

Workers' Compensation Appeal Tribunal

Decision #152

Board Direction to Rehear Decision#150

Claim No.: 3000-0095

Date of Original Notice of Appeal: August 29, 2008

Date Received at the Tribunal: September 2, 2008

Date of Board Direction to Rehear: December 9, 2008
Received December 11, 2008

Date of Documentary Review by Appeal Committee: December 22, 2008

Date of Decision: December 22, 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

Documentary Review

Location: Room #201, 419 Range Road
Whitehorse, Yukon Territory

Introduction

- [1] This is a rehearing of a decision originally decided by this appeal committee (Decision #150) on November 13, 2008. Decision #150 allowed the worker's appeal and found that he suffered an aggravation of a pre-existing condition in his back which continued to impact him after his compensation for a low back strain was discontinued. The worker injured his back when he slipped on a piece of cardboard covering an icy floor at work on February 27, 2007 and fell on his back.
- [2] On December 9, 2008, the alternate chair of Yukon Workers' Compensation Health and Safety Board (the "board") wrote to the appeal committee directing a rehearing of this appeal and staying Decision #150 pursuant to section 64(8) and 64(10) of the *Workers' Compensation Act* R.S.Y. 2008 (the "Act"). The members of the board stated the appeal tribunal did not properly apply Board Policy CL-47, "Pre-existing Conditions"; Board Policy EL-03, "Payment of Interest on Compensation Benefits" and Policy EN-02, "Merits and Justice of the Case".
- [3] In June 2007 the board advised the worker that he could expect assistance until he was fit for work. He was referred to neurosurgeon Dr. Sahjpaul who saw him in July of 2007 and ordered tests for surgery. The board decided in September 2007 that they would not cover the cost of his surgery. Following that advice the worker's family doctor arranged for him to be seen by a spine clinic through the public health insurance system. In December 2007 the worker's family doctor advised he was still unfit for work. Also in December 2007 the board stated that his file was still active pending a decision regarding a suitable occupation. The board continued to pay compensation for loss of earnings until May 2008. By going through the public healthcare system, the earliest the worker was able to see a surgeon was October 2008, over a year after surgery scheduled through the board was cancelled.
- [4] The board originally accepted the claim for an acute injury to the worker's lumbar spine as a result of a slip and fall at work on February 27, 2007. The worker was provided with loss of earnings benefits from February 28, 2007 to May 21, 2008 as well as medical benefits until October 17, 2007; however the board refused to pay for surgery scheduled for the Fall of 2007. We find the board's rationale inconsistent.
- [5] In letters dated May 7 and July 25, 2008 the adjudicator notified the worker that it was not probable he was suffering from an acute strain 14 months after the injury and his claim was being closed. This decision was appealed to the hearing officer and then to the tribunal. The appeal committee found that the worker suffered an aggravation of a pre-existing condition that continued to impact him after May 21, 2008 and he was entitled to compensation as provided by Policy CL-47.
- [6] A rehearing was convened by way of a documentary review on December 22, 2008. The appeal committee reviewed the worker's entire record anew. We also considered the relevant policies, as well as the board's December 9, 2008 direction to rehear. The workers' advocate notified the tribunal they had nothing further to add to their original presentation or to the worker's testimony. As the employer did not participate in the original hearing they were not notified about the stay and rehearing. The rehearing proceeded by way of documentary review. We will only address the board's reasons for stay and direction to rehear.

Board's Reasons for Stay and Reconsideration

Issue 1. The appeal tribunal did not properly apply Policy CL-47, Pre-existing Conditions.

[7] The board's stay and direction to rehear states in part:

All medical evidence on file either confirms that the worker's February 27, 2007 work-related slip and fall would not lead to disc herniation and would not cause pain and limitation 20 months after the injury, or does not assist in establishing a work-related injury.

The balance of medical evidence in this case clearly points to the conclusion that the worker's ongoing disability since May 2007 is related to the degenerative changes in his back, rather than the work-related injury.

[8] Nowhere in Decision #150 did we suggest that the worker's slip and fall led to disc herniation. At paragraph [87] we concluded: 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. [Emphasis added.]

[9] Policy CL-47 (effective date April 1, 1994) states:

A. Definitions

(a) Pre-existing condition

A pre-existing condition means a known or unknown abnormal physical and/or psychological state of health that existed prior to the compensable disability.

(b) Aggravation

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

(c) Non-compensable pre-existing condition is a condition that did not arise out of and in the course of employment. It is not work-related.

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. [Emphasis added.]

- [10] The policy clearly says that if the compensable condition causes the pre-existing condition to become symptomatic, “worsened”, or contributed to the deterioration of the pre-existing condition, loss of earnings shall be paid. The fact that the worker had pre-existing degenerative disc disease is not in dispute. The fact that the worker suffered a workplace disability due to the February 27, 2007 slip and fall also is not in dispute. However, board policy CL-47 is clear; a claim based on an injury which causes a pre-existing condition to become symptomatic or to deteriorate will be compensable.
- [11] The hearing officer concluded that there was no aggravation of a pre-existing condition. The appeal committee concluded that the worker suffered a workplace injury that continued to impact a known pre-existing condition after compensation was discontinued.
- [12] We have taken a close look at the medical evidence before and after the accident with regard to the worker’s ability to work being an important factor.

Medical reporting prior to workplace injury

- [13] - A December 6, 2001 x-ray of the lumbar spine notes “disc space narrowing at L4-5 and L5-S1 *without significant findings*”.
- A May 2002 x-ray of the thoracic spine reveals *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 2002 reveals only *mild* degenerative narrowing of the C5-6 disc and *no evidence of joint degeneration*.
- 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 worker reports low back pain, arising from operation of a forklift, to Riverfront Physiotherapy in October 2002 – 4½ years prior to the injury. He testified that he did not file a claim because he thought he would recover and did not want to jeopardize his job.
- [14] The foregoing medical reports indicate the worker was employed at the recycling centre when testing was undertaken and still maintained full-time employment. The medical reporting is consistent with the worker’s testimony that he had intermittent back pain over the years at the recycling center but it did not prevent him from working.

- [15] The worker began with the accident employer in 2000 – 7 years prior to the workplace injury. The file indicates it is only after his workplace accident that he required time off due to back pain; he has not been employed since.

Medical reporting after the workplace injury

- [16] 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”. It is not clear from his report whether the relationship of the workplace fall caused an increase in the worker’s symptoms. Reporting indicates the injury caused an increase in symptoms due to the pre-existing condition even though the condition pre-dated the injury.
- [17] A March 6, 2007 lumbar spine x-ray indicates evidence of *mild degenerative disc disease* but no evidence of significant spondylolisthesis.
- [18] 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.
- [19] On July 26, 2007 the worker attends neurosurgeon Dr. Sahjpaul. He 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.
- [20] Again, based on the medical evidence prior to the workplace injury, the file indicates that prior to the February 2007 workplace accident, the worker was able to work despite his pre-existing back condition and surgery had not been recommended for his condition. In fact, the medical consultant remarks in his August 13, 2007 report, “The CT scan of 2006 has almost an identical report to the CT scan of March 2007. As a matter of fact *there seemed to be some improvement in the level of stenosis in the region of L3 and L4*”. [Emphasis added.]

Issue 2. The appeal tribunal did not properly apply Policy EN-02, Merits and Justice of the Case.

- [21] The board’s stay and direction to rehear with respect to this states, in part:

The medical evidence of the neurosurgeon found that the worker’s spinal stenosis and disc herniation were the cause of his back pain. The YWCHSB’s Medical Consultants reject any suggestion that the worker’s continuing problems with his lower back were due to the slip and fall on February 27, 2007.

The report of the family physician, Dr. Abdelmalek, does not assist in supporting the conclusions arrived at the by the Appeal Tribunal.

All medical evidence on file either confirms that the worker's February 27, 2007 work-related slip and fall would not lead to disc herniation and would not cause pain and limitation 20 months after the injury, or does not assist in establishing a work-related injury.

The balance of medical evidence in this case clearly points to the conclusion that the worker's ongoing disability since May 2007 is related to the degenerative changes in his back, rather than the work-related injury. If the medical evidence was correct in that the worker's ongoing disability since May 2007 was related to the degenerative changes, then we cannot understand how, based on the medical evidence, the Appeal Tribunal reached its decision.

We also see no indication under Policy EN-02, "Merits and Justice of the Case", where the appeal tribunal weighed the medical evidence in its totality in coming to its conclusion.

[22] Policy EN-02 states in part:

Purpose: The purpose of the this policy is to guide those required under the *Act* to make decisions concerning compensation benefits. Within the parameters of the *Act* and YWCHSB policy, decision-makers have ample opportunity to exercise their discretion to ensure compassion, respect and fairness in decisions.

3. Weighing Evidence

a) Standard of Proof

The standard of proof for decisions made under the *Act* is the balance of probabilities – a degree of proof which is more probable than not.

c) Evidence and the Decision-making Process

Decision-makers must assess and weigh all relevant evidence. This necessarily involves making judgements about the credibility, nature and quality of that evidence as they determine the weight of evidence on either side of an issue. The decision-maker cannot ignore or fail to evaluate relevant evidence in their written decision.

[23] We find the Board's reasons for the stay and direction to rehear confusing. Policy EN-02 provides decision-makers with direction on making decisions concerning compensation benefits. It appears the board has conducted an analysis of the medical evidence, reweighed the evidence and come to their own conclusion that the degenerative disc disease is the reason for continuing problems for the worker. The board comments the tribunal has rejected the medical consultants' opinions and did not weigh the medical evidence in its totality. We understand the worker had degenerative disc disease (pre-existing condition); we maintain that the worker suffered an aggravation of his pre-existing condition.

[24] The medical consultant in August of 2007 says "it is most likely that the injury of 2007 did nothing but bring to light a clearly already existing disease condition of the lumbar spine". He recognizes the worker has a pre-existing condition. He states, "In addition to the fact that [the worker's injury] showed no sign of acute symptoms of disc prolapse, he in fact had the exact radiological findings in his lumbar spine in 2006 as was found in 2007. The CT scan evidence showed clearly that there is significant and pre-existing left S1 nerve compression."

The medical consultant reports again on April 29, 2008 as follows:

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.

[25] Unfortunately, the medical consultant and board staff did not give consideration to policy CL-47, specifically when a workplace injury is superimposed on a pre-existing condition. They did not question whether the accident caused the pre-existing condition to become symptomatic or whether or not the accident caused the condition to deteriorate or worsen to the point the worker was no longer able to work. Mention is made several times that the board will not be responsible for the worker's degenerative disc disease or sciatica. They concentrate on the change in diagnosis from acute sprain to osteoarthritis and degenerative disc disease.

[26] 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.

[27] 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.

[28] 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.

[29] We find, based on the reports of the treating physicians and physiotherapist, combined with the worker's testimony and failure to return to work after the February 2007 slip and fall, the new symptoms of back pain arose as a result of the worker's February 27, 2007 accident. This accident also caused the worker's pre-existing condition of degenerative disc disease to deteriorate to the point that he was unable to work, resulting in his loss of employment and the need for required surgery.

[30] Following we set out, in part, Terence G. Ison's commentary, from *Workers' Compensation in Canada*, 2nd ed. on deteriorating conditions:

5.4.4 Deteriorating conditions: Where a worker had a pre-existing deteriorating condition, eligibility for compensation depends upon the effect of the compensable disability. Suppose, for example, a worker had a spondylosis of the spine which had not disabled him from work so far, but which was progressing to the point where it would be likely to have that effect. The worker twisted his back at work and suffered a muscle strain. Subsequently he recovered from the muscle strain to the point where it no longer disabled him from work but at that time or subsequently, the spondylosis progressed to the point where it became disabling. . . .

In other cases, it may appear that the deteriorating condition has been permanently worsened or "aggravated" by the compensable disability. Suppose, for example, that worker had a spondylosis of the spine that was progressing to the point at which it might have had a disabling effect in the future, though perhaps not immediately. The worker twisted his back at work and suffered a disc protrusion for which he was treated by a laminectomy. He might have needed the laminectomy at some stage in any event, but the need has been advanced in time and in certainty by the compensable injury. If it were not for the compensable injury, the worker might have avoided the residual disability for some significant period. In these circumstances, the whole of the resulting disability is compensable.

[31] As we stated earlier, the worker was not a surgical candidate before the workplace injury; he was employed for almost 8 years before his condition prevented him from working. We find that because the worker's pre-existing condition deteriorated as a result of the workplace accident, the need for surgery advances in time and certainty due to the compensable injury which is as a result of the workplace accident.

[32] We conclude this 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".

Issue 3. The appeal tribunal did not refer to Policy EL-03, Payment of Interest on Compensation Benefits.

[33] The board's stay and direction to rehear with respect to this states in part:

Under that policy, the worker is entitled to be paid interest where he has incurred out of pocket expenses for services that are directly related to the work-related injury.

However, we do not believe the appeal tribunal should award interest for loss of earnings benefits. Section 1 and section 5 of policy EL-03, Payment of Interest on Compensation Benefits, are clear that interest shall not be paid where there was delay due to circumstances that were not under the control of YWCHSB.

[34] Section 31, of the 2008 Act states:

If compensation is payable, the decision-maker, hearing officer or appeal tribunal shall order that interest be paid on that compensation in accordance with a board of directors' policy and the board shall pay that interest.

[*Black's Law Dictionary*, 8th ed. defines "shall" as: 1. Has a duty to; more broadly, is required to. This is the mandatory sense that drafters typically intend and that courts typically uphold.]

[35] We now turn to Policy EL-03, Payment of Interest on Compensation Benefits, (effective date July 1, 2008 – this policy will apply retroactively to April 1, 2000) which we have set out, in part, below:

General Information

The *Workers' Compensation Act* S.Y. 2008 (the "Act") requires that where compensation is payable, the decision-maker, hearing officer, or the Workers' Compensation Appeal Tribunal (Tribunal) *shall* order that interest be paid on such compensation in accordance with the Workers' Compensation Health and Safety Board (YWCHSB) policy and the YWCHSB *shall* pay that interest.

Policy Statement

1. Interest Payments on Compensation Benefits

Interest shall be paid on compensation benefits where the adjudication of a claim for a worker was delayed due to circumstances that are under the control of the YWCHSB.

Subject to paragraph 5 (Exclusions), the date of receipt of the Workers' Report of Injury/Illness shall be used as the commencement date for the claim.

Delays not under the control of the YWCHSB are those caused by workers and service providers in support of a claim for compensation benefits.

4. Application

Interest is payable on compensation benefits that have direct monetary implications to the injured worker. Compensation benefits that shall be considered for interest payments include:

a) compensation for loss of earnings

Interest will also be paid in those instances where an injured worker incurs out of pocket expenses for services that are directly attributable to their work-related injury that would have been paid by the YWCHSB had the claim been accepted as part of the adjudication process.

[36] An example is provided with Policy EL-03 as follows:

The YWCHSB receives a Workers' Report of Injury/Illness on January 1, 2007. An adjudicator decision denying compensation benefits is issued on January 28, 2007. The decision is appealed. The appeal decision issued on January 2, 2008 determines compensation is payable in the amount of \$50,000 plus interest.

The policy then provides an example of how interest payable is calculated on the claim.

[37] It appears the Board of Directors has not applied the policy properly in this instance. It is clear that the worker is entitled to interest payments on “compensation for loss of earnings”, pursuant to section 4. subsection (a) of the policy. The delay was not caused by the worker nor service providers. We will set out the board’s example using this worker’s particulars:

The YWCHSB receives a Workers’ Report of Injury/Illness on February 28, 2007. The worker is paid compensation benefits for a workplace injury until May 21, 2008. An adjudicator decision denying compensation is rendered on May 7 and July 25, 2008. The decision is appealed. The hearing officer’s review also denies compensation in an August 15, 2008 decision. This decision is appealed. The tribunal appeal decision issued on November 13, 2008 determines compensation is payable (no amount), plus interest.

Contrary to the board stating the delay in this instance was not under the control of the board, we find, following the above example, it was under the control of the board and not delayed due to any action by the worker or service providers.

[38] Although the worker did have a pre-existing degenerative disc condition in his back prior to the February 27, 2007, we conclude that it was asymptomatic before the injury. The worker’s symptoms started immediately after the slip and fall and have not improved nor resolved since. No medical approval was provided for the worker to return to work in any capacity. We further conclude that but for the workplace accident and the effects of that injury, the worker’s pre-existing condition deteriorated to the point that he could not work.

[39] Policy CL-47 states that a pre-existing condition does not negate a worker’s entitlement to compensation benefits.

Decision

Decision #150 stands. 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 **22nd day of December 2008** in the City of Whitehorse, Yukon Territory. The decision has been made with the full agreement of the appeal committee

Carel Alexander, Member

E. Sumner, Committee Chair

W. Cary Gryba, Member