prior to the fall would include soreness of his back but it was nothing sustained. He would pace himself so he could still continue working. He maintained full-time employment.

- [37] After the slip and fall he was prescribed painkillers and also undertook physiotherapy treatment as well as acupuncture, although the acupuncture did not seem to help.
- [38] As a result of the injury, he said his symptoms are constant pain across his hips and back, with numbness down the back and sides of his legs. He has tingling, and if he moves a certain way, he gets “electric shocks”. He explained these as constantly dealing with the onset of a Charlie horse – tightness and cramping. The worker said he has loss of feelings and weakness when he is walking. He has trouble sleeping because he is shifting position to try to get comfortable. If he does not move, his back pain is aggravated. On the other hand, if he does too much, he experiences shooting pains. The worker said that before the accident, if he overdid it, he would be achy but he did not have the same symptoms he has now.
- [39] The worker testified that he attended 17 physiotherapy sessions which centered on increasing core strength to the abdominal muscles combined with electrical manipulation. He described this as four little pads that work the muscles to release the tension. [It is called a “TENS” machine which is Transcutaneous Electrical Nerve Stimulation. It is used for pain control, both acute and chronic.] The worker said he tried acupuncture. The first time it helped for about an hour and then it varied after that. He said acupuncture treatments did not work for him. The worker said the only thing which helps to relieve the pain and pressure is constantly shifting and moving positions. Heat and stretching also lend some relief.
- [40] When questioned whether the worker discussed his back history with Dr. Sahjpaul, neurosurgeon, on July 26, 2007, the worker said he told the doctor that when he overdid his activities before the incident, his pain would always subside or go away. The pain and discomfort after the injury could not be compared to what he experienced previously. The worker said that although he is not sure whether his medical history was provided to Dr. Sahjpaul, the doctor was flipping through some papers which the worker assumed was his medical reports.
- [41] The worker explained the physical demands of his job as follows:
- He was responsible for anything that happened in the warehouse which included loading and unloading trucks.
 - Helping prepare the baler.
 - Baled and pre-baled goods using forklifts and physically dragging product.
 - Maintaining and servicing all the equipment, including rebuilds on most of the machines.
 - If one of the workers was ill, he had to do their job.
 - Take care of the paperwork.
 - Manage the staff.
- [42] The worker testified that at least 50% of his time was spent operating equipment such as the forklift, loader, and pallet jacks. He said when he first started in 2000, the forklift was equipped with solid tires for approximately one year. He complained about it. He said that was when initially his back started “acting up”. There were a few instances when he hit a hole while on

the forklift and it jarred his back. He explained it “like riding a jackhammer”. The worker said the loader is not too bad because it is equipped with an air glide seat and large tires. He said the yard was always rutted, causing the equipment to bounce and jar. He could feel it through his entire body.

- [43] Currently he is unemployed. It is his opinion that his injury resulted in his employer’s decision to lay him off on March 7, 2007. He does not believe there was any concern with his work ethic or work performance. He said at one time he asked for clerical help because there was too much to do. Upon being promoted to a supervisory role, his work on the equipment did not decrease. He was still responsible for training other workers and still had to work the equipment; extra help was always needed. Before beginning work for this employer, he said he was pain-free.
- [44] The worker said he worked for the accident employer for 8 years. Before that he worked in a factory “building industrial hose”. He said the work was not demanding and although he operated a forklift in that job, it was inside and the floor was smooth.
- [45] The worker was questioned why he did not file a claim when he first noticed his back symptoms in 2002. He said that he had just moved his family to the territory in April of 2000. He had 4 children and needed to find employment. It took awhile but he finally got a job. He did not want to make waves because he was fairly new at his job. Also, he thought the symptoms would get better and he wanted to do his best to stay working. He had responsibilities. He attended physiotherapy and continued working.
- [46] He testified he did not undertake any recreational activities such as snowmobiling, hiking, or sports which could cause injury to his back.
- [47] The worker said his doctor ordered the 2006 CT scans because at that time he was loading at least 4 to 5 trucks per week by himself without rest or breaks in between. This caused his back to become aggravated.
- [48] He said before the employer started modifying his work, he tried to delegate some of the heavier tasks to his workers. However, in his last 8 months of employment he was primarily assigned loading trucks with the forklift. Although he tried to maintain the yard so it was not so rough, there was always heavy equipment operating on it which caused big holes and uneven terrain.

Workers’ Advocate’s Submission

- [49] The workers advocate says sections 3, 6, 33, of the *Workers’ Compensation Act*, RSY 2002 apply to this worker’s case as well as the following policies:
- Policy CL-42, Arising Out of and In the Course of Employment
 - Policy CL-47, Pre-existing Conditions, effective date 94-04-01

Also provided for the committee’s review was a 3-page brochure by Occupational Health Clinics for Ontario Workers Inc., titled “Ergonomics and Driving”.

- [50] The workers' advocate relied on the following excerpts from Terence G. Ison's, *Workers' Compensation in Canada*, 2nd ed.:
- pgs. 207 & 208, section 9.7.5, Rebutting the presumption
 - pg. 107, section 5.4.4, Deteriorating conditions
 - pg. 60, section 3.7.6, Surgery resulting from multiple causes
- [51] She said she will address the following topics:
- Disclosure of medical information
 - Job description and physical demands
 - Claim management of the file
- [52] The advocate says medical reporting suggests the worker never recovered from the slip and fall at work. Medical reporting at 7 and 10 months post-accident indicates no change in the medical diagnosis. She says this is noted in the adjudicator's decision letter of May 7, 2008; the worker's family doctor does not mention any back sprain or strain. Further, the worker's family doctor does not provide medical approval for return to work.
- [53] The advocate submits the hearing officer's decision focuses on the worker's diagnosis being changed but she says the worker's symptoms began immediately after the slip and fall. They have never improved nor resolved. The worker was never granted medical approval to return to work at any time in any capacity.
- [54] She addresses a fax by the adjudicator to Dr. Abdelmalek dated December 12, 2007 which requests a medical update and also advises the board will proceed with determining a suitable occupation. The advocate says this is confusing because the worker had just been notified the board would be proceeding with rehabilitation (under Policy CS-11) which means acceptance of the disability regardless of whether or not it was pre-existing.
- [55] The advocate says the adjudicator released a second decision letter on May 7, 2008 indicating the worker's claim for compensation was being concluded when there was no further medical evidence to suggest an improvement in the worker's condition. The claim is closed on May 28, 2008.
- [56] The advocate addressed the lumbar spine x-ray completed on December 6, 2001 which notes "disc space narrowing at L4-5 and L5-S1 without significant findings". She says this x-ray was taken after the worker had been working for the accident employer for some time. She submits the worker did not have significant back issues prior to this.
- [57] The advocate says the September 23, 2002 referral from Riverfront Physiotherapy indicates the worker reports a history of low back pain for the past 3 days with no history of trauma but a "given history of lifting and prolonged driving in the past". She stresses the history of lifting and prolonged driving of the forklift occurred while he was at the accident employer's. This predated the slip and fall but reveals the worker was complaining of back pain several years before the workplace incident.
- [58] She addresses physiotherapy chart notes dated October 3, 2002 which states:

1 ½ years ago low back pain began. Injured while at work jarring on forklift. Progressively worse over last year and a half.

General low back pain right greater than left. Pain in both hips. Numbness in right greater than left. Whole leg feels asleep. Favours right leg.

Aggravated by jarring, vibration, prolonged sitting, overdoing lifting, etc.

She maintains this is either a direct causal link to the worker's back issues or an activation or aggravation of a pre-existing condition. She says it is unfortunate the worker did not complete a claim for compensation at this time, however the worker explained earlier that he thought it would get better and did not want to miss time from work.

- [59] The advocate says the physiotherapy initial assessment report of May 24, 2007 notes the worker is complaining of "new pain". She contends the new pain started with the slip and fall and has not relented.
- [60] The advocate says the circumstances of this worker's job activities indicate the injury he sustained specifically fit the definition of "arising out of and in the course of employment". Further, Policy CL-47, "Pre-existing conditions" sets out the circumstances where a work-related disability may aggravate a pre-existing condition, such as in this worker's case. She says in this worker's case, a known pre-existing condition was aggravated by a workplace disability. [We will set out the relevant sections of the policies in our Analysis.]
- [61] The advocate submits the worker would not be in the condition he is in today but for the slip and fall at work on February 27, 2007. She says there is no contrary evidence to indicate the worker would have required back surgery but for the workplace accident. She contends the board has not rebutted the presumption clause contained in section 6 of the 2002 Act. No contrary evidence has been provided. The worker's need for surgery and its consequences are compensable.
- [62] The advocate cited several paragraphs from a previous WCAT Decision #36, which they feel is pertinent to this worker's claim. She submits the general circumstances are similar.
- [63] She maintains the physical job demands were not addressed by the adjudicator nor mentioned by the medical consultant, although there is a job description on file. The worker testified to the heavy nature of his job duties. The advocate says the worker was subjected to years of pounding and jarring on his whole body. This would contribute to aggravation of his spinal degeneration.
- [64] The advocate notes the worker's claim was managed by more than one adjudicator. She says this should not adversely affect the overall claim management process; however in this case, they question whether fair judicial process was undertaken. She submits that at one point the worker's claim was proceeding in a rehabilitative direction with a view to other suitable occupations. However, upon receipt of the file by a different adjudicator, the file direction completely changed focus. This is evidenced by the adjudicator seeking a second medical consultant's opinion. The advocate maintains it is clear the file was being advanced to

rehabilitation and nothing was done in this regard including Policy CS-11 not being implemented. The file contains two references toward rehabilitative efforts: a note to file dated September 4, 2007 wherein the adjudicator plans to discuss employment options and that the worker may undergo a functional capacity evaluation. A December 12, 2007 letter from the adjudicator to Dr. Abdelmalek advises the board will proceed with determining a suitable occupation. This plan was not implemented and on May 7, 2008 the worker's claim for compensation was concluded.

- [65] The workers' advocate submits the worker's back pain started after the worker began employment at the recycling centre. She says the worker's physical job demands may have had a direct cause in the development of his back pain. The accident may have aggravated or activated a pre-existing spine condition.
- [66] She says there is no medical evidence to determine whether the worker had any changes in his spine prior to August 1, 2000 when he began working for the recycling centre. No diagnostic tests had been done at this time because back pain was not an issue. In October 2002 the worker attended a physiotherapist, indicating that symptoms of back pain began 1½ years previously. Physiotherapy reports correspond.
- [67] The advocate submits that the first medical investigation into the worker's back pain was on December 1, 2001 when x-rays were taken. Based on complaints from the worker, his treating physician felt further testing was warranted.
- [68] The advocate asked the committee to note the events leading up to the worker filing his claim as follows:
- August 1, 2000 – the worker began employment with the recycling centre.
 - April 2001 – worker notes back symptoms following 9 months of forklift driving, extensive jarring and vibration at work.
 - December 6, 2001 – first x-ray that reveals the start of lumbar back symptoms.
 - October 3, 2002 – physiotherapy chart notes reveal symptoms started one and a half years earlier while at work. One and a half years previously would be April of 2001.

The advocate says this indicates the worker's back pain symptoms began approximately one year after he started working for the recycling centre. The first year of work involved a great deal of forklift driving with a machine that had solid tires being driven over very rough terrain. This was the start of his back problems and it is supported by medical documentation such as the earlier physiotherapy chart notes in which objective testing was completed. The December 6, 2001 x-ray revealed only very minor degeneration.

- [69] The advocate asserts that after several years of whole body vibration and bouncing and jarring at work the worker developed disc bulges. She maintains it was his work-related activities which attributed to his back symptoms. Adding to this trauma was the serious slip and fall sustained at work. They believe the continuous jarring from driving the forklift contributed to the damage to the worker's spine and caused a progressive aggravation. She says the worker has been attempting to recover from his work-related injury with no objective or subjective improvement in his symptoms for over 1½ years. He remains symptomatic and at no time

since the initial injury has he medically improved or reached a plateau. Alternatively the symptoms have persisted to a chronic pain state and likely accelerated the need for surgery. There has been no medical approval for him to return to work in any capacity.

- [70] The advocate submits the worker did not require back surgery prior to the accident and now surgery is not only required, it is critical to his medical recovery. He must be restored to substantially the condition he would have been in had the compensable injury not occurred. She maintains that the constant pounding and jarring from operating heavy equipment over rough ground for 8 years could have been a contributing factor in causing or worsening the herniation to the worker's back discs. In addition to not receiving appropriate entitlement under the Act, she says it is feasible that the worker lost his job as a result of the effects of the workplace accident.
- [71] The worker is asking that his benefits be reinstated to May 21, 2008 and that the required back surgery and subsequent recovery be accepted by the board. This will allow him an opportunity to return to suitable and gainful employment.

Analysis of the Issue

Issue: Was there an aggravation of a pre-existing condition?

Answer: Yes

Issue: Did the worker suffer a work-related disability which has led to the requirement for surgery?

Answer: Yes

- [72] Section 17 of the 2008 *Act* provides that if a disability arises out of or in the course of a worker's employment, the disability is presumed to be work-related unless the contrary is shown.
- [73] Section 19 of the *Act* states that workers are entitled to the benefit of the doubt, on any application for compensation, when there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced.
- [74] Policy CL-42, (effective November 17, 1993) section C., "Arising Out of Employment" states:
- "Arising out of employment" means that a disability was caused by the worker's employment. It must be linked to, originate from, or be the result of, in whole or in part, by an activity or action undertaken because of a worker's employment.
- "Arising in the course of employment" means the disability must be linked to a worker's employment in terms of time, place and activity. It is the direct result of an activity, action, procedure, or conduct undertaken during a worker's employment.

[75] There is no dispute the worker was injured at work on February 27, 2007. The board accepted his claim and he was provided with compensation benefits and medical aid until May 21, 2008. However, medical reporting indicates his symptoms of back pain persisted and continue to date, resulting in the need for back surgery.

[76] Policy CL-47, Pre-existing Conditions, defines a pre-existing condition as:

a known or unknown abnormal physical and/or psychological state of health that existed prior to the compensable disability.

An “aggravation” of a pre-existing condition is defined as:

the temporary or permanent effect of a compensable condition on a pre-existing condition.

Entitlement to Compensation states:

A pre-existing condition may not negate a worker’s entitlement to compensation benefits.

If it can be shown that the pre-existing condition is worsened by the compensable condition, the pre-existing condition shall be considered compensable to the extent that the pre-existing condition has deteriorated as a result of the compensable condition.

Loss of earnings benefits shall be paid for a compensable aggravation of a non-compensable pre-existing condition.

[77] Medical reporting on file indicates the worker reported low back pain to Riverfront Physiotherapy in October of 2002. The initial assessment report notes back pain began 1½ years earlier while operating a forklift at work. This would encompass the time the worker was employed with the accident employer. He testified that he did not file a claim because he thought it would get better and he did not want to jeopardize his job.

[78] An x-ray of the thoracic spine in May of 2002 notes only mild scoliosis of the lower 2/3 of the spine to the left. There is no evidence of disc or synovial joint degeneration. An x-ray of the cervical spine also completed in May of 2002 reveals only mild degenerative narrowing of the C5-6 disc and no evidence of joint degeneration.

[*Dorland’s Medical Pocket Dictionary*, 25th ed. defines scoliosis as “lateral curvature of vertebral column”.]

[79] A December 6, 2001 x-ray of the lumbar spine notes “disc space narrowing at L4-5 and L5-S1 without significant findings”. This also predates the slip and fall incident.

- [80] Two CT scans completed on June 20, 2006 reveal mild to moderate degenerative disc disease and mild to moderate bilateral osteoarthritis of C5-6, L3-4, L4-5 and L5-S1 discs. The foregoing medical reports indicate the worker was employed at the recycling centre when testing was undertaken.
- [81] Dr. Tadepalli diagnoses back sprain on February 27, 2007 and remarks on a known history of sciatica and stenosis. He failed to conduct any testing, relying only on a cursory examination. The board accepts the claim based on a “back sprain”.
- [82] A March 6, 2007 lumbar spine x-ray indicates evidence of mild degenerative disc disease but no evidence of significant spondylolisthesis.
- [83] A March 29, 2007 CT scan of the lumbar spine reports moderate to severe central spinal stenosis and mild central disc protrusion at L4-5 and central and left-sided disc herniation at L5-S1 disc.
- [84] On July 26, 2007 the worker attends Dr. Sahjpaul, neurosurgeon. He also undergoes an MRI of the lumbar spine. Dr. Sahjpaul reports the worker has severe multilevel lumbar discogenic disease with relative spinal stenosis. He advises surgical treatment.
- [85] On December 12, 2007 [see para. 27] the adjudicator notes the worker’s claim is still active “pending a decision regarding suitable occupation”. We do not understand why the board did not continue to pursue this.

Further medical reporting

- [86] On October 31, 2008, the advocate provided a further report completed October 2, 2008 by Dr. Gittens, neurosurgeon. The worker saw Dr. Gittens on September 25, 2008. Following the process set out in Policy AP-03, New Evidence at Reviews & Appeals, the appeal committee considered Dr. Gittens report. We determined it did not meet the criteria for new or additional evidence as defined in Policy AP-03.

Conclusion

- [87] The hearing officer found the worker’s employment did not contribute to his spinal condition and there was no evidence to show he had any major trauma to his spine. The hearing officer concluded that the development of degenerative disc disease was due to normal aging. We disagree. We conclude that it is reasonable and probable that this worker’s muscular injury resulted in his suffering a lasting effect on an underlying pre-existing condition - that being degenerative disc disease which ultimately led to the need for surgery.
- [88] The worker began with the accident employer in August of 2000 at the age of 40. All medical reporting is undertaken after he began working. The worker testified that he spent many years with the accident employer operating heavy equipment over rough terrain and likened it to “riding a jackhammer”.

- [89] We understand that aging may be one factor in the progression of degenerative disc disease. We find it is not reasonable that without prior indications of back trouble before his tenure with this employer, at age 47, he is unable to work but for his workplace activities during those 7 years, including the incident of February 2007.
- [90] Based on the following reporting we conclude the worker was asymptomatic prior to the slip and fall of February 2007:
- December 6, 2001 x-ray of the lumbar spine that reveals disc space narrowing at L4-5 and L5-S1 without significant findings.
 - September 23, 2002 physiotherapy report which states the worker had low back pain for 3 days radiating into his thigh on the right side but no history of trauma.
 - May 9, 2002 x-ray of the thoracic spine which notes no evidence of disc or synovial joint degeneration.
 - May 9, 2002 x-ray of the cervical spine which shows mild degenerative narrowing of the C5-6 disc but no evidence of facet joint degeneration.
 - Physiotherapist chart notes of October 3, 2002 indicate symptoms started one and half years previously.
 - Two CT scans of June 20, 2006, which indicate mild to moderate degenerative disc disease.
- [91] The worker attended both his doctor and physiotherapist with complaints of low back pain several years before the workplace incident. He attributed this to his heavy occupational activities. We find this, as well as the objective medical evidence above, provides a direct link to the development of his back pain, including the February 2007 incident, which caused an aggravation to his pre-existing condition.
- [92] Policy CL-47 states that a pre-existing condition does not negate a worker's entitlement to compensation benefits. Based on the medical evidence we find that although the worker had a pre-existing condition at the time of the injury, it was asymptomatic. It is the work injury that caused the disablement and it is the effects of that injury which have prevented the worker from returning to his pre-injury employment, or any employment.
- [93] The worker was able to work through the symptoms until the accident, which we conclude caused his symptoms to progress to the point where he could not work. But for the February 27, 2007 compensable injury, the worker would not be in the condition he is in now. At no time after the accident was he given medical clearance to return to work.
- [94] We find, based on medical reporting of the treating physician, physiotherapists and consulting neurosurgeon, and by analyzing this information as a whole, the new symptoms attributed to the pre-existing condition of disc degeneration arose or were aggravated by the worker's February 27, 2007 slip and fall. That accident caused the worker's pre-existing condition to deteriorate resulting in his loss of employment and the need for required surgery.
- [95] We conclude the worker had a known abnormal physical state of health that existed prior to the compensable disability (pre-existing condition) which aggravated the effects of the compensable condition. The preponderance of medical evidence establishes the pre-existing condition was worsened by the compensable condition; therefore the pre-existing condition

shall be considered compensable to the extent that the pre-existing condition has deteriorated as a result of the compensable condition. As directed by Policy CL-47 "Loss of earnings benefits shall be paid for a compensable aggravation of a non-compensable pre-existing condition".

Decision

The worker's appeal is allowed. The hearing officer's August 15, 2008 decision is reversed.

1. The worker did suffer a work-related disability arising out of and in the course of his employment on February 27, 2007. This resulted in an aggravation of a pre-existing condition in his back as required within the terms of Policy CL-47 which entitles him to compensation.
2. The worker was unable to work after February 27, 2007 and also requires back surgery as a result of the aggravation to his pre-existing condition.
3. The worker's compensation benefits shall be reinstated to May 21, 2008. Costs associated with the required back surgery and subsequent recovery, as well as medical aid shall be accepted by the board.
4. Interest is awarded pursuant to section 31 of the *Workers' Compensation Act*, S.Y. 2008 and Policy EL-03.

Dated this **13th day of November 2008** in the City of Whitehorse, Yukon Territory.

The decision has been made with the full agreement of the appeal committee.

E. Sumner, Committee Chair

Committee:

Ed Sumner	Chair
Carel Alexander	Member
W. Cary Gryba	Member