

# Workers' Compensation Appeal Tribunal

## Decision #154

### Claim No.: 3000-2531

Date of Notice of Appeal: December 29, 2008

Date of Documentary Review: January 14, 2009

Date of Decision: January 22, 2009

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

Presiding Officer:	H. Leenders
Member representative of employers:	H. Hermanson
Member representative of workers:	M. McCullough

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

## Introduction

This 27-year-old worker was employed as a rock truck driver at a mine site. On May 21, 2008 he filed a report of injury with Yukon Workers' Compensation Health & Safety Board (the "board") indicating he suffered an injury to his back while weight training with 25 lb. dumbbells on October 17, 2007. A June 27, 2008 adjudicator's letter notified the worker she would not accept his claim for compensation.

The worker appealed this decision to a board hearing officer. The hearing officer agreed with the adjudicator in his November 25, 2008 decision. He found that although the worker's injury arose in the course of his employment, it did not arise out of his employment; the disability was not work-related as defined by section 117 (1) of the *Workers' Compensation Act*, R.S.Y. 2002 (the Act). The worker asks the tribunal to reverse the hearing officer's decision and to accept his claim as a work-related disability.

## Jurisdiction

- [1] On December 29, 2008 the workers' advocate office, representing the worker, filed an appeal of the hearing officer's decision with the tribunal under s. 53 of the *Workers' Compensation Act*, S.Y. 2008 (the "Act"). 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 worker filed a claim for an injury which occurred on October 17, 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Where a previous *Workers' Compensation Act* is repealed the normal rule of interpretation is to use the most current *Act*.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.

Compensation entitlement decisions are made pursuant to legislation in place at the time of injury. The worker reported an injury that occurred on October 17, 2007. In this instance the *Workers' Compensation Act*, R.S.Y. 2002, should be used to determine the issues of entitlement.

## Background

- [3] The board provided the following policies to the tribunal as relevant to this appeal under the authority of section 24 (4) of the 2002 *Act*:
- Policy IN-03 – Transition Policy, effective July 1, 2008
  - Policy CL-42 – Arising Out of and In the Course of Employment, effective October 1, 2007
- [4] The appeal was conducted by documentary review. The workers' advocate provided written submissions. The employer was notified but did not participate.

## Evidence

[5] The appeal committee considered the following:

- workers' advocates submission which included pgs. 32 and 37 of Terence G. Ison's *Workers' Compensation in Canada*, 2<sup>nd</sup> ed.
- the entire claim record No. 3000-2531 as provided by the board.

## Hearing Officer's Decision

[6] The worker is appealing the hearing officer's November 25, 2008 decision. He is seeking a decision accepting his claim as a work-related disability and payment of compensation commencing October 17, 2007. The hearing officer concluded that the appellant did not suffer a work-related disability arising out of his employment.

## Evidence from the Record

[7] The worker filed a Worker's Report of Injury/Illness dated May 21, 2008 stating that while weight training with 25 lb. dumbbells at camp he threw his back out, injuring his "left L3—L4 disk". The date of injury was October 17, 2007. The worker reported his injury to the first aid attendant at the job site who told him that he could not work like that so to leave camp and seek medical attention. The worker did not seek further medical attention until November 15, 2007.

[8] The Employer's Report of Injury/Illness dated May 26, 2008 and is accompanied by a letter from the human resources manager stating the worker was hired on October 13, 2007. The job at the mine site was completed on October 26, 2007 and all employees were laid off. The manager notes the worker said he injured his back on October 17<sup>th</sup> while lifting weights on his own after he completed a shift of work. The onsite foreman stated the worker sought treatment and left the jobsite on October 18<sup>th</sup> and was paid for 6 days of work. The employer did not hear from the worker until the second week of May 2008 when he attended the office in Whitehorse to inform them he had filed a claim for injury with the compensation board.

[9] The record does not contain any WCB doctor's progress reports, although chart notes are provided for the time period November 15, 2007 to May 20, 2008. Following are excerpts from the chart notes:

- November 15, 2007 - Dr. Kanachowski  
Subjective – he's had some left lower back pain since mid October. He was working at the mine in . . . and was in the gym lifting weights and heard a pop and got pain in his left back. He's been doing regular stretching exercises for his back which he has done for many years. He previously had an injury in 2004 when he fell on the ice and recalls having some back pain at that time but that did resolve. . . . On his lumbar spine x-ray from November 2004 there is some sclerosis relating to the posture facet articulation at L5, likely degenerative.

Objective – Full ROM [range of motion] back. Straight leg raise negative. Gait normal. Heel and toe walking normal. . . . No obvious tenderness in the spine at present.

Assessment – Left lower back pain. I think likely this is muscular lower ligamentous, given the history.

The worker is referred for repeat x-rays and physiotherapy.

- December 17, 2007 – Dr. Tadepalli reports that back x-rays reveal osteoarthritis. Objective information indicates the worker’s back feels normal with no perineal parathesia. Left and right straight leg raises are normal. Dr. Tadepalli assesses “low back pain with sciatica.” The worker is referred for a CT scan and physiotherapy.

- December 21, 2007 – Dr. Todd  
Subjective – States he’s had back pains off & on for a long time (many years).

Objective – Lumbosacral spine is non-tender on palpation. He indicates pain in the lower lumbar region. Motor & touch in the legs is normal. Straight leg raises negative. . . . Lumbar range of motion is decreased as he is having pain even moving about. X-ray November 27 showed degenerative changes. These have not changed since x-ray of 2004.

Assessment - . . . Rule out degenerative disc disease, osteoarthritis or mechanical back pain.

- January 10, 2008 – Dr. Todd  
Objective – Motor and touch in legs is normal. Straight leg raises slightly positive in the left at 90 degrees. . . . His recent CT shows left paracentral disc protrusion at L4-5, likely affecting central canal, but the study was poor.

Assessment – Persisting back pain with radiation in the left leg. Rule out L4-5 disc lesion.

Plan – I have sent him for a limited repeat CT scan L4-5.

- February 7, 2008 – Dr. Kanachowski  
The worker attends with a medical certificate for employment insurance benefits. The worker was not examined. Dr. Kanachowski notes the worker has not “gone back to physio. yet”. The assessment is “L4-5 paracentral disc protrusion with some displacement of the left L5 nerve root with back and leg pain.”
- March 28, 2008 – Dr. Macdonald  
The worker describes his back pain as a “deep, deep ache and a shooting [pain] down his left leg and causing numbness along his left posterolateral leg.”

- April 11, 2008 – Dr. Macdonald  
The worker presents with a “very obvious limp, his back is really in spasm and tilting to the left and he certainly looks in a bad way”. The worker wishes to proceed with the MRI and is considering surgery.
- May 20, 2008 – Dr. Macdonald  
The MRI reveals and confirms “posterior disc extrusion centrally at L4-5 and into the left of mid-line which impinges on the left L5 nerve root that originates from the thecal sac”. The worker is taking 10 – Tylenol #3’s per day. Consideration for him to attend a back clinic is recommended.

[10] A June 4, 2008 progress note by physiotherapist Corinne Tetrault, states the worker has attended 5 appointments to date, cancelling one appointment and “no show” at another. The summary states:

[The worker’s] condition is not improving with conservative treatment. Although his pain centralizes with the lateral shift correction/traction and myotomal strength improves during treatment, it is not long lasting. His pain peripheralizes again shortly after leaving therapy and the shift reappears. Positive neuro signs have not changed over time. This client needs a surgical consult.

[11] On June 27, 2008 the adjudicator notifies the worker she will not accept his claim for compensation because his actions at the time of the incident were not a regular part of his job duties and were not for the purpose of his employer’s business. She concludes the evidence indicates his injury was caused by personal activity and not work-related.

[12] The worker appeals the adjudicator’s decision to the hearing officer. A documentary review is undertaken on November 18, 2008. On November 25, 2008 the hearing officer confirms the adjudicator’s decision, denying the worker’s claim.

### **The Workers’ Advocate Documentary Submission**

[13] The workers’ advocate, on behalf of the worker, asks the appeal committee to reverse the hearing officer’s November 25, 2008 decision, resulting in acceptance of the worker’s claim as a work-related disability.

[14] The advocate relied on Policy CL-42, Arising Out of and In the Course of Employment, effective October 1, 2007. She also used excerpts from Terence G. Ison’s, *Workers’ Compensation in Canada*, 2<sup>nd</sup> ed. as follows:

- pg. 32, section 3.3.15 – Inducement of hire
- pg. 37, section 3.3.27 – Arising out of and in the course of

[15] The advocate submits the spirit and intent of Policy CL-42 and, prior to that, Policy CL-29, Captive Worker (revoked October 1, 2007) is such that as a captive worker in an isolated

worksite injuries resulting from the use of facilities provided by the employer, including recreational facilities and equipment, will normally be held to have arisen out of and in the course of employment.

- [16] The advocate sets out Policy CL-42, Appendix A, Arising in the course of employment, as follows:

Workers staying in a residential facility may be considered to be in the course of employment when the worker:

1. Is required to use the premises as a condition of employment; or
2. Is permitted to use the premises because the worksite is so remote that the worker had no reasonable alternative for accommodations.

- [17] The advocate submits that specifically Appendix A as noted above was not considered when adjudicating this claim. She says the hearing officer's November 25, 2008 decision verifies this because he found the worker **was in the course of employment when he was injured on October 17, 2007**. The advocate submits this worker's injury arose out of and in the course of his employment as a captive worker. (Bolding added by the advocate.)

- [18] The advocate sets out the presumption clause contained in Policy CL-42 as follows:

To determine whether a disability (injury/illness) is work-related, the decision-maker must weigh the evidence and decide whether the disability both arose out of and occurred in the course of the worker's employment. However, in some cases it is not possible to get sufficient evidence to determine that a disability (injury/illness) arose both out of and in the course of a worker's employment. **The presumption clause (Section 6 of the [2002] Act) ensures that the worker receives compensation in cases where the decision maker can conclude that the worker's disability (injury/illness) either arose out of or occurred in the course of employment, but not both.** (Bolding and underlining added by the advocate)

- [19] The advocate concludes the worker was a captive employee. Due to the remote location, he had no reasonable alternative choice for accommodations. He was on the employer's premises at the time of injury, partaking in a recreational activity provided and sanctioned by the employer. She maintains the disability arose in the course of the worker's employment. The advocate submits section 6 of the (2002) Act, the presumption clause must be applied and the disability is then presumed to be work-related. She further submits there is no evidence on file that weighs more against the disability being work-related than for it.

**Issue:** Did the worker suffer a work-related injury on October 17, 2007?  
**Answer:** No

## Analysis of the Issue

[20] The committee agrees with the board and workers' advocate that the worker, due to the isolation of his workplace, was required to be on the mine site in order to do his job. This is interpreted as meeting the requirement of "in the course of employment" as set out in the *Act*.

[21] The question that needs to be resolved is: Did the worker's injury arise out of the course of employment and thus is work-related and compensable? Policy CL-42, "General" states:

Entitlement for compensation will be awarded when a disability (injury/illness) arises out of and in the course of employment. This means that a disability (injury/illness) which results from the nature, condition(s) or obligations(s) of the employment and that the disability (injury/illness) happens at a time, place and circumstance consistent with the employment.

[22] The committee does not agree with the workers' advocate's submission to the tribunal where she states that the presumption clause ensures that workers receive compensation in cases where the decision-maker can conclude the worker's injury either arose out of or occurred in the course of employment, but not both. The 2002 *Act*, section 6, "Presumption to be work-related" states:

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.

The definition of work-related in section 117 of the *Act* states:

"work-related" in reference to a disability of a worker means a disability arising out of and in the course of the employment of a worker;

[23] The worker was hired as a rock truck driver for a subcontractor at the mine site from October 13, 2007 to October 26, 2007. It was a remote site and the worker received room and board. There were no requirements placed on the worker other than that he work his shift each day. The facilities belonged to the mining company and evidently could be used by the subcontractor's workforce.

[24] Although the mine site has a gym, the worker chose to stay in his room and work out with his own weights, sustaining a back injury. We do not consider this as being consistent with his employment.

[25] The workers' advocate claims that since the worker was a captive worker, the injury sustained was out of the course of employment. Policy CL-42, the clarifying policy on the presumption clause, addresses the issues involved.

[26] We set out the following excerpts from Policy CL-42, Arising Out of and In the Course of Employment, effective October 1, 2007:

#### Policy Statement

A claim for compensation must meet the following criteria before it can be accepted:

1. the claimant must be a “worker” as defined in the Act.
2. the worker’s employment must be in an industry that is within the scope of the Act.
3. the worker must have suffered a disability (injury/illness); and
4. the disability (injury/illness) must be work-related, meaning that it must have arisen out of and in the course of the worker’s employment.

This policy focuses on the established principles that have evolved to define “arising out of and in the course of employment” within the compensation system.

#### Arising Out of Employment

While no single criterion can be conclusive in determining whether a disability arose out of a worker’s employment, the YWCHSB will consider the following criteria in making this determination on a case-by-case basis.

1. Whether the disability (injury/illness) occurred when the worker was in the process of doing something for the benefit of the employer;
2. Whether the disability (injury/illness) occurred while the worker was doing something at the instruction of the employer;
3. Whether the disability (injury/illness) occurred while the worker was using equipment or materials supplied by the employer;
4. Whether the disability (injury/illness) was caused by some activity of the employer or another worker; and
5. Whether the activity was an accepted or condoned part of the work environment.

Workers are not entitled to compensation if they have removed themselves from the course of employment by their actions. Actions which may be considered as removing oneself from the course of employment include, but are not limited to:

1. activities which are exclusively personal;

[27] The policy is clear in that no single criterion can be conclusive in determining whether a disability arose out of a worker’s employment. Out of the five criteria that are listed and to be used on a case-by-case basis, none can be used in this case to construe that the injury was work-related. We will specifically address each one:

1. The worker was not in the process of doing something for the benefit of the employer.
2. The worker was not doing something at the instruction of the employer; the incident happened after his work shift was over.

3. The worker was not using equipment or materials supplied by the employer. He was using his own equipment in his room.
4. The injury was not caused by some activity of the employer or another worker as the worker was alone in his room.
5. While the activity may be an accepted or condoned part of an isolated work site, it was not part of the work environment.

[28] The committee also considered if the worker removed himself from the course of employment by his actions. We agree that the lifting of weights in that particular setting can only be considered to be an exclusively personal activity. It was not required by the employer, it did not involve any other employees, and it was done for the sole benefit of the employee only.

[29] There is also the gap between the actual incident and reporting of the same to the board. We can only surmise that initially, the worker as well as the supervisor on the jobsite, and the first medical professionals, considered it a self-inflicted injury not related to the workplace.

## **CONCLUSION**

[30] On the basis of our examination of the facts in this case, we conclude that the worker's injury did not arise out of the course of his employment. Therefore, the injury he suffered on October 17, 2007 was not work-related.

## **DECISION**

The worker's appeal is denied. The hearing officer's November 25, 2008 decision is confirmed.

Dated this **22<sup>nd</sup> day of January 2009** in the City of Whitehorse, Yukon Territory.

This decision is made with the concurrence of the appeal committee.

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H. Leenders, Committee Chair

### **Committee Members:**

H. Leenders	Committee Chair
M. McCullough	Member
H. Hermanson	Member