

# Workers' Compensation Appeal Tribunal

## Decision #171

**Claim No.:** 2005-0454

**Related Claim Nos.:** 89-1280; 93-1219; 95-0070; 97-0859; 98-0541; 98-0808;  
98-1015; 2001-0972; 2002-0473; 2003-0658

Date of Notice of Appeal: January 27, 2010

Date Notice received at the Tribunal: February 1, 2010

Date of Oral Hearing: June 17, 2010

Date of Decision: July 28, 2010

**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:	H. Hermanson
Member representative of workers:	W.C. Gryba

**In attendance:** The Worker  
The worker's representative – Julie Docherty  
Vernna Johanson, Recorder

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

## Introduction

This 51-year-old worker has been employed for many years as a CAT operator. On February 27, 2009 he wrote to an adjudicator of Yukon Workers' Compensation Health and Safety Board (the "board") requesting that his claims for compensation be re-opened because of ongoing back problems he related to prior claims, dating back to 1989 that he had filed with the board. The worker indicated that due to the heavy nature of his job as a CAT operator, his back condition worsened over the years.

The adjudicator concluded the worker suffered from a pre-existing condition which was not caused by the worker's employment and denied his claims. The worker appealed to a hearing officer. On November 26, 2009 the hearing officer confirmed the adjudicator's decision and denied the worker's claim. The worker asks the tribunal to reverse the hearing officer's decision and to find that he has an ongoing work-related disability.

- [1] The worker attended the hearing and testified by affirmation. He was represented by the Deputy Workers' Advocate. The employer was notified of the appeal but did not attend. The proceedings were recorded.

## Evidence

- [2] The appeal committee considered the worker's testimony, the advocate's submissions, board policies as noted below, and the entire claim records (11 claims) as provided by the board.

## Documents submitted outside the required timelines

The deputy advocate submitted an x-ray report of the lumbar spine taken on April 23, 2010 and a consultation report by Dr. Ramesh Sahjpaal also dated April 23, 2010 to the tribunal on June 16, 2010, the day before the hearing. Approximately 40 minutes before the hearing was scheduled to begin on June 17, 2010, an Operative Report with the date of procedure noted as February 9, 2009 was provided via e-mail attachment by the advocate. During her submission the advocate also provided the committee with an x-ray report dated March 22, 2002. No request was made to enter any of the documents as evidence during the course of the hearing. These documents were considered by the appeal committee.

## Jurisdiction

- [3] On February 1, 2010 the worker submitted an appeal of the hearing officer's November 26, 2009 review, 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.
- [4] The worker filed his last claim on April 11, 2005 for an injury which occurred on April 9, 2005. Compensation entitlement decisions are made pursuant to legislation in place at the time of injury. In this instance the *Workers' Compensation Act*, R.S.Y. 2002 should be used to determine the issues of entitlement.
- [5] The board provided the following policies to the tribunal as relevant to this appeal under the authority of section 64 (4) of the 2008 *Act*.

- EN-02, Merits and Justice of the Case; effective July 1, 2008
- Policy CL-42, Arising Out of and In the Course of Employment; effective November 17, 1993
- Policy CL-47, Pre-existing Conditions, effective date April 1, 1994

**Evidence from the Records**

[6] In April of 2009 the worker requested that an adjudicator re-open his claims for compensation because he believed his ongoing back problems were related to his years of running heavy equipment. The hearing officer concluded that the worker’s back problems were degenerative in nature and also denied the worker’s appeal. The worker is appealing the hearing officer’s decision.

[7] Below is a chart of this worker’s claims with Yukon Workers’ Compensation Health and Safety Board:

<b>Claim No.</b>	<b>Incident Date</b>	<b>Time Loss</b>	<b>Mechanism of Injury</b>	<b>Diagnosis</b>	<b>Treatment</b>
89-1280	Sept 6/89	None	Changing track on D9 CAT, pulled muscles	Lumbar strain L2-3, L5	Chiropractic
93-1219	November 3/93	None	Lifting broken pad on CAT, twisted wrong	Spinal restrictions at L3 & L5	Chiropractic
95-0070	Jan 19/95	27 days	Lifting equipment into back of truck	Low back strain	Physiotherapy
97-0859	July 9/97	43 days	Slipped on loose board at work, fell	Soft tissue injury, possible disc involvement	*POWER Program
98-0541	June 7/98	11 days	Twisting & bouncing while operating D10 CAT	Lumbar overuse syndrome; impact trauma	Chiropractic
98-0808	Aug 9/98	8 days	Working on rough surface operating D8 CAT	Acute low back pain, radiculitis?, osteospondylosis	Chiropractic
98-1015	Sept 10/98	81 days	Working on rough ground operating D8 CAT	L5 radiculopathy/ overuse lumbar strain	Therapeutic stretching; ice Chiropractic Physiotherapy
2001-0972	Sept 7/01	31 days	Clearing gravel pit with D8 CAT	Lumbar spine posterior facet jamming; irritation with surrounding muscle hypertonicity	Chiropractic Physiotherapy

Claim No.	Incident Date	Time Loss	Mechanism of Injury	Diagnosis	Treatment
2002-0473	Apr 20/02	304 days 31 days **REA	Fell off CAT; landed on feet, injuring back	Bilateral contusions & strain to ankles	Chronic Pain Clinic/Physio. for back pain
2003-0658	June 17/03	14 days	Pushing buggies of dirt into a pit with D10 CAT	Exacerbation of chronic low back pain & sciatica	Physiotherapy
2005-0454	Apr 9/05	8 days	Knocking down trees with CAT. Went into creek bed, throwing worker forward.	Contusions & abrasions to head, left arm and knee. Low back pain.	Doctor visits

\*POWER – Program of Work Evaluation and Rehabilitation

\*\*REA – Re-employment assistance

Following are excerpts from medical reports contained on the worker's claim files with respect to the worker's back problems:

- [8] Claim No. 89-1280  
September 11, 1989 – Rhonda Holway-McIntyre, Chiropractor, “Vertebral motion restricted L2-3, L5. Weak back syndrome – previous lack of exercise, lumbar strain.”
- [9] Claim No. 93-1219  
November 8, 1993 - Dr. Lelek, Chiropractor, “Spinal restrictions found at L3 & L5 vertebral levels as well as sacroiliac joint. Muscular hypersensitivity found as lumbar paraspinals bilaterally.”
- [10] Claim No. 95-0070  
January 21, 1995 - Dr. Quong, M.D., “++ Spasm in low back. Unable to forward flex.”
- [11] Claim No. 97-0859
- July 14, 1997 - Dr. Galloway, M.D., “Range of movement is minimal for flexion and extension because of pain in the back. There is soreness to palpitation over the mild and lower back, where the paraspinal muscles are very tense.”
  - July 15, 1997 - Wade Scoffin, Occupational Therapist, POWER Program, “This gentleman presents with a soft tissue injury to the lumbar region of his back. There is possibly some disc involvement that is only reported in specific sustained positions. There also appears to be some right sided SI joint displacement on the right side.”
  - August 5, 1997 - Dr. Lelek, Chiropractor, “Spinal restrictions in rotation at L3 & L5.”
- [12] Claim No. 98-0541  
June 11, 1998 - K. Eaton, Chiropractor, “Lumbar overuse syndrome, impact trauma. Continued impact trauma to lumbar intervertebral discs.”

- [13] Claim No. 98-0808  
August 10, 1998 - Dr. Shafer-Macdonald, M.D., "Tenderness T10, T11, T12, L1 and left flank, no numbness in legs."
- [14] Claim No. 98-1015
- September 11, 1998 - Dr. Eaton, Chiropractor, "Right paraspinal muscle spasm. L5/S1 vertebral segmental dysfunction, soft tissue inflammation."
  - September 14, 1998 - X-ray of the lumbosacral spine, "Alignment of the vertebral bodies is good. Disc spaces are well maintained. No fracture, dislocation or bony change is shown. The appearances have not changed since the previous examination in 1995."
  - September 25, 1998 - Wade Scoffin, Occupational Therapist, POWER Program, "This gentleman has what appears to be nerve irritation secondary to disc protrusion."
- [15] Claim No. 2001-0972
- September 10, 2001 – Dr. Koltun, M.D., "On examination he does have negative straight leg raising. Reflexes appeared equal. He did appear to have a lot of muscle spasm in his low back. I think this is just mechanical back pain but it is causing him a fair bit of discomfort."
  - October 4, 2001 – Rhonda Holway-McIntyre, Chiropractor, "Lumbar spine posterior facet jamming/irritation with surrounding muscle hypertonicity. If his work requires him to do any work on extremely rough ground, reoccurrences are likely."
- [16] Claim No. 2002-0473
- June 3, 2002 – Dr. Koltun, M.D., "This patient is still sore. Has been going to Physio, using pain killers. When he walks he does get some shooting sensation down the back of both legs."
  - July 26, 2002 – MRI of the Lumbar Spine, "Spondylitic changes at L4/5 and L5/S1. Small central posterior L4/5 disc herniation. Mild to moderate central canal stenosis at L4/5." [A neural foraminal mass at T12 is also noted questioning a nerve sheath tumour.]
  - August 14, 2002 - An adjudicator's note to file states, "Dr. Koltun called today and verified that the mass is not work-related. He has referred [the worker] to a neuro-surgeon and is waiting for a date. He said that when [the worker] goes in for surgery they will likely deal with the disc herniation at the same time. He said in the meantime he believes [the worker's] back pain is mechanical and due to his work. I agreed."
  - October 7, 2002 - Dr. R. Sahjpaal, Neurosurgeon:  
  
Radiographs: A small central L4-5 disc herniation is identified. There is mild canal stenosis. Degenerative changes are seen at L4-5 and L5-S1, mild. No other significant abnormalities are seen.

Assessment and Recommendations: With regards to the patient's presenting injury and symptoms of low back pain, it is important to note that I am not convinced that he has any radicular symptoms in his lower extremities. He therefore has low back pain related to a fall. The only significant abnormality seen on the MRI scan is a small focal central L4-5 disc herniation. Whether this pre-dates the April 20, 2002 fall is impossible to determine as the patient has not previously had imaging of the thoracolumbar spine (CT or MRI scan), to the best of my knowledge. Whether the disc herniation at L4-5 is in fact contributing to his symptoms is also unclear.

. . . Given the fact that he has had repeated injuries to his low back and episodes of low back pain, which has responded to conservative treatment in the past, I would still favor pursuing conservative measures at the present time.

- October 10, 2002 – MRI of the Lumbar Spine, Dr. Audrey Spielmann:

Impression:

2. Central/right paracentral disc herniation at L4/5, unchanged in size but slightly increased in signal intensity. Compromise of the traversing right L5 nerve root remains a possibility.

- December 23, 2002 – The board medical consultant reports:

It is clear that he has significant degenerative changes in the lumbar spine, with no evidence of nerve root irritation. The description of the disc bulge is more in keeping with a degenerative process rather than any acute injury. In particular, there was no complaint of back pain when he fell off the CAT. The initial claim was for an ankle injury. It would be highly unlikely for him to suffer an acute disc prolapse without any symptoms. It is my impression that the changes on the MRI are consistent with long-term degenerative changes.

- Dr. Tadepalli provides the board with several imaging reports on April 10, 2008 at the request of a board adjudicator. Following are findings from the March 6, 2007 CT scan:

A CT scan of the lower thoracic and lumbar spine undertaken on March 6, 2007 indicates:

Summary: Findings in relation to the left neural foramen at T12-L1 are compatible with the patient's previously documented nerve sheath tumor.

This patient has congenital narrowing of the osseous central canal. There is some superimposed degenerative changes present resulting in mild central stenosis of the L3-4 level and moderate bilateral foraminal stenosis at the L5-S1 level with the potential for irritation of the exiting L5 nerve roots

- March 18, 2008, Dr. Sahjpaul, M.D., Neurosurgeon:

Summary: [The worker] requires an MRI thoracolumbar spine. He may well be a candidate for surgery at the L4-L5 levels as he does have sciatica. I will request an MRI scan and review the investigations once they are done. It appears that his back pain and right leg pain date back to the work-related injury and he has never healed.

[17] Claim No. 2003-0658

- June 18, 2003, Dr. Koltun's reports after "any factors that might complicate recovery":

He has pre-existing low back problems with evidence of degenerative disease and disc prolapse in his lumbar spine which was confirmed on previous MRI scans.

- May 31, 2004, Dr. Michael Boyd, Neurosurgeon, Vancouver General Hospital Spine Clinic reports:

Impression: . . . He is neurologically intact. He has clinical evidence of mechanical as well as some discogenic back pain. I do not think he has any evidence of any significant nerve root impingement, particularly with regards to the L1 nerve root. . . . I would like to review the imaging before I make the final recommendations; however, I suspect that it is going to be difficult to treat his back pain, and it may be that he might have to change occupations.

[18] Claim No. 2005-0454

- An x-ray of the cervical spine taken on October 26, 2005 indicates the following:

Impression:

1. Non-visualization of the cervicothorax junction in the lateral projection.
2. Mild-to-moderate degenerative changes.
3. No acute bony abnormality identified.

- [19] The worker writes to the adjudicator on February 27, 2009 requesting that his claims for compensation be re-opened because of ongoing problems with his back which, he believes, are related to his prior compensation claims. Following is an excerpt from the adjudicator's decision:

Based on my review of the evidence, I have concluded that you are suffering from a pre-existing condition in your lower back (degenerative disc disease and spinal stenosis) that was not caused by your employment and is therefore not work-related. Given that there is no evidence of any new work-related incident or injury that can be said to have caused your current condition; I am unable to authorize re-opening of your claims for compensation at this time.

[20] The advocate provided 3 documents to the appeal committee [see para. 2] the day before the hearing and the morning of the hearing. Following are excerpts from these reports:

- Operative Report dated February 9, 2009 indicates the worker underwent a lumbar laminectomy of the L4-5.
- An MRI undertaken on April 23, 2010 contains findings of:

Lumbar vertebral body alignment is maintained.

Minimal disc space narrowing is present at L3/4, without significant disc bulge or protrusion. Again noted is moderate degenerative disc space narrowing at L4/5 with a generalized posterior disc bulge. There is now evidence of surgery at this level. . . .

The degenerative disc changes seen at L5/S1 are largely stable in the interval, with moderate to severe disc space narrowing, generalized posterior disc bulging and mild dural compression. Mild to moderate neural foraminal stenosis is present on the basis of disc material and osteophyte without evidence of overt nerve root compression.

Impression: . . . Interval L4/5 surgery with associated dural decompression, as described.

- An April 23, 2010 Consultation Report by Dr. R. Sahjpaul, Neurosurgeon states:

[The worker] is doing well. . . . Incidentally, he asked me whether his L4-L5 problem was work-related. Looking back on my notes, he did have a significant fall after which time he developed symptoms. The initial CT scan did show in addition to spinal stenosis a central L4-L5 disc herniation. I have told him that I suspect the L4-L5 disc herniation was traumatic but obviously he had some degenerative changes also.

### **The Worker's Testimony**

[21] The worker explained the 2002 injury as follows:

The hydraulic cap for the oil was not put back on tightly enough on the CAT. While operating the CAT, the vibration caused the cap to come off and oil was splashing all over. He radioed the mechanic to bring another hydraulic cap. While he was waiting for the mechanic, he had the door open of the CAT and was standing against the side. The mechanic pulled up in the slope of the ditch, walked around his truck and threw the cap at him. His reaction was to reach for it, causing him to over-reach and fall off the CAT onto the frozen ground. He landed feet-first causing him to sprain his ankle and tear the cartilage in his knee and his back felt "pushed together".

He lay on the ground for 10 to 15 minutes before he could get up; he saw stars. The mechanic helped him up and he lay down on the back of the mechanic's flat deck for at least another ½ hour. After the dizziness went away, he stood up. The mechanic got in touch with the foreman. The worker said he had about an hour left before quitting time so he returned to work.

The next morning he said he could not get out of bed due to back pain. He ultimately attended the Nursing Station in Destruction Bay. The nurse told him he needed to go to Whitehorse and see a doctor. He drove himself to Whitehorse.

[22] The worker was provided with compensation for approximately 11 months with respect to this claim. He attended the Canmore Pain Clinic for 6 to 8 weeks and returned to work. The worker said his back was still sore. He also had pain that went into his legs. His doctor prescribed painkillers but he said he stopped taking them because they were bothering his stomach. He testified that he was never pain-free after the 2002 injury.

[23] The worker described the 2005 injury as follows:

He was running a D-8N open CAT knocking trees down to widen the highway. The foreman was ahead of him also running a CAT although they were quite far apart. His foreman would take a swipe and knock the trees down and the worker would come behind him and keep going in circles until they opened up the area.

He said the trees were coated in dust. Once they are felled, you cannot see because of the dust that comes off of them. They were not aware of an old creek bed in the area where they were working. His foreman missed the creek bed but the worker hit it on his pass. The bed was about 4 to 5 feet deep. The CAT nose-dived right into it. It caused the worker to fall forward, hitting his head and knee. His back was jolted when he was thrown forward. He was not wearing a seatbelt because he said when you are doing that kind of work, branches come whipping back at you at a high speed. He needed to be able to get out of the way and so did not fasten his seat belt.

The following day his back was sore, his knee and ankle were swollen. He went to the Destruction Bay Nursing Station where he was told to go to Whitehorse and see the doctor. He did so. The worker filed a claim with the board which was accepted.

[24] The worker was referred by his family doctor for back surgery in 2009. He said that between 2005 and 2009 he had constant pain running down his legs and his back was sore. When he went to Vancouver for the back surgery, his back was so sore he needed to buy a cane in order to walk. After the surgery, his sciatica was gone; he no longer suffers pain in his legs. The cost of surgery was not assumed by Workers' Compensation.

[25] Presently, the worker says he still suffers from pain and muscle spasms in his back, which bothers him, although he can tolerate it. He said his job entails a lot of back and forth movement of his body. Since the operation, the pain has subsided.

- [26] The worker testified that he has been running CATs since he was 14 or 15 years old. He said that Dr. Sahjpaul was aware of the many injuries he had suffered to his back over the years. The injuries he sustained were always in the same area – to his lower back.
- [27] When the worker was questioned what he would like to be retrained for if the occasion arises, he said he has not given it much thought. Further, he has been doing this job his entire life; since he was a young teenager.

### **The Worker's Advocate's Submission**

- [28] The advocate submits that the board has denied this worker's request to re-open his claims because his ongoing pain symptoms are a result of degenerative conditions and not because of multiple work-related accidents.
- [29] The advocate says the worker has 11 work-related back injury claims filed with the board. The worker's ongoing symptoms are not all due to degeneration. The traumas from the work-related accidents, they believe, has accelerated the pre-existing condition that he had.
- [30] The advocate refers to the March 6, 2007 x-ray. [This is actually a CT scan of the lower back and lumbar spine.] She says there is degeneration at the various levels. The advocate then compared the CT scan to a March 22, 2002 x-ray of the lumbosacral spine, noting that the March 22, 2002 x-ray outlines only "mild scoliosis and mild osteoarthritis of the L5-S1". She says that pursuant to all of the reporting on all of the files there was degeneration but it was very mild.
- [31] To emphasize her point, the advocate provided a page from *Merriam Webster's Collegiate Dictionary*, 10<sup>th</sup> ed. which contained the word "mild". [The appeal committee will not comment on or review this information.]
- [32] She contends the board's decisions relied solely on congenital degenerative stenosis; degeneration. She submits that if it existed before the worker's work-related accidents, it was normal in nature, mild, that which everyone probably has. The imagining shows between 2002, the first big accident, and 2007 there was quite a digression in the degeneration at that spot; L4-5.
- [33] The advocate submits Dr. Sahjpaul noted in his April 23, 2010 report the degeneration the worker had but also speaks to the L4-5 herniation that had to be repaired, suggesting the herniation was "traumatic in nature".
- [34] She contends the degeneration accelerated after the "big" accident in 2002. She states that Policy CL-47, Pre-existing Conditions, defines acceleration as "when the work-related incident has worsened or caused a deterioration of the pre-existing condition, causing permanent damage". She says this specifically applies to this worker's case. He would not have had to have the surgery in February 2009 save and except for the accident which accelerated the whole process. The advocate also contends the worker would not have the ongoing pain and symptoms except for the work-related injuries, specifically the 2002 and 2005 injuries.

[35] The advocate asks the appeal to consider the following question:

Would the worker be where he is now with ongoing pain and symptoms and would he have had to have surgery at that time, but for the work-related accidents?

[36] The worker's advocate addressed the reporting received after the last adjudicative decision [ref. paras. 2 & 20]. She notes the medical reporting speaks to a nerve sheath tumour on the worker's thoracic spine. She says the tumour is non-significant in this situation – medical reporting indicates the tumour is not symptomatic. Also, the tumour is located higher on the spine than the lower back issues the worker is experiencing.

[37] She references Dr. Sahjpaul's April 23, 2010 report [ref. para. 20] which states:

Incidentally, [the worker] asked me whether his L4-5 problem was work-related. Looking back on my notes, he did have a significant fall after which time he developed symptoms. The initial CT scan did show in addition to spinal stenosis a central L4-L5 disc herniation. I have told him that I suspect the L4-L5 disc herniation was traumatic but obviously he had some degenerative changes also.

[38] The advocate says that the worker suffered many work-related injuries to his back. He also has degeneration although in 2002, the degeneration was "mild". The worker spent 43 years working in a very heavy industry. She submits when the worker first filed claims with the board he did not have a back "full of severe degeneration". She maintains this is what the decision-makers have made this out to be – there was a congenital stenosis, which may be true; however it was mild, minimal. The board focused on the worker's predisposition, genetics, stenosis and narrowing of the spinal column. The board never adequately considered the occupational exposure the worker was subjected to through the years.

[39] She asks the committee to review and consider the effect the worker's employment of running heavy equipment for 43 years has had on someone with mild degeneration. She queries: Does it speed it up? Does it worsen it? Does it accelerate it?

[40] The advocate submits Dr. Sahjpaul notes two things: 1) the herniations were traumatic in nature and 2) the surgery was required to repair the herniations in order to alleviate the sciatica. She says the worker would not have the herniations except for the work-related accidents.

[41] She submits, pursuant to Policy EN-07, "Pre-Existing Conditions", there probably was an acceleration and that is when the work-related incidents have worsened or caused the deterioration of the pre-existing condition causing permanent damage.

[42] The advocate contends the adjudicator and hearing officer did not take into consideration the worker's occupational exposure with respect to the constant pounding and did not take into consideration the numerous injuries to the same place. She further submits the board decision-makers relied heavily on the medical consultant's reporting when Dr. Sahjpaul's opinion as the

surgeon and specialist should have been given more weight. The medical consultant did not examine the worker.

- [43] She says after the worker was sent to the Canmore Pain Clinic, he was returned home and resumed a very heavy occupation. She says that if more investigation had been done, with a functional capacity evaluation undertaken at that time, possibly a ruling would have been rendered noting the worker should not be put back into the heavy industry. The rehabilitative process would have then “kicked in” and the board would have had to find a suitable occupation for the worker which could involve retraining or deeming.
- [44] The worker asks the tribunal to reverse the hearing officer’s November 26, 2009 decision and to make a determination that his ongoing condition is work-related.

**Issue: Is the worker’s ongoing condition work-related?**

**Answer: No**

**Analysis**

- [45] In order for an injury to be compensable, it must be the result of an accident as defined under Policy CL-42, “Arising Out of and In the Course of Employment”. When adjudicating the eligibility of a claim, decision-makers must look at the nature of the injury and its relationship to the compensable accident.
- [46] The worker filed 11 claims for compensation dating back to 1989; all have been accepted by the board as work-related injuries. Medical reporting indicates the worker consistently re-injured the same region in his lower back – L3, L4-5. Diagnoses from the first claim, beginning in 1989 and continuing until 2002 are consistent:
- Claim No. 89-1280 – “lumbar strain L2-3, L5”  
93-1219 – “spinal restrictions at L3 & L5”  
95-0070 - “low back strain”
- Claim No. 97-0859 – “soft tissue injury, possible disc involvement”  
98-0541 – “lumbar overuse syndrome, impact trauma”  
98-1015 – “L5 radiculopathy/overuse lumbar strain”  
2001-0972 – “Lumbar spine posterior facet jamming”  
2002-0473 – although a diagnosis was provided as “bilateral contusions & strain to ankles”, the worker was sent to the Canmore Chronic Pain Clinic to manage his back pain.  
2003-0658 - “exacerbation of chronic low back pain & sciatica”
- [47] Section 6 of the *Workers’ Compensation Act*, R.S.Y. 2002 (the “Act”) 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.”

[48] We find the worker's numerous injuries arose out of and in the course of his employment. There is nothing contained in the files, or in the worker's testimony that relates his back pain to anything other than injuries sustained to his back during the course of his employment. Despite that he does have degenerative changes, the "presumption" to the contrary has not been shown in this instance.

[49] The adjudicator as well as the hearing officer relied heavily upon the report from the medical consultant who stated that, in his opinion, the worker suffers from "significant" and "long-term" degenerative changes. The medical consultant opined, with respect to the 2002 injury, that the disc bulge was more in keeping with degenerative changes than an acute injury.

[50] We prefer Dr. Sahjpaul's opinion over the medical consultant's in this regard. He is a neurosurgeon and specialist who has examined and treated the worker on several occasions. On March 18, 2008 Dr. Sahjpaul reports, "It appears that his back pain and right leg pain date back to the work-related injury and he has never healed". A Consultation Report of April 23, 2010 by Dr. Sahjpaul states,

Incidentally, [the worker] asked me whether his L4-L5 problem was work-related. Looking back on my notes, he did have a significant fall after which time he developed symptoms. The initial CT scan did show in addition to spinal stenosis a central L4-L5 disc herniation. I have told him that I suspect the L4-L5 disc herniation was traumatic but obviously he had some degenerative changes also.

[51] The appeal committee disagrees with the medical consultant that the worker had "significant" degenerative changes before the 2002 incident. A March 22, 2002 x-ray reveals findings of "mild to moderate disc space height loss at L5-S1 with mild anterior osteophytes" and "mild degenerative changes at L5-S1". A CT scan completed on March 6, 2007 notes "congenital narrowing of the osseous central canal" and "mild central stenosis at the L3-4 level and moderate central stenosis at L4-5". The CT scan also shows "advanced disc degeneration" at L5-S1". We conclude the degeneration was likely exacerbated by the numerous years of operating heavy equipment.

[52] The advocate's submissions are based on Policy EN-07 [see para. 41]. This is incorrect, Policy EN-07 came into effect July 1, 2008. It does not apply to this worker's appeal. Instead, Policy CL-47, Pre-existing Conditions, effective April 1, 1994, should properly be used in this instance.

Policy CL-47, 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

A 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.

B. Entitlement to Compensation

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 not be paid for a pre-existing condition if the worker has recovered from the aggravation of a pre-existing condition to the extent that there is no loss of earnings caused by the aggravation, and the disability is the sole result of a pre-existing condition.

- [53] All medical professionals as well as board staff and the medical consultant agree that the worker is suffering from degenerative changes to back. Dr. Koltun, when speaking to the adjudicator on August 14, 2002 stated he had referred the worker to a neuro-surgeon and is waiting for a date. He said that when the worker goes for surgery they will likely deal with the disc herniation at the same time. "He said in the meantime he believes the worker's back pain is mechanical and due to his work." The committee considered Policy CL-47, Pre-existing Conditions and found that since all the claims were accepted as work-related, the policy would apply.
- [54] We find that over 43 years of employment this worker has been engaged in has entailed jarring and bouncing while operating heavy machinery. He testified he continued to experience bouts of pain and limited mobility, indicating an aggravation(s) of a pre-existing condition. We conclude the worker's pre-existing condition was aggravated by his compensable injuries.
- [55] The worker testified that since the operation in 2009, his pain has diminished considerably. He has been provided with compensation benefits in the form of wage loss and medical management on a case-by-case basis.

**Provision of documents**

- [56] As stated earlier, two documents were advanced to the committee the day before the hearing, one document was provided 40 minutes prior to the hearing and the final document, a March 22, 2002 x-ray report, was given to committee members during the hearing. The advocate submitted these documents to strengthen her argument.

[57] Section 63 (b)(iii) of the *Workers' Compensation Act*, S.Y. 2008 states:

The members of the appeal tribunal shall:

(b) make rules and procedures consistent with the Act and regulations relating to

(iii) procedures for the conduct of its own affairs including hearings by appeal committees;

[58] The Workers' Compensation Appeal Tribunal's (WCAT) Rules of Procedure for Proceedings before WCAT sets out disclosure requirements as follows:

Disclosure

Section 64(4) of the *Workers' Compensation Act* provides the tribunal with access to the entire claim file or record.

4. All evidence to be presented at the hearing must be provided to the appeal committee and other parties at least 7 days prior to the hearing.

[59] WCAT's Notice of Appeal states, in Section 7. "Additional Information":

Information, submissions or evidence must be provided to the Tribunal and other parties 7 days before the hearing. (Evidence or information not provided 7 days in advance will not be accepted into the hearing.)

[60] Policy AP-03, "New Evidence at Reviews & Appeals" states in part:

Policy Statement

If new information is presented at the review or appeal level, the hearing officer or the Tribunal must determine whether the new information is new evidence, in accordance with the definition of new (or additional) evidence.

[61] We have determined that the documents provided to the appeal committee immediately before and during the hearing are not new evidence. They do not meet the criteria contained in Policy AP-03 for new or additional evidence.

[62] We commend the worker for his tenacity and work ethic. Information on file indicates he would suffer an injury and after usually a short course of treatment or minimal time off work, return to his employment.

## Decision

The appeal committee disagrees with the findings of both the adjudicator and the hearing officer in that they attribute the pain condition of the worker to degenerative disc disease. We agree with the evidence that the worker does suffer some mild degenerative disease affecting the lower back, but also find that medical evidence of his pain condition is linked to his numerous work-related injuries. His occupation has exacerbated what may have been a pre-existing degenerative disease. It is not known to what extent the degeneration process has contributed, but we do know that work-related injury has been a factor.

We conclude, on the balance of probabilities that both factors are equal in value and therefore the presumption goes in favour of the worker.

The decision is not to award the worker with immediate benefits but to acknowledge that the worker's claims are related. We will not order a blanket authorization for any future claims; any claims brought forward must be determined on their own merits.

Dated this **28<sup>th</sup> day of July 2010** in the City of Whitehorse, Yukon Territory.

This decision is made with the full agreement of the appeal committee.

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W. C. Gryba, Member

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E. Sumner, Committee Chair

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H. Hermanson, Member

### Committee Members:

E. Sumner	Presiding Officer
H. Hermanson	Member
W.C. Gryba	Member