

# Workers' Compensation Appeal Tribunal

## Decision #176

### Claim No.: 97-0109

Date of Notice of Appeal: May 18, 2010

Date of Oral Hearing: October 13, 2010

Date of Decision: November 25, 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:	M. McCullough

**In attendance:** The Worker via telephone  
The worker's representative – Rebecca Anderson  
Nancy Huston - observer  
Vernna Johanson, Recorder

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

## Introduction

This 47-year old worker was employed as a truck driver delivering home heating fuel to residential customers. He filed a claim for compensation to the Yukon Workers' Compensation Health and Safety Board (the "board") for an injury he sustained to his back while filling a fuel tank on January 16, 1997. The worker's claim was accepted by the board. The worker was referred to a rehabilitation program and returned to work. However, he claimed a recurrence of his injury on August 25, 1997, resulting in board-authorized surgery in December of 1997. His file was closed on April 30, 1998.

There was no activity on the file from August 1998 to December 2005. The worker requested that his claim be re-opened. The request was originally denied but a hearing officer review in February 2009 concluded that the worker's current symptoms were related to his 1997 work-related injury and compensable surgery. In August 2009 the worker was referred to a physiotherapy and rehabilitation centre for assessment with a recommendation that he participate in a 6 to 8 week interdisciplinary rehabilitation program. On discharge, the worker was to participate in a home exercise program.

On April 29, 2010 a board case manager (adjudicator) found the worker was not completing the recommended home exercises resulting in the worker not mitigating his losses as per section 14 of the *Workers' Compensation Act*. The worker asks the tribunal to reverse the adjudicator's decision. He requests compensation benefits be re-instated in order to participate in further rehabilitation to overcome the effects of his work-related disability.

[1] The worker attended the hearing via telephone and testified by affirmation. He was represented by the deputy workers' advocate. The accident employer is no longer in business and therefore was not notified of the appeal. 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 record as provided by the board.

## Jurisdiction

- [3] On May 18, 2010 the worker forwarded an appeal of the adjudicator's April 29, 2010 review, with the tribunal under s. 14 (1) 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 a claim for an injury which occurred on January 16, 1997. Compensation entitlement decisions are made pursuant to legislation in place at the time of injury. In this instance the *Workers' Compensation Act* S.Y. 1992 as amended to the date of accident 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*.

- Policy IN-03, Transition Policy
- Policy CL-47, Pre-existing Conditions, effective 94-04-01
- Policy RE-02-1, Duty to Co-operate, Part 1 of 4, Early and Safe Return to Work Plans
- Policy RE-02-2, Duty to Co-operate, Part 2 of 4, Roles and Responsibilities
- Policy RE-02-3, Duty to Co-operate, Part 3 of 4, Functional Abilities
- Policy RE-02-4, Duty to Co-operate, Part 4 of 4, Penalties for Non Co-operation

### **Evidence from the Record**

As this appeal deals with a suspension of benefits, there is no need to summarize the entire record. We will provide a summary of file documentation that relates specifically to the suspension of benefits

- [6] The worker was employed as fuel delivery driver. On January 29, 1994 he filed a Worker's Report of Injury/Illness stating he injured his back on January 16, 1997 while filling a residential fuel tank. The worker's claim was accepted by the board; he received wage loss and medical benefits.
- [7] On August 25, 1997 the worker attends his family physician who advises that the worker be referred to a specialist for surgical decompression of his protruding disc. He is referred to Dr. Wing, orthopaedic specialist on November 14, 1997. The board accepted responsibility for and authorized the discectomy surgery which occurred on December 4, 1997.
- [8] The worker is provided a 10% permanent partial impairment (PPI) award in March 1998 due to the surgically treated disc lesion and ongoing minor neurological impairment of the lower extremity related to his lumbar spine.
- [9] In September 2005 the worker asks that his claim be reopened, reporting that he had ongoing pain for the past five to six years and recent parathesias of the left leg. A May 23, 2006 letter to the worker from the adjudicator denies the reopening of the claim because the adjudicator could not find a link between the worker's current condition and his work-related incident of 1997.
- [10] The deputy workers' advocate, on behalf of the worker, provides the adjudicator with further medical evidence on October 1, 2008. She requests a further review of the claim. The adjudicator responds on October 6, 2008 that his May 23, 2006 stands; he concludes the worker's ongoing and current symptoms are related to degenerative disc disease which did not arise out of or in the course of employment.
- [12] The worker appeals this decision to the hearing officer. On February 6, 2009 the hearing officer renders a decision reversing the adjudicator's May 23, 2006 and October 6, 2008 decisions. She finds that the worker's current medical symptoms are related to the compensable work-related injury of January 16, 1997 and subsequent back surgery of December 4, 1997.
- [13] An August 27, 2009 MRI of the lumbar spine states:

Impression: Post-surgical changes at L5-S1 but no recurrent disc protrusion. The non-surgical levels of the lumbar spine are otherwise normal.

Dr. Durand provides an addendum, dated August 31, 2009 to the MRI with the following recommendations:

- Presently, this patient can work in a light physical demand level and should avoid repetitive bending and lifting.
- This patient does not have any abnormalities on his MRI that need referral to a back surgeon.
- In view of this patient's symptoms, and in my opinion, he would benefit from an eight week Provider Site Based Rehabilitation Program to increase his range of motion, decrease his discomfort and maximize his physical demand level. This patient can slowly progress in his physical demand level as he progresses through the rehabilitation process. Hopefully, this program would be able to improve and maximize his physical demand level.

[14] The worker participates in a six week rehabilitation program in September 2009 through CBI Physiotherapy and Rehabilitation Centre.

[15] A September 16, 2009 note to file by the adjudicator states:

I called CBI to discuss the worker and his feeling that he needed pain management. They felt that he didn't need it at this point and would not really recommend it for him. His movement is getting better in the week and half that he has been there and his pain levels are inconsistent. They get the sense that the worker feels that he is going to need years of therapy and that he will not be happy unless he is retrained. He feels that he needs to be retrained. When they show him that he is functionally able to do most of his pre-injury job he gets upset. They also let him know based on my conversation with them regarding vocational rehab. that our hierarchy is to look at transferable skills and entry level occupations first before retraining is even thought about. It is our last hierarchy.

[16] An October 22, 2009 CBI Physiotherapy & Rehabilitation Centre discharge report indicates the worker completed a six week rehabilitation program and demonstrated the ability to work at a medium NOC level capacity; he is fit to resume his pre-accident job demands at the time of discharge. Following are excerpts from the report:

[The worker] demonstrated full range of motion and normal muscle tone of the lumbar spine with no palpable joint restrictions. Range of motion was frequently noted to be self-limited on testing with full mobility noted at other times. Pain behaviours were noted as [the worker] would report significant lumbar pain levels, ranging from 6/10 to 18/10 and he self-limited his functional abilities due to reported increases in pain. He was not observed to reach his psychological maximum with his lifting tasks.

[The worker] demonstrated three of four positive non-organic findings on several occasions. Non-organic tests are those tests which do not move or provoke tissues of the lumbar spine. Positive tests are indicative of a non-mechanical pain response. There are no objective findings present to suggest any musculoskeletal limitations or pathology.

[The worker] was fit to resume his pre-accident job demands at the time of discharge.

- [17] On November 9, 2009 the adjudicator writes to the worker providing his reasons for ongoing entitlement. The adjudicator notes the worker was released from the CBI rehabilitation program able to resume his pre-accident employment as a fuel delivery driver, resulting in the worker no longer being entitled to compensation for wage loss. The adjudicator states:

You have been discharged from CBI with a home program in order to maintain your discharge level of function. If you fail to participate in that home program you may be failing to mitigate your losses under section 14 of the Act. Failure to mitigate may affect any future re-open requests.

If further medical information is received with regard to your work-related injury of your low back, your file will be reviewed at that time.

- [18] A Doctor's First Report dated December 15, 2009 by Dr. Laura Wise states the worker attended with subjective complaints of lower back pain radiating into lower legs. No deformity is noted; there is no point tenderness. The treatment plan is to "continue rehab & physio."
- [19] Dr. Wise provides an office visit report dated December 15, 2009 noting "poorly controlled" diabetes. The patient is also complaining of chest pain for the past 3 months with activity "resolves with stopping activity". The worker is advised to stop smoking, use medications regularly and improve dietary changes.
- [20] Physiotherapist Tanya Van Dam reports on April 14, 2010 that the worker attended with pain in his central low back radiating into both legs to ankles. She diagnoses "L5/S1 laminectomy (secondary degenerative disc disease)". The treatment plan is for acupuncture, traction, manual therapy, home exercise program, lifting education and a work conditioning program. Factors that might complicate recovery are noted as "chronicity of injury" and "patient reports no treatment has helped in the past."
- [21] An April 20, 2010 adjudicator's note to file states:

I received a call from the worker. He wanted to inform me that he has aggravated his back. He said that he took a trip to Grande Prairie and upon his return his back was bothering him. He said he went to emergency on April 4/10 and then to his doctor. He has had an assessment from a physiotherapist and has been attending therapy. I asked if [he] had been continuing his home exercises given to him by CBI. He said that he had

and has lost 10 pounds. I explained that I needed all the medical and therapy reporting in consideration of a re-open.

[22] On April 21, 2010 the adjudicator asks the board medical consultant to review the file and provide her medical opinion on whether there is a need for a new treatment plan of acupuncture, traction, and manual therapy and whether work hardening is viable considering the worker has indicated that all treatment in the past has not worked. He was discharged from CBI fit to return to his pre-injury occupation and instructed to continue with a home exercise program. The adjudicator also queries whether it is reasonable to return the worker to CBI for re-evaluation to determine whether he has been following the recommendations contained in the discharge report. "Or is there enough in the new therapy report to show that he has not been exercising regularly."

[23] The medical consultant responds on April 27, 2010. Following are excerpts from her report:

I note that on December 15, 2009 [the worker] was seen by Dr. L. Wise at the Kriel Professional Corp. Medical Clinic. The report on his chart showed extremely poorly controlled diabetes mellitus with a hemoglobin A1C of 12.5 and blood glucose fasting level of 16.4. These clearly showed uncontrolled diabetes mellitus. These levels also show chronically poor self-management of diabetes mellitus in respect to any exercise or fitness program.

These clinical findings would strongly suggest that [the worker] has not maintained the level of home therapy that he was discharged from CBI with. It is my medical opinion that treatment with acupuncture, traction, manual therapy and further work hardening exercise will not be anymore beneficial to [the worker] as his following his home exercise program. Also general fitness exercises program that involves cardio workup will also be effective both for [the worker's] back pain and for control of his diabetes mellitus. I think it will be helpful to forward the CBI report to both the physiotherapist and Dr. L. Wise at Dr. Kriel's office. [The worker] should also be encouraged to take a copy of his home exercise program to his new physiotherapist.

It is obvious that he has not been carrying out the recommended exercise program. It will be beneficial for him to resume these exercises with the help of his new physiotherapist.

[24] On April 29, 2010 the adjudicator writes to the worker explaining his decision. He states:

Upon completion of a six week rehabilitation program from CBI, you were discharged from the program able to resume our pre accident duties as a fuel delivery driver. You were discharged from CBI with a home program in order to maintain your discharge level of function.

Based on the review of your file, it was the doctors [medical consultant's] opinion that, "It is obvious that [the worker] has not been carrying out the recommended exercise program and it would be beneficial for him to resume those exercises. Treatment with acupuncture, traction, manual therapy and further work hardening will not be anymore beneficial than following his home exercise program".

Given this information I am unable to authorize further physical therapy and work conditioning as you have failed to mitigate your losses as per Section 14 of the Act. You were discharged from the work conditioning program at CBI with an understanding that your continued participation in a home exercise program was imperative to maintain your discharge level of function and fitness. This has not occurred.

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

- [25] The worker testified that when he was discharged from the work-conditioning program on October 22, 2009 he was still in "extreme pain". He said a few days earlier he had to go to the Emergency Department and get a shot to settle his back down; the pain was getting way out of control. He said that he told the therapist [at CBI] that he was experiencing extreme pain and "it didn't seem to matter one way or the other to them". The worker stated that "with CBI if you're in pain, you're making progress."
- [26] The worker was asked to explain how he aggravated his back in December 2009. He said as part of his exercise program he is to "take a walk". He took his dog for a walk and "it just aggravated it". He thinks he may have walked too far or something. He said he does not have to do much to aggravate it. Even if he turns too quickly, his leg goes numb and he falls over.
- [27] The worker testified that he took WCB's advice and got a truck driving job hauling CO<sub>2</sub>, which, he submitted is the "easiest job he could possibly find to drive truck". He drove to Grande Prairie (from Medicine Hat), unloaded his load and his back started to bother him so much that he vomited during the night. When he drove back to Medicine Hat his wife had to help him get out of the truck. He said his legs were "just gone". He submits this pain and aggravation to his legs stems from the scar tissue rubbing against a nerve which "cuts off his legs". The worker testified that the only thing that aggravated his pain/injury was the trip to Grande Prairie and back.
- [28] When questioned whether the worker had any extended periods of time since 1997 without back pain he said he has "always had back pain, it's just a matter of how severe". Some days it would not be too severe; he could do things. Other days it would be so severe that he could not do anything. He said, "It's pretty much always been like that." The worker testified that he never had any trouble with his back prior to the 1997 fall.

[Note: We question the worker's credibility. A January 19, 1997 Doctor's First Report by Dr. Skinner states the worker attended with "low back pain since this a.m. - on and off for five years. He had been employed as a truck driver for 15 years. The worker's description of injury states: "denies injury – says it's due to truck driving long hours."]

- [29] The worker said that physiotherapy treatments have been most beneficial to him. It keeps his back "kind of loose" and it eases the pain a little bit but not a lot. Lately, he said, it does not seem like anything is working. The more exercise he does, the more it aggravates it. The physiotherapy keeps his back loose and he lays on a heating pad or something and he is then able to walk.
- [30] The worker testified he took "a lot of pain medication" and it helps but he cannot do anything when he is taking it. He has been taking pain medication since the accident in 1997. He takes oxycontin, diabetes medication, apo-tramadol/acetaminophen, and naproxen; anti-inflammatories and pain killers mostly. He takes pain medication 3 times per day, every day. He said that he is unable to drive truck after he has taken some of his pain medication.
- [31] He stated as a daily routine he gets up and completes a couple of hours of exercises/therapy that was given to him, he then goes for a walk. The exercises consist of stretches, presses, arching the back and standing on one foot for balance; he then lays down and stretches his legs and does tucks. He said he looks for a job that he can do. This involves "walking around and stretching". He goes home and works out a little bit with weights. The worker said he purchased a home gym in order to "work out the parts of me that actually do work". The worker said he has done this as a daily routine ever since he was discharged from the CBI program. He said he tries to do a little more every day. Some days it aggravates his back and other days "it seems to work out pretty good". The only times he does not complete his exercise program is when he has back pain during the night and it continues into the day. When this occurs he said that even taking pain medication does not alleviate the pain.
- [32] He said he sees his doctors regularly due to his diabetes. He said his diabetes is still "a little bit out of control" after a year. He attributes this to his body adjusting to exercising, not because he is not completing the exercises. With the pain he experiences, he submits, it elevates his blood sugar. Between the pain and the exercises he has to attend the doctor every month to regulate his medications. He testified that his diabetes is under control now.

[The worker provided contradictory testimony. He stated that his diabetes is still a little out of control but then later said it is now under control. Also ref. para. #28.]

- [33] When questioned how the initial accident happened, the worker explained that he was filling a residential fuel tank. In order to get on top of the tank, he had to climb a wooden ladder. One of the rungs on the ladder broke and he fell to the snow-covered ground. He estimated that he fell approximately 13 feet. The worker said he did not report the accident right away because he thought he would be sore for a few days and then he would be okay. He kept on working but as time passed, his pain got worse.

## The Worker's Advocate's Submission

- [34] The advocate says the worker contacted the case manager on April 20, 2010 to inform him that he had aggravated his back. At this time the case manager (adjudicator) asked the worker if he had continued with the exercises provided to him at discharge from CBI. The worker reported that he had been continuing the home exercise program and had lost 10 pounds.
- [35] The advocate submits that despite the fact the worker told the adjudicator that he had been participating in the home exercise program, the adjudicator used section 14 of the *Act* to disallow the worker's request to re-open the claim.
- [36] She submits, as the worker testified, he has done everything required of him as directed by the adjudicator and the therapist at CBI. He participated in the home exercise program and has now lost a considerable amount of weight to support this. The advocate says that although the worker has experienced positive change with respect to weight loss, he continues to suffer from back pain.
- [37] The advocate contends the board used the worker's poorly regulated diabetes as grounds to support that the worker did not participate in a home exercise program therefore disallowing the request to reopen his claim. She submits there are several types of diabetes; not all are the same nor are they treated and regulated the same way. She says the medical consultant did not consider the effects of narcotics on the worker's condition or that physical activity can impact blood sugar levels, thereby producing problems with regulating medications.
- [38] She maintains that the "thin skull" rule applies in this instance; you take your victim as you find them. The worker's condition of diabetes should play no part in this worker's claim for back pain. There is no medical reporting tying the back pain to the diabetes. Diabetes should not have been considered when the worker requested that his claim be reopened.
- [39] The advocate submits the worker has been living with back pain, because of the work-related accident, in excess of 13 years. To come to the conclusion that after attending a six week work conditioning program and undertaking home exercises, the worker will never suffer from back pain again is unrealistic. They dispute the board's findings that the worker suffers from an aggravation of a previous injury because he did not perform his home exercises.
- [40] The advocate says the Objects of the Act and Policy CL-47, Pre-existing Conditions, should be considered when deciding this claim. She uses the following from Terence G. Ison's, *Workers' Compensation in Canada*, 2<sup>nd</sup> ed. to support her submission:
- Pg. 105, section 5.4.1, Pre-existing causal factors
  - Pg. 110, section 5.5.2, Significance
- [41] She contends the worker has suffered an aggravation of his pre-existing condition. The condition was a direct result of the work-related accident in 1997. She submits because the injury and subsequent surgery was compensable, so too is the aggravation. The advocate maintains the worker would not be in the current condition he is, in need of ongoing medical aid and rehabilitation, if not for the work-related compensable injury and subsequent surgery.

## Relief Requested

[42] The worker asks the appeal committee to reverse the adjudicator's April 29, 2010 decision. He requests that his claim be reopened and he be provided with the necessary medical treatment and benefits for his work-related injury.

**Issue: Did the worker mitigate his losses pursuant to section 14 of the Act?**

**Answer: Yes**

## Analysis

[43] Section 14 of the 2008 Act states:

(1) Every worker must

- (a) take all reasonable steps to reduce or eliminate any impairment and loss of earnings resulting from a work-related injury;
- (b) seek out and co-operate in any health care assistance or treatment that, in the opinion of the board, promotes the worker's recovery or return to work;
- (c) if required by the board, submit to a medical examination, independent medical examination or other evaluation;
- (d) take all reasonable steps to provide to the board full and accurate information on any matter relevant to the worker's claim for compensation; and
- (e) notify the board immediately of a change in the circumstances that affects or may affect the worker's initial or continuing entitlement to compensation.

(2) The board may suspend, reduce or terminate compensation otherwise payable to a worker, where the worker fails to comply with paragraphs (1) (a), (b), (c), (d), or (e).

[44] Section 19 of the Act states:

Despite anything contained in this Act, when the disputed possibilities are evenly balanced on an issue, the issue shall be resolved in favour of the worker or the dependent of a deceased worker.

[45] The worker was discharged from the CBI rehabilitation after completion of a 6 week rehabilitation program and with a home exercise program to maintain his discharge level of function. He was considered fit to resume his pre-accident employment as a fuel delivery driver.

[46] When the worker contacted the board to notify them he had re-injured his back or aggravated his previous back condition, the adjudicator queried whether or not the worker had continued

with his home exercise program. The worker stated that he had; further, he had lost 10 lbs. The adjudicator asked for an opinion from the board medical consultant. Based solely on the medical consultant's reporting that clinical findings showed extremely poorly controlled diabetes indicating the worker was not carrying out the recommended exercise program, the adjudicator failed to authorize a re-opening of the claim or further medical benefits in the form of therapy or work-conditioning. The medical consultant further noted, "It is obvious that he has not been carrying out the recommended exercise program. It will be beneficial for him to resume these exercises with the help of his new physiotherapist."

- [47] We find the medical consultant's statement contradictory to the adjudicator's refusal to authorize further treatment. Although the medical consultant opines the worker has not continued with his home exercise program, she discusses resuming exercises with his new physiotherapist.
- [48] As the workers' advocate pointed out there are many different types of diabetes as well as several things that could impact the worker's diabetes. The board accepted the worker's claim originally for a back injury.
- [49] The worker participated in a rehabilitation program and tried to resume working. We find that he complied with the criteria set out in section 14 (1) (a) (b) (c) (d) and (e). Rather than re-open the claim and determine whether the worker's present condition is related to the original work-related injury, the adjudicator closed all avenues the worker could take to reinstate his claim. Medical reporting does not indicate a link between the worker's diabetes and his back pain.
- [50] Based on the balance of probabilities as contained in section 19 and assuming the worker continued with his home exercise regime, we conclude that the adjudicator incorrectly invoked section 14 of the Act. We find the adjudicator gave more weight to the medical consultant's opinion that the worker was not continuing with his home exercise program and therefore was not mitigating his losses, rather than believe the worker when he said that he continued with his exercise program. In this instance, we find the possibilities are evenly balanced and the issue should be resolved in favour of the worker.
- [51] The advocate asked the appeal committee to consider Policy CL-47, Pre-existing Conditions. We will not do so as this has not been previously determined by an adjudicator or hearing officer. We will rule only on whether or not the worker mitigated his losses as provided by section 14 of the Act. We find that he did.
- [52] Based on the worker's testimony we have concerns with the amount and type of medication the worker is taking [ref. para. #30]. Early in the claim, Dr. Quong commented that he was "reluctant to try more potent narcotics to alleviate the back pain" (April 14, 1997) and "I believe that narcotics should be absolutely avoided" (April 24, 1997).
- [53] Policy RE-01, Return to Work – Overview states:

### General Information

Return to work is a proactive approach to help injured workers return to safe and productive work activities as soon as it is functionally appropriate.

### Prevention

Preventing workplace injuries is the responsibility of everyone in the workplace. When injuries do occur it is important for workers and employers to minimize the impacts by focusing on keeping the worker, when possible, or returning the injured worker to safe and productive work as soon as it is functionally appropriate for the worker to do so. Prevention of recurrences and further injuries once injured workers have returned to work is of utmost importance.

[54] The worker has been provided with a permanent impairment award, wage loss benefits and medical assistance in order to return him to the work force. It appears that he is having difficulty returning to any kind of employment. We believe it would be beneficial for him to move forward and return to gainful employment.

### Decision

The worker's appeal is allowed. The adjudicator's April 29, 2010 decision is reversed and varied.

1. The worker's claim shall be re-opened as of the date of this decision.
2. The board shall re-assess the worker in order to facilitate a return to work as per Policy RE-01.

Dated this **25<sup>th</sup> day of November 2010** in the City of Whitehorse, Yukon Territory.

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M. McCullough, Member

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E. Sumner, Committee Chair

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H. Hermanson, Member