

## Noteworthy Decision Summary

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**Decision:** WCAT-2011-01618      **Panel:** Cathy Agnew      **Decision Date:** June 29, 2011

### ***Section 96.2 of the Workers Compensation Act – Reopening – Previously Accepted Permanent Aggravation – Pre-Existing Lumbar Degenerative Disc Disease***

The worker injured his low back in 1998. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted his claim for a low back strain. A panel of the former Workers' Compensation Review Board subsequently accepted the worker's claim for a permanent aggravation of his pre-existing degenerative disc disease. In 2001 the Board granted the worker a permanent partial disability award based on 4.75% of total disability, for the accepted permanent aggravation.

In 2009, the worker's physician reported to the Board that the worker had discogenic pain with numbness in his lower legs. Surgery was recommended. The Board undertook an adjudication of whether the worker had suffered a significant change in his compensable condition. The Board medical advisors, including a senior orthopaedic medical advisor, gave the opinion that degenerative disc disease inevitably progresses with time, regardless of activity. The changes in the worker's CT scan and the need for surgery were said to reflect the natural history of the worker's condition. The worker's condition was thought to have been fixed at the time the decision to accept it was made in 2001.

There was also a 2011 report from the treating neurosurgeon, stating that the ongoing physical demands of the worker's employment did not help the degeneration. It was possible that the physical demands may have accelerated the degenerative process.

Section 96(2) of the *Workers Compensation Act* authorizes the Board to reopen a matter that was previously decided if there has been a significant change in the medical condition that the Board has previously decided was compensable, or a recurrence of the injury. The question for the panel to decide was whether the worker's pre-existing degeneration, which had been accepted only on an aggravation basis in connection with a specific work incident, had changed significantly such that the claim should be reopened. The suggestion by the neurosurgeon that work over time may have accelerated the degeneration was a different issue, and not before WCAT.

The panel found it was clear from the evidence on file, including radiologic studies, that the worker's condition had progressed. This meant there had been a significant change in the worker's compensable condition such that the 1998 claim should be reopened.

In regard to the medical opinion that progression of degenerative disc disease is inevitable, and the worker's condition was fixed at the time the decision was made in 2001, the panel found this reflected a misunderstanding of law and policy with respect to compensable aggravation of a pre-existing non-disabling condition.

There is no suggestion in policy items #15.10, #22.00 or #26.55 of the *Rehabilitation Services and Claims Manual, Volume II* that an aggravation is fixed at the time it occurs. To do so would deprive the worker of compensation for any further aggravation. This is not a situation where a pre-existing disability is aggravated by a work injury. It is a case where there was no pre-

existing disability. The further degenerative changes reflected a significant change in the condition the Board had previously accepted as compensable, and the worker's 1998 claim was reopened.

**WCAT Decision Number :** WCAT-2011-01618  
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**Panel:** Cathy Agnew, Vice Chair

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## Introduction

- [1] The worker has appealed a December 11, 2009 decision of a review officer in the Review Division of the Workers' Compensation Board (Board), operating as WorkSafeBC (*Review Reference #R0110301*). The review officer confirmed a case manager's September 23, 2009 decision that the worker's 1998 claim, which had been accepted for a permanent aggravation of his pre-existing lumbar degenerative disc disease, would not be reopened.
- [2] The worker asked for his appeal to be considered by reviewing the documentary evidence and written submissions and I agree that an oral hearing is not required. As noted in the *Workers' Compensation Appeal Tribunal (WCAT)'s Manual of Rules of Practice and Procedure (MRPP)* item #7.5, WCAT will normally conduct an appeal by written submissions where the issues are largely medical, legal, or policy based and credibility is not at issue.
- [3] The employer did not participate in the appeal although invited to do so.

## Issue(s)

- [4] Should the worker's 1998 claim be reopened?

## Jurisdiction

- [5] WCAT has jurisdiction to consider this appeal under section 239(1) of the *Workers Compensation Act (Act)* as an appeal from a final decision made by a review officer under section 96.2 of the Act.

## Background and Evidence

- [6] The worker's claim was established following an incident on August 31, 1998 when he experienced acute symptoms in his low back when he turned while attempting to pick up a 200-pound pole. The Board initially accepted his claim for a low back strain and provided temporary disability benefits to the worker until August 15, 1999. A panel of the Workers' Compensation Review Board (Review Board) decided on February 9, 2001 that the worker had suffered a permanent aggravation of his pre-existing degenerative disc disease and that he was not able to return to his pre-injury job due to the ongoing symptoms of pain and leg weakness which were related to the effects of his work injury.

- [7] On November 8, 2002, the Board provided the worker with a permanent partial disability award effective August 16, 1999 based on 4.75% of total disability for his accepted permanent aggravation of pre-existing degenerative disc disease in his lumbar spine.
- [8] On March 5, 2009, the worker's family physician, Dr. Lau, reported to the Board that the worker had discogenic pain with numbness in his lower legs.
- [9] The case manager asked for advice from the Board medical advisor about whether the worker had suffered a significant change in his compensable condition. Dr. D responded on September 18, 2009. He reviewed the pertinent radiological studies, summarized below.
- [10] A lumbar x-ray had been undertaken on September 21, 1998. It revealed moderate narrowing at L3/5 with slight narrowing at L5/S1. In addition, marginal osteophytes were noted at the anterior aspects of L3 and L4 and degenerative osteoarthritis was present in the facet joints of the lumbar spine.
- [11] A CT scan in November 1998 showed degenerative changes as well as diffuse annular bulging at L4/5 and L5/6, slightly more prominent at L4/5 where it could reflect significant central spinal stenosis.
- [12] Another CT scan on September 21, 2002 showed marked central spinal stenosis at L2/3, L3/4, and L4/5, central disc protrusion at L2/3, and a right paracentral disc protrusion at L4/5.
- [13] A March 7, 2009 MRI, forwarded by Dr. Lau, showed significant central spinal stenosis from L2 to L5 as well as foraminal narrowing at several levels.
- [14] A lumbar MRI on July 3, 2009 was reported as revealing significant central spinal stenosis from L2 to L5. The radiologist had reported right L2/3 foraminal occlusion, narrowing of the left L3/4 foramen and marked narrowing of the left foramen at the L4/5 level. A surgical opinion was recommended.
- [15] Neurosurgeon, Dr. Gul assessed the worker on July 20, 2009. In his report, Dr. Gul noted the MRI findings and stated his opinion that the worker's presentation was in keeping with neurogenic claudication secondary to lumbar spinal stenosis. He said that the worker also had an element of L5 radiculopathy. Dr. Gul recommended a lumbar laminectomy. He reported that he had discussed with the worker the anticipated natural history of lumbar spinal stenosis secondary to degeneration and he emphasized that the surgery was not intended to address the ongoing issues in regards to the future effects of lumbar spondylosis.

- [16] In his September 18, 2009 opinion, Board medical advisor, Dr. D incorporated comments from senior orthopaedic medical advisor, Dr. F who stated his opinion that degenerative disc disease inevitably progresses with time, regardless of activity. Dr. F felt that the changes in the CT scan and the need for surgery identified by Dr. Gul reflected the natural history of the worker's condition.
- [17] Dr. D also consulted neurologist, Dr. W, who agreed with Dr. F. He felt that the worker's degenerative disc disease was not related to his work injury. He noted that spinal stenosis had already been evident in 1998 and had progressed, as expected, given the degenerative nature of the disease.
- [18] On September 23, 2009, the case manager issued the decision letter that was confirmed in the December 11, 2009 Review Division decision that is the subject of the present appeal.
- [19] The worker provided a January 31, 2011 report from neurosurgeon, Dr. Gul, in support of his appeal. Dr. Gul stated the following:

Based on the information that I have on file for [the worker], it would appear that given the physical demands of his work probably did not help the lumbar spine degeneration. Given the work associated mechanical strain to his lower back over a period of time it is possible that the physical demands of work may have accelerated the degenerative process in his lumbar spine, although being specific with respect to timing is inherently difficult given the nature of lumbar spondylosis.

## Reasons and Findings

- [20] Section 250(4) of the Act provides that, if the evidence supporting different findings on an issue is evenly weighted, I must resolve that issue in a manner that favours the worker.
- [21] Section 250(2) of the Act provides that I must base my decision on the merits and justice of the case, but in doing so, I must apply a policy of the board of directors of the Board that is applicable in this case. The policies applicable to this appeal are found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).
- [22] The Board's board of directors has approved changes to the policies on compensation for personal injury in Chapter 3 of the RSCM II. These new policies only apply to claims for injuries, mental stress or accidents that occur on or after July 1, 2010. Since the worker's injury occurred before July 1, 2010, the previous Chapter 3 policies apply to this appeal.

- [23] The worker's notice of appeal to WCAT was filed late and his application for an extension of time to appeal was allowed by a WCAT vice chair on November 23, 2010. By letter dated November 30, 2010, WCAT advised the worker that any additional evidence and his written submission were due on or before December 21, 2010. On December 17, 2010, the worker requested more time and the appeal coordinator wrote to him, advising that he had been granted a further 45 days to send a submission. The new due date for submissions was February 4, 2011.
- [24] On March 4, 2011, WCAT received receipts from the worker for appeal expenses incurred to obtain an October 16, 2010 letter from Dr. Lau that had been provided in response to the vice chair's request for medical evidence to support his application for an extension of time to appeal. The vice chair who had allowed the worker's extension of time application issued an amended decision on March 29, 2011, allowing payment of this appeal expense.
- [25] At the same time that he submitted receipts for these appeal expenses, the worker also provided a January 23, 2011 invoice from Dr. Lau requesting prepayment of a medical report prior to completion. The worker indicated that he was financially unable to pay Dr. Lau and asked for her to be paid directly for her report. According to MRPP item #13.1.5, WCAT will generally not accept late or unsolicited written submissions after the due date has passed.
- [26] Section 7(1)(b) of the *Workers Compensation Act Appeal Regulation* authorizes WCAT to order the Board to reimburse a party to an appeal for certain expenses including expenses associated with obtaining or producing evidence submitted to WCAT. Item #16.1.3 of WCAT's MRPP provides guidance for the exercise of a panel's discretion to award expenses. It explains that WCAT may order reimbursement of a medical report if it was useful or helpful in the consideration of the appeal or if the panel considers that it was reasonable for the party to have sought such evidence in connection with the appeal proceedings.
- [27] I consider that I do not have authority to reimburse the worker for a report that has not been submitted to WCAT and indeed has not yet been obtained by the worker. I have no way of evaluating the usefulness of the evidence to be provided by Dr. Lau or whether it was reasonable for the worker to have sought it when the report has not been submitted. However, I have considered whether I require further medical evidence from Dr. Lau in order to determine the matter under appeal. I consider the existing medical evidence to be sufficiently complete and reliable to enable me to reach a sound conclusion with confidence. Consequently, I decline the worker's request to obtain a further report from Dr. Lau.
- [28] Section 96(2) of the Act authorizes the Board to reopen a matter that was previously decided if, since the decision was made, there has been a significant change in the medical condition that the Board has previously decided was compensable, or there has been a recurrence of the worker's injury.

- [29] The worker seeks to have his 1998 claim reopened on the basis that there has been a significant change in his compensable condition.
- [30] According to policy item #C14-102.01, a “significant change” is a change in the worker’s physical or psychological condition that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits or services. It does not mean a change in the Board’s knowledge about the worker’s medical condition. In relation to permanent disability benefits, a “significant change” would be a permanent change outside the range of fluctuation in condition that would normally be associated with the nature and degree of the worker’s permanent disability.
- [31] A claim may be reopened for repeated periods of temporary disability benefits or for any permanent changes in the nature or degree of a worker’s permanent disability.
- [32] Policy item #34.12 emphasizes that no condition is ever absolutely stable or permanent and there will commonly be some degree of fluctuation. Fluctuations in a worker’s permanent condition may require the worker to be off work from time to time. If the fluctuations causing the disability are within the range normally to be expected from the condition for which the worker has been granted a permanent disability award, no wage loss is payable. The permanent disability award is intended to cover such fluctuations. Wage loss is payable only where there is medical evidence of a significant deterioration in the worker’s condition which not only goes beyond what is normally to be expected, but is also a change of a temporary nature. If the change is permanent, the worker’s disability award will be reassessed.
- [33] I do not find support for the worker’s appeal in Dr. Gul’s January 31, 2011 report since Dr. Gul’s opinion does not pertain to the issue that is presently to be decided. The question for me to decide is whether the worker’s pre-existing degeneration, which has been accepted only on an aggravation basis in connection with a specific work incident, had changed significantly such that his claim should be reopened. Dr. Gul appears to suggest that the physical demands of the worker’s employment over a period of time may have accelerated the degenerative process in the worker’s spine due to associated mechanical strain to his lower back. This is a different issue, a new adjudication that has not been undertaken by the Board and one that is not before me in this appeal
- [34] The condition that has been accepted as compensable in this case is a permanent aggravation of the worker’s pre-existing degenerative disc disease. The underlying degenerative condition is not compensable. However, in accepting the aggravation as compensable, the Review Board vice chair noted that the worker’s pre-existing pathology had not caused him any ongoing problems or impairment prior to the August 1998 work injury. She found that there was an aggravation of the underlying condition as a result of the work injury that had resulted in ongoing leg weakness and pain symptoms, which were permanent and which had impacted on the worker’s ability to work.

- [35] The Board provided the worker with a permanent partial disability award of 4.85% of total disability for the permanent functional impairment that was assessed as having resulted from his accepted condition effective August 16, 1999. It is clear from the evidence, including the radiological studies on file, that the worker's condition has progressed since that time. I conclude from this evidence that there has been a significant change in the worker's compensable condition such that his 1998 claim ought to be reopened.
- [36] I note Dr. W's opinion that the worker's current symptomatic lumbar spinal stenosis was not caused by his work injury in 1998. He acknowledged that there had been a progression of disease in the eleven years since the work incident, but he felt that the worker would have the same findings and symptoms in 2009 whether or not the work incident had occurred. Dr. W asserts this opinion without explaining how the worker's condition, which has been recognized as having been aggravated by the work incident, could be the same in 2009 as it would have been had the incident not occurred. I consider Dr. W's medical opinion to be inconsistent with the adjudicative reality of the worker's claim. Given that the worker did suffer a permanent compensable aggravation of his degenerative condition, it is not now open to the Board to find that the work incident did not make a difference.
- [37] I accept Dr. F's medical opinion that progression of degenerative disc disease is inevitable. However, his statement that "...this man has been accepted for a permanent aggravation of the DDD and this state was fixed at the time the decision was made in 2001" reflects a misunderstanding of the law and policy with respect to a compensable aggravation of a pre-existing non-disabling condition.
- [38] The Board's policy item #15.10 addresses the situation where a worker has a pre-existing deteriorating condition. This policy distinguishes between a disability that the worker would not have escaped regardless of the work activity, which is non-compensable, from one that, in the absence of some exceptional strain or circumstance, was not likely to reach a critical point and become a disability. In the latter situation, the employment is considered to have causative significance in producing the disability, which is therefore compensable.
- [39] Policy item #22.20 provides that where a worker has a pre-existing non-compensable condition which is aggravated and rendered disabling by a work injury, the Board accepts that it was the injury that rendered that condition disabling and pays compensation accordingly.
- [40] Policy item #26.55 provides that where a worker has a pre-existing disease which is aggravated by work activities to the point where the worker is thereby disabled, and where such pre-existing disease would not have been disabling in the absence of that work activity, the Board will accept that it was the work activity that rendered the disease disabling and pay compensation.

- [41] There is no suggestion in these policies that the extent and nature of compensation to be provided should be “fixed” at the time the permanent aggravation occurred. To do so would deprive the worker of compensation for any further deterioration in his condition that might occur subsequent to the assessment of his disability award. I find no support for this approach in the Board’s policy. This is not a situation such as is captured in policy item #44.30 where a pre-existing disability is aggravated by a work injury. In that case, the Board considers how much of the worker’s disability is due to the compensable aggravation and how much is due to the pre-existing disability. In the case of the worker who is the subject of the present appeal, no pre-existing disability was established and therefore there is no basis to apportion or “fix” the amount of disability to be attributed to his compensable condition.
- [42] I find that the further degenerative changes that have occurred in the worker’s lumbar spine, as demonstrated in the radiological studies on file, reflect a significant change in the condition that the Board has previously accepted as compensable. His 1998 claim should be reopened.

## **Conclusion**

- [43] I allow the worker’s appeal and vary *Review Reference #R0110301* by finding that the worker’s 1998 claim ought to be reopened.
- [44] No appeal expenses were requested and I make no order in that regard.

Cathy Agnew  
Vice Chair

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