Noteworthy Decision Summary

Decision: WCAT-2006-04763 **Decision Date:** December 22, 2006
Panel: Cynthia Katramadakis

Reconsideration – New Matter for Adjudication – Effect of Prior Non-Compensable Pre-Existing Condition on Subsequent New Medical Condition – Sections 96(4) and 96(5) of the Workers Compensation Act – Policy item #C14.101.01 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy for its analysis of the effect of an unappealed decision not to accept a pre-existing degenerative condition when that decision was issued more than 75 days before the acceptance of a new medical condition.

The worker's claim was initially accepted for a lumbar contusion. It was subsequently accepted for a compression fracture. However, the Workers' Compensation Board, operating as WorkSafeBC (Board), denied a reopening of the worker's claim on the basis that the worker's current complaints were more likely related to his pre-existing non-compensable spinal stenosis. In a prior unappealed decision, the Board had determined that the worker's ongoing complaints were related to his non-compensable pre-existing spinal stenosis, and that the workplace incident had not worsened this condition. In the decision under appeal both the Board and the Review Division of the Board concluded that the worker had suffered only a temporary aggravation of his pre-existing spinal stenosis condition.

A preliminary issue arose as to whether the Board and Review Division had reconsidered the prior unappealed Board decision beyond the 75 days allowed by section 96(5) of the *Workers Compensation Act* (Act). The panel found that, because the acceptance of this newly diagnosed medical condition and its effect on the pre-existing spinal stenosis had not been previously decided, the reconsideration provisions of the Act did not apply and the matter was properly within the jurisdiction of the Board, the Review Division, and now the WCAT panel to decide.

Section 96(4) of the Act provides that the Board may, on its own initiative, reconsider a decision or order made previously. Section 96(5) states that there must not be more than 75 days which have elapsed since the date of the decision or order in question; there must not have been a request for review in respect of that decision or order under section 96.2; or there must not have been an appeal filed in respect of that decision or order under section 240.

The panel concluded that Board's determination regarding whether the compression fracture caused a permanent aggravation of the worker's pre-existing spinal stenosis condition was not a matter the Board was able to turn its mind to at the time it made the unappealed decision. Policy item #C14.101.01 of the *Rehabilitation Services and Claims Manual, Volume II* identifies that at various points during the adjudication of a claim the need may arise to adjudicate new matters not previously decided and make decisions on these matters. The limits in the Act on the Board's ability to change previous decisions through reconsideration or a reopening are not intended to restrict the Board's ability to make new decisions in accordance with the Act and

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

policy that do not question previous decisions. A situation provided in policy where the Board may make a new decision on a matter not previously decided is one that arises as a result of new information or a change in circumstances that occur after a previous decision. Another situation is where the acceptability of additional medical conditions identified during the adjudication of a claim or acceptability of further injury or disease arises as a consequence of a work injury.

An amendment was issued for WCAT-2006-04763 and is attached to this document.

WCAT Decision Number: WCAT-2006-04763
WCAT Decision Date: December 22, 2006
Panel: Cynthia J. Katramadakis, Vice Chair

Introduction

On January 30, 2003 the worker, a steel fabricator, reported injuring his lower back when he slipped while pulling columns off a forklift and consequently landing "flat" on his back. The Workers' Compensation Board, now operating as WorkSafeBC (Board), initially accepted the claim for a lumbar contusion. Some time later, investigations indicated the worker also had an L1 compression fracture.

By way of a September 23, 2005 decision letter, a case manager advised that on the strength of a Board medical advisor's (BMA) opinion, the L1 compression fracture was considered reasonably related to the mechanism of injury under the claim. However, the case manager also determined that the worker's current complaints were more likely related to his pre-existing non-compensable degenerative disc disease. Therefore, the case manager declined to reopen the claim as there had been no significant change in the worker's compensable condition nor a recurrence of the injury. Finally, the case manager concluded the medical evidence did not support that the worker had been left with any permanent functional impairment and thus, the claim would not be referred to Disability Awards.

The worker requested a review of this decision from the Board's Review Division. By way of a decision dated February 28, 2006, a review officer confirmed the Board's decision concluding that it was at least 50% likely that the worker sustained an L1 compression fracture as a result of the work incident. The review officer also confirmed that the worker's ongoing symptoms and complaints were related to his pre-existing back condition given the BMA's opinion that the healing time for a compression fracture was two months, and given that the worker had only sustained a temporary aggravation of his pre-existing degenerative disc disease. On this basis, the review officer confirmed that there were no grounds to reopen the claim.

The worker appealed this decision to the Workers' Compensation Appeal Tribunal (WCAT) seeking a finding that his compensable compression fracture was the cause of his ongoing complaints and accordingly, the claim ought to be reopened for benefits.

The worker is represented in his appeal. The employer did not participate in the appeal although advised of its right to do so.

Preliminary Matters

Firstly, the worker requested an oral hearing. In June 19, 2006 correspondence to the Registry Department of WCAT, the worker's representative stated he intended to raise issues concerning the credibility of the Board's decision makers. By way of a written response dated June 30, 2006, a Deputy Registrar with WCAT denied the request for an oral hearing; however, he advised the representative that should the panel considering the appeal determine that further evidence or an oral hearing is required, then the parties would be notified accordingly.

I have reviewed the worker's request again in accordance with WCAT's *Manual of Rules of Practice and Procedure* (MRPP), which sets out criteria for convening oral hearings. Item #8.90 sets out a number of criteria WCAT considers in deciding whether an appeal will proceed by way of an oral hearing. I have considered those criteria as follows:

1. Whether there is a significant factual issue to be determined. I find that is not the case here. From my view, the main issues under appeal are medical in nature and revolve around interpreting and applying the *Workers Compensation Act* (Act) and policy. Moreover, I find that there are no significant issues of credibility to resolve in the appeal. I have no reason to question the credibility of the worker and I do not consider that the issues under appeal turn on the worker's credibility. I also considered the representative's request for an oral hearing in order to challenge the credibility of the Board officer who made the original decision under appeal. However, I do not consider the need to conduct an oral hearing on this basis given I am satisfied there is sufficient documentary evidence with which to weigh the Board's decision. And, it is open to the worker and his representative to bring forth any inconsistencies between the Board's decision and other claim evidence, which includes any new evidence submitted at the time of the WCAT appeal.

2. Whether there are multiple appeals of a complex nature. I find that is not the case here. There is one appeal and the issues center on a reopening determination. I do not consider that an oral hearing would assist me in understanding the issues.

3. Whether there is a complex issue with importance to the workers' compensation system. While I can appreciate that this appeal and its outcome is very important to the appellant, I do not consider it raises issues of global importance to the workers' compensation system.

4. Whether there are other compelling reasons for convening an oral hearing (e.g. where an unrepresented appellant had difficulty communicating in writing). In

this case, the worker is represented. The submissions forwarded to the appeal are on point and address counter arguments to the Board's decision. I do not find any compelling reason for convening an oral hearing.

Consequently, I agree with WCAT's Registry Department and find that this appeal will proceed on the basis of a read and review of the file evidence, and submissions.

Secondly, a May 22, 2003 decision letter advised that the worker's ongoing complaints were related to his pre-existing spinal stenosis, which the Board had not accepted as being compensable under the claim. The worker did not appeal this decision. In the decision under appeal, the Review Division and the original Board decision concluded that the worker suffered only a temporary aggravation of his pre-existing spinal stenosis condition. On its face, both decisions would appear to have reconsidered the previous May 22, 2003 decision. Section 96(4) of the Act provides that the Board may, on its own initiative, reconsider a decision or order made previously. Section 96(5) of the Act states that there must not be more than 75 days, which has elapsed since the date of the decision or order in question; there must not have been a request for review in respect of that decision or order under section 96.2; or there must not have been an appeal filed in respect of that decision or order under section 240. Because the original Board decision and Review Division decision far exceeded the 75-day provision, it would initially appear that the decision-makers acted outside their jurisdiction.

Did the Board and Review Division act outside its jurisdiction when it determined in its February 28, 2006 decision that the worker suffered a temporary aggravation of his pre-existing spinal stenosis?

In answering this question, I find it noteworthy that when the Board rendered the May 22, 2003 decision, it was unaware of the L1 compression fracture diagnosis. The existence of this condition was first brought to light by a February 26, 2005 x-ray. By consequence, the Board's determination of whether the L1 compression fracture caused a permanent aggravation of the worker's pre-existing spinal stenosis condition was not a matter the Board was able to turn its mind to at the time of the May 22, 2003 decision. For apparent reasons, therefore, it is not possible to read the May 22, 2003 decision as encompassing the issue I just defined.

Further scrutiny of this issue requires contemplation of the Board's policy item C14-101.01, which clarifies the types of decisions that do not constitute reconsideration or a reopening of a previous decision. Policy identifies that at various points during the adjudication of a claim the need may arise to adjudicate new matters not previously decided and make decisions on these matters. The limits in the Act on the Board's ability to change previous decisions through reconsideration or a reopening are not intended to restrict the Board's ability to make new decisions in accordance with the Act and policy that do not question previous decisions. A situation provided in policy where the Board may make a new decision on a matter not previously decided is one that

arises as a result of new information or a change in circumstances that occur after a previous decision. Another situation is where the acceptability of additional medical conditions identified during the adjudication of a claim or acceptability of further injury or disease arises as a consequence of a work injury.

Accordingly, in certain circumstances, when the Board receives a request for further compensation, it may be necessary to make several decisions. In the specific case under this appeal, the request was to adjudicate the effects of a newly accepted medical condition. In deciding this issue, it was necessary for the Board to embark on an adjudication of the effects of the newly diagnosed condition on the pre-existing condition. And, in this case, a determination of the matter requires a determination of whether this new condition caused a permanent aggravation of the pre-existing spinal stenosis.

Because the acceptance of this newly diagnosed medical condition and its effect on the pre-existing spinal stenosis had not been previously decided, I find that the reconsideration provisions do not apply and therefore, the matter was properly within the jurisdiction of the Board, the Review Division, and now this panel to decide.

Issue(s)

The issues under appeal are:

- Whether the worker's ongoing symptoms, specifically generalized lumbar spine pain with radicular symptoms, relate to his compensable L1 compression fracture.
- Whether the L1 compression fracture caused a permanent aggravation of his pre-existing non-compensable degenerative disc disease.
- Whether the worker is entitled to a reopening of his January 2003 claim.
- Whether the worker is entitled to a referral to Disability Awards.

Jurisdiction

Section 239(1) of the Act, as amended, provides that a decision made by a review officer under section 96.2 may be appealed to WCAT. Section 250(1) of the Act allows WCAT to consider all questions of law and fact arising in an appeal, subject to section 250(2), which requires that WCAT apply the relevant Board policy and make its decision on the merits and justice of the case.

This is an appeal by way of a rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

The worker is now 50 years old. At the relevant time of his injury, he had been working as a steel fabricator with the employer on record for six months.

As previously indicated, on January 30, 2003 the worker injured his lower back when he was pulling three steel columns onto a forklift. In the process of pulling a column, his feet suddenly slipped in the mud and he landed flat on his back. The worker reported that he felt immediate pain in his tailbone/low back region. He missed one shift from work, January 31, 2003. A physician's first report for the same date diagnosed a low back contusion. There was local tenderness over the lumbosacral area at L1-L4 though no radiation of symptoms into the legs. The worker returned to his regular duties on February 3, 2003; however, he continued to experience ongoing back discomfort. When reassessed by his attending physician, Dr. Mail, on February 13, 2003, the worker described a worsening of symptoms that included considerable pain with radiation into the right foot and posterior thigh.

A review of prior medical reports obtained by the Board indicates the worker had prior low back complaints for which he was seeking treatment. I have summarized the worker's prior relevant treatment for his back as follows:

- A July 27, 2002 chart note entry indicates the worker sought treatment for back pain. The worker reported low right lumbar pain for over one year. He reported feeling an ache in his right leg and posterior thigh radiating to the foot. He also reported that sometimes he felt tingling and numbness in the same areas. The attending physician diagnosed L5-S1 nerve root impingement and possible early spinal stenosis. X-rays taken the same day revealed severe narrowing of the L2-3, L4-5, and L5-S1 disc spaces. A vacuum phenomenon was present at L4-5 and L5-S1 and there were marginal osteophytes throughout the lumbar spine.

- An August 10, 2002 chart note entry indicates the worker again sought treatment for back pain localized in the posterior right thigh with radiation and tingling in the right foot. The worker was noticed to have an antalgic gait, limping on the right. He was diagnosed as having an L5-S1 disc herniation.

- A CT scan taken August 30, 2002 revealed mild central acquired spinal stenosis at the L3-4 and L4-5 levels, secondary to disc bulge and retrolisthesis at L4 and L5. The worker also had a far lateral right-sided L3-4 disc herniation posteriorly displacing the right L3 nerve root.

- A chart note entry of September 24, 2002 indicated the worker overall was getting worse. He reported aches in the right leg and toes. Examination demonstrated reduced straight leg raise on the right, antalgic gait, and stiffness. Dr. Mail diagnosed lumbosacral spinal stenosis.

- On November 2, 2002 the worker commenced a course of physiotherapy to improve muscle weakness and core stability for his back.

- A November 20, 2002 chart note entry stated the worker left a message with his attending physician indicating he needed a prescription for his back pain. The chart entry indicated that the worker had been prescribed Ibuprofen, Tylenol No. 3, and Naprosyn.

A BMA then provided the opinion (claim log memo April 11, 2003) that the January 30, 2003 work incident would be compatible with causing a new disc herniation or aggravating a pre-existing one. Therefore, the BMA requested a repeat CT scan in order to compare it with the one taken in August 2002. According to the BMA, if the CT scan showed a change that could be related to the work incident, then a referral to the Visiting Specialist Clinic would be appropriate. If, however, the CT scan showed no change, then according to the BMA, the worker's ongoing symptoms were more likely related to the pre-existing disc disease and not the compensable incident.

An April 17, 2003 CT scan showed little interval change since August 2002. There was multilevel degenerative disc disease with acquired spinal stenosis at L2-3, L3-4 and L4-5, and an associated far right lateral protrusion at L3-4.

Given the recent CT scan revealed no significant change, the BMA opined that the worker had only sustained a lumbar contusion as a result of the January 30, 2003 work incident. He explained that the expected period of recovery from a lumbar contusion was a couple of weeks and, thus, the worker's ongoing symptoms as of February 13, 2003 were more likely related to the pre-existing spinal stenosis, which was not worsened by the compensable fall.

By way of a May 22, 2003 decision letter, a Board officer notified the worker of the BMA's opinion that any ongoing back complaints were the result of the pre-existing spinal stenosis, which had not worsened as a result of the January 30, 2003 incident. Accordingly, the Board officer concluded that the diagnosis that remained accepted under the claim was a lumbar contusion, and no wage loss or health care benefits would be paid. The worker did not appeal this decision; instead, he wrote to the Board on June 6, 2005 requesting a further review of his claim given his back problems had continued to such extent that eventually he left his employment as a steel fabricator. The worker believed that the compensable fall triggered a serious problem in his lower back given that he had never experienced the severity of back pain he had suffered since the work incident. The Board communicated to the worker (letter dated June 14, 2005) that since more than 75 days had elapsed since the May 22, 2003 decision, the decision could not be reconsidered.

The worker's representative communicated to the Board in a letter dated July 21, 2005. The representative summarized the events in the intervening three years, including a

January 23, 2004 outpatient clinic report from Vancouver General Hospital indicating that from Dr. Adrian's (physical medicine and rehabilitation specialist) assessment, the worker's right-sided back and leg pain suggested lateral canal stenosis impinging on the right S1 root. Dr. Adrain noted that the worker also had multiple spondylitic levels with impingement of the right L3 and L2 roots; however, this did not correlate with his symptomatology. The representative also referenced a February 26, 2005 x-ray revealing evidence of an L1 compression fracture. Accordingly, the representative requested that the claim be accepted for the compression fracture and the worker be afforded all the benefits to which he was entitled.

In addition, during this intervening three-year period, Dr. Badii, rheumatologist and spine specialist, assessed the worker. At the time of a February 24, 2005 assessment with Dr. Badii, the worker stated that his back symptoms started sometime in 2001. The worker described that his symptoms involved right-sided lower back pain with radiation into the right leg. The pain also involved the posterior thigh, calf, outside the right foot, and sole of the right foot. The worker reported that he continued to experience these symptoms. In Dr. Badii's opinion, the worker's symptoms were consistent with spinal stenosis as seen on the CT scan.

In support of the worker's request to have the diagnosis of L1 compression fracture accepted, Dr. Mail stated that the L1 compression fracture was likely missed on the April 17, 2003 CT scan since the scan seemed to view below the L2 level. He believed the bulk of the worker's pain from the January 30, 2003 incident stemmed from the compression fracture and not the spinal stenosis. He requested the Board revisit the claim in light of this missed diagnosis.

As documented in a September 19, 2005 claim log memo, a BMA stated that the mechanism of injury could plausibly result in a compression fracture; however, the worker did not describe localized pain but rather symptoms of generalized lumbar spine pain with radicular symptoms consistent with his pre-existing history. Regarding the expected recovery from a compression fracture, the BMA cited occupational disability guidelines indicating that tenderness from a compression fracture should have resolved within two months. In addition, the natural history of a compression fracture precluded the progression of pain, and treatment for the fracture if diagnosed at the time of the incident would have been no different than what the worker received. Regarding the worker's pre-existing spinal stenosis, the BMA believed that the compensable incident caused a temporary aggravation of the condition, which would have resolved within six to eight weeks. Therefore, the BMA concluded that the recent increase in pain as of January 2005 was likely due to an exacerbation of the pre-existing condition.

The September 23, 2005 decision letter and February 28, 2006 Review Division decision followed.

Submissions

The worker's representative forwarded submissions to the appeal dated March 8, 2006 and September 12, 2006. Appended to the latter submission are two medical reports from Dr. Badii dated September 20, 2005 and November 14, 2005, which were also forwarded to the Review Division at the time of its review and consequently comprise part of the claim file.

In the September 20, 2005 report, Dr. Badii noted that he had reviewed the February 26, 2005 x–ray report though, unfortunately, he did not have access to the films themselves to look at the severity of the fracture. Dr. Badii noted that according to a history taken at the time, the worker had some mild back pain though it never interfered with his day-to-day activities; however, following the incident at work, the pain was severe and would radiate into his buttocks and posterior thigh. In Dr. Badii's opinion, there was a distinct possibility that most of the worker's symptoms were related to the new compression fracture. While the worker had some spinal stenosis, Dr. Badii stated that this would not have changed so suddenly in so short a period after the fall. Because of the timing of the symptoms and a history of severe worsening very shortly after a fall, Dr. Badii thought the fracture was a likelier explanation for the pain than spinal stenosis.

Dr. Badii opined in his report of November 14, 2005 that the worker's pain was related to both spinal stenosis and the chronic L1 compression fracture. Examination revealed mild tenderness to palpation of the L1 spinous process and a bone scan on September 29, 2005 showed mild intake in the region of L1.

With respect to arguments raised in the worker's submission, I have addressed the representative's relevant points in my discussion and findings of the issues below.

Reasons and Findings

Since the worker's injury occurred after June 30, 2002, and the reopening decision on his claim was made after March 3, 2003, the Act as amended by both the *Workers Compensation Amendment Act, 2002* (Bill 49) and the *Workers Compensation Amendment Act, (No. 2), 2002* (Bill 63) applies to this appeal. Policy relevant to this appeal is contained in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

The applicable policy in this case is articulated in policy item #C14-102.01 of the RSCM II. That policy echoes the provisions of section 96(2) of the Act by providing that the Board may reopen a matter that had been previously decided if:

> a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or

b) there has been a recurrence of a worker's injury.

Policy item #C14-102.01 of the RSCM II provides that a "significant change" means a change in the worker's physical condition (not a change in the Board's knowledge about the worker's medical condition) that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits.

Neither the Act nor policy item #C14-102.01 of the RSCM II defines a "recurrence". Policy states that a recurrence of the original compensable injury occurs without an intervening second compensable injury.

A resolution of the Board's board of directors (*Resolution 2004/11/16-04*) amended RSCM II policy item #C14-102.01 to clarify ambiguities in the Board's policies with respect to the reopening of a claim. The resolution is effective January 1, 2005, and applies to all decisions (not appellate decisions) made on or after that date. The amended language states that a recurrence of an injury for purposes of section 96(2) may result where the original injury, which had either resolved or stabilized, occurs again without any intervening new injury.

The Board is of the opinion that the worker's ongoing complaints relate to his pre-existing spinal stenosis. The worker, on the other hand, believes that his complaints relate to his compensable L1 compression fracture. In order to determine whether the worker is entitled to a reopening of his claim, the first issue that I must decide is whether, in fact, his back symptoms are related to his compensable condition. If that is established then I must next decide whether these symptoms represent a significant change in the compensable condition or a recurrence of the injury.

For the reasons that follow, I find that the weight of the evidence establishes that the worker's ongoing symptoms are not related to his compensable L1 compression fracture.

First, I am mindful that the worker was symptomatic prior to the January 30, 2003 work incident. Medical reports described these symptoms as back pain localized in the posterior right thigh with radiation and tingling in the right foot. The worker was noticed to have an antalgic gait, limping on the right. The worker also reported a worsening of these symptoms in September 2002 and two months later (November 2002) he commenced a course of physiotherapy for treatment for his back complaints. This evidence suggests to me that the worker's condition was fairly symptomatic prior to the January 2003 work injury. Immediately after the injury, the worker's symptoms included local tenderness over the lumbosacral area though no radiation of symptoms into the legs. Then, approximately ten days later, the worker described a worsening of symptoms that included considerable pain with radiation into the right foot and posterior thigh. These symptoms, which remained the focus of the worker's subsequent treatment, are analogous to those for which he sought medical attention prior to the compensable work injury. The worker and his representative characterize the pre-existing condition as mild intermittent backache,

which did not prevent the worker from working as a steel fabricator. However, in my view the prior medical information indicates a fairly symptomatic pre-existing condition that appears more significant than a mild backache.

Second, Dr. Adrian considered that worker's right-sided back and leg pain suggested lateral canal stenosis impinging on the right S1 root. His opinion abides well with Dr. Badii's assessment in February 2005. At the time of that assessment, the worker again described symptoms involving right-sided lower back pain with radiation into the right leg. In Dr. Badii's opinion, the worker's symptoms were consistent with spinal stenosis. I am mindful that Dr. Badii's opinion changed in September 2005 to be more supportive of the worker's position. At that time, Dr. Badii stated there was a distinct possibility that most of the worker's symptoms were related to the new compression fracture. The worker's representative submitted that the Board did not give equal consideration to Dr. Badii's September 2005 opinion. Since Dr. Badii had the benefit of examining and treating the worker, and is a specialist in spine and occupational medicine, the representative submitted more weight ought to be afforded to this opinion.

I acknowledge both Dr. Badii's opinion and the representative's argument supporting this position. However, I note that a history taken from the worker at the time of the September 2005 assessment differed from the medical evidence on file from the attending physician. The worker reported to Dr. Badii that prior to the January 30, 2003 work incident, he had only experienced some mild back pain; however, following the incident at work, the pain was severe and radiated into his buttocks and posterior thigh. Therefore, according to Dr. Badii, while the worker had some spinal stenosis, this would not have changed so suddenly in so short a period after the fall. Because of the timing of the symptoms and a history of severe worsening very shortly after a fall on the tailbone, Dr. Badii thought the fracture was a more likely explanation for the pain than the spinal stenosis. In reading Dr. Badii's opinion it appears he placed significant weight in the history obtained from the worker when rendering an opinion on the likely cause of these ongoing symptoms. However, this history is contrary to other medical evidence on file specifically, chart notes from Dr. Mail for visits between July 2002 and November 2002. I discuss further in this decision the discrepancy between the worker's description of the extent of his symptoms stemming from his pre-existing condition and that contained in the medical reports from Dr. Mail. By preferring the documentary evidence over the worker's retrospective recollection of the nature of his pain, I do not intend to imply that he downplayed the significance of his pre-existing condition. Rather, I prefer the evidence that is contemporaneous to when the worker sought treatment for symptoms related to his pre-existing condition. Accordingly, since Dr. Badii's opinion is based on evidence to which to I give less weight, I, in turn, give less weight to his opinion.

Finally, in the opinion of the BMA the worker's presentation was consistent with his pre-existing spinal stenosis. The worker described generalized lumbar spine pain with radicular symptoms. The BMA noted that the natural history of a compression fracture

precluded the progression of pain. The worker's representative submitted that because the worker had returned to work after only two days, the strenuous activity involved with his employment was detrimental to the healing of the compression fracture. While I acknowledge the representative's argument, I note that the medical evidence on file does not support his view. There is insufficient evidence that because the worker's compression fracture remained undiagnosed for two years that this had a detrimental effect on the healing process of the condition. Although the representative submitted that during this period the worker struggled at work and coped with taking a variety of medications, I am mindful that two months prior to the January 30, 2003 work incident, the worker was prescribed Ibuprofen, Tylenol No. 3 and Naprosyn, which is similar to the medication regime he had been prescribed throughout the course of his care under the claim. Consequently, while the worker submitted his reason for quitting work was his progressively worsening compression fracture, in light of the evidence on file, his disability in January 2005 would appear to be more in keeping with the natural progression of his pre-existing symptomatic condition.

I now turn to the issue of whether the worker suffered a permanent aggravation of his pre-existing spinal stenosis. In deciding this issue, I place significant weight on the worker's symptomatology prior to the January 30, 2003 work incident. As the medical evidence establishes, the worker had symptoms associated with spinal stenosis proximate to the date of the compensable injury. While the worker characterized his symptoms in connection with his spinal stenosis as being only an intermittent backache, evidence obtained from the attending physician indicated the worker presented with symptoms greater than those described in the submission. Again, in stating this, I do not intend to cast doubt on the worker's credibility. How someone labels his/her pain is very subjective and depends, amongst other things, on an individual's pain threshold. However, I prefer the evidence contained in Dr. Mail's chart notes as I find this evidence provides better contemporaneous documentation of the nature and extent of the pre-existing condition. Specifically, chart notes obtained from Dr. Mail indicated that in July 2002 the worker presented with aching in the right posterior thigh to the foot. The worker also complained of intermittent tingling and numbness in the same area. When reassessed one month later (August 2002), the severity of the worker's symptoms was described as moderate. Again, he reported posterior right thigh pain with radiation and tingling in the right foot, which occurred daily. At this point, the worker's gait was affected and he was noted to be limping on the right.

Medical evidence on file ten days after the compensable injury described the worker's complaints as right foot and posterior thigh pain. From my view of the evidence, there is little material difference between the nature and intensity of the worker's symptoms in January 2005 to what they were prior to the work injury. In other words, there is insufficient medical evidence indicating that the worker's symptoms associated with his pre-existing spinal stenosis remained greater in both intensity and duration beyond an acute phase. An acute phase, according to the BMA, would be approximately six to

eight weeks. Accordingly, I find that the worker suffered only a temporary aggravation of his pre-existing spinal stenosis.

The representative submitted that the worker is entitled to a permanent partial disability award for the L1 compression fracture. While the decision of entitlement to an award is not before me, I note the original Board decision of September 23, 2005 indicated the worker was not entitled to a referral to Disability Awards given that medical evidence did not support he had been left with any permanent functional impairment. However, the Permanent Disability Evaluation Schedule, Appendix 4, dated August 1, 2003 specifies, under item #75 in Schedule D, percentages ranging from 0 to 4% for lumbar spine compression fractures. I find there is a potential that a permanent disability exists as a result of the compensable L1 compression fracture. Therefore, in accordance with Board policy #96.20, I find the worker is entitled to a referral to Disability Awards for further evaluation.

Conclusion

I vary the Review Division's February 28, 2006 decision. I find that the worker's ongoing symptoms, specifically generalized lumbar spine pain and radicular symptoms, are not related to his compensable L1 compression fracture. I further find that the worker did not incur a significant change in his compensable condition nor a recurrence of that condition. Accordingly, he is not entitled to a reopening of his claim. I find that the worker did not suffer a permanent aggravation of his pre-existing spinal stenosis. However, I find the worker is entitled to a referral to Disability Awards in relation to his L1 compression fracture.

Expenses were not requested. Nor, can I find where any were undertaken in mounting this appeal. Therefore, none are awarded.

Cynthia J. Katramadakis
Vice Chair

CJK/jd/dw

WCAT Amended Decision Number: WCAT-2006-04763a
WCAT Amended Decision Date: January 25, 2007
Panel: Cynthia J. Katramadakis, Vice Chair

Amended Decision

In *WCAT Decision #2006-04763* dated December 22, 2006, I varied a February 28, 2006 decision of the Workers' Compensation Board, now operating as WorkSafeBC (Board), regarding the worker's ongoing symptoms, specifically generalized lumbar spine pain and radicular symptoms. It has come to my attention that my decision contains a typographical error appearing in the first paragraph of page 7 when I referred to the worker as being 50 years old rather than his correct age of 60. In accordance with the Workers' Compensation Appeal Tribunal (WCAT) *Manual of Rules of Practice and Procedure* policy item #15.21, a panel may, on request by a party or on the panel's own initiative, amend a final decision to correct any of the following [section 253.1(1) of the *Workers Compensation Act* (Act)]: (a) a clerical or typographical error.

Accordingly, I make the following correction to paragraph one of page 7 of the original decision:

> **Background and Evidence**
>
> The worker is now **60** years old.

Cynthia J. Katramadakis
Vice Chair

CJK/ml

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898