## Noteworthy Decision Summary

**Decision:** WCAT-2012-00586 **Panel:** Shannon Salter **Decision Date:** February 29, 2012

***Section 31 of the Administrative Tribunals Act – Preliminary Issues – Relitigation – British Columbia (Workers' Compensation Board) v. Figliola – res judicata***

This decision is noteworthy for its analysis and application of *British Columbia (Workers' Cpmpensation Board) v. Figliola* (*Figliola*) in circumstances where the issue(s) before WCAT may have already been dealt with appropriately in other proceedings.

The worker's claim for low back injuries was accepted by the Workers' Compensation Board, operating as WorkSafeBC (Board), for health care benefits only. Some months later the worker's employment was terminated, and the worker applied for temporary disability benefits under his low back claim. Both the Board and the Review Division determined that the worker was not entitled to temporary disability benefits on the basis that the worker's injury had resolved by that time.

The worker also participated in a labour arbitration, the result of which saw the worker reinstated in an accommodated position with the employer. When the worker appealed the Review Division decision on his entitlement to wage loss benefits to WCAT, the employer argued that the issue had already been determined by the labour arbitrator, and submitted that the worker was attempting to relitigate the same issue as was before the arbitrator. The Panel provided the parties with copies of Section 31 of the *Administrative Tribunals Act* (ATA), and the *Figliola* decision, and invited submissions on whether the worker's claim for wage loss benefits should be summarily dismissed on the basis of section 31.

Subsection 31(1) of the ATA provides, among other things, that a tribunal may dismiss all or part of an application if the application is frivolous, vexatious or trivial or gives rise to an abuse of process, or if the substance of the application has been appropriately dealt with in another proceeding. The *Figliola* decision involved a situation where several workers sought compensation from the Board, were unsuccessful, and brought similar discrimination complaints to both the Review Division and the British Columbia Human Rights Tribunal (HRT), whose governing legislation (the *BC Human Rights Code*) contains a provision similar to that of section 31 of the ATA. The Supreme Court of Canada held that the HRT's decision to hear the worker's complaints was patently unreasonable because it ignored the mandate of the Human Rights Code in that the Review Division had already appropriately dealt with the matter.

The majority in *Figliola* also held that when interpreting provisions such as section 31 of the ATA it is important to consider the underlying principles, those being finality, fairness and the integrity of the justice system, and to consider whether the previously decided legal issue was essentially the same as that being complained of to the tribunal. The panel in the present appeal determined that the legal issue in the arbitration decision was whether the employer failed in its duty to accommodate the worker by terminating his employment, while the issue before WCAT was whether the worker's compensable injury had temporarily disabled the worker from his employment. As the panel concluded that the two legal issues were substantially different, it was determined that WCAT's hearing of the worker's appeal was not an attempt at relitigation, nor an abuse of process.



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## Introduction

[1] The worker injured his low back at work in December 2009. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for a lumbar strain/sprain and for health care benefits only.

[2] The employer terminated the worker's employment on August 27, 2010. Soon after his termination, the worker applied for wage loss benefits with the Board, under his December 2009 claim.

[3] In a written decision, dated October 18, 2010, the Board accepted that the worker sustained a temporary aggravation of pre-existing degenerative back pain in the December 2009 incident. The Board further decided that this aggravation had resolved and that the worker was not entitled to temporary wage loss benefits effective August 27, 2010.

[4] The worker appealed the Board's decision to the Review Division, with respect to the resolution of his temporary aggravation of pre-existing degenerative back pain and his entitlement to temporary wage loss benefits.

[5] In *Review Reference #R0124342*, dated April 28, 2011, a review officer confirmed the Board's decision on the basis that the worker's disability in August 2010 did not result from his December 2009 work injury.

[6] The worker appealed *Review Reference #R0124342* to the Workers' Compensation Appeal Tribunal (WCAT).

[7] As a result of a labour arbitration decision in May 2011, the worker was reinstated into an accommodated position with the employer.

[8] The employer is participating in this appeal. Both parties are represented and have received disclosure of the record, an opportunity to file new evidence, and an opportunity to make submissions.



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**Issue(s)**

[9] The issues in this appeal are:

1. Did the worker's compensable lumbar back strain/strain and/or temporary aggravation of his pre-existing degenerative back pain resolve by August 27, 2010?

2. Is the worker entitled to temporary disability benefits after August 27, 2010 as a result of his December 7, 2009 workplace injury?

**Jurisdiction**

[10] This appeal is brought under section 239(1) of the *Workers Compensation Act* (Act) which permits appeals of Review Division decisions to WCAT.

[11] WCAT may consider all questions of fact, law, and discretion arising in an appeal, but is not bound by legal precedent. In making its decision, WCAT must consider the merits and justice of the case, but in so doing, must apply a policy of the Board's governing body that is applicable in the case. Finally, WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

[12] The Board has approved changes to the policies on compensation for personal injury in Chapter 3 of the *Rehabilitation Services & Claims Manual, Volume II* (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 claimed injury occurred before July 1, 2010, the previous Chapter 3 policies apply to this appeal.

**Preliminary Issues**

[13] The worker initially requested that the appeal proceed by way of written submissions, but this was changed to an oral hearing at my request. I considered WCAT's *Manual of Rules of Practice and Procedure* (MRPP) and reviewed the issues, evidence, and submissions in this appeal. I determined that this appeal raises credibility issues and factual disputes which required testimony from the parties to resolve. I held an oral hearing of this appeal on January 23, 2012, in Richmond, B.C. The worker and his representative participated by telephone, while the employer and its lawyer participated in person.

[14] There are a number of preliminary issues to address in this appeal. One such issue is whether, and to what extent, the May 2011 labour arbitration board decision affects this appeal.

[15] The worker and the employer had signed an accommodation agreement in June 2009 when the worker returned to work after a knee injury claim. The employer terminated the worker's employment on August 27, 2010 on the basis that the worker had failed to advance his accommodation agreement with the employer. The worker, through his union, grieved the termination. A labour arbitrator held a hearing in which the worker gave sworn evidence. I will address the substance of the worker's evidence in the arbitral proceedings in more detail later in this decision; however, in essence, the worker testified that he was able to work, either in his accommodated position or in an automatic truck driving position, as of the date of termination.

[16] The labour arbitrator, in a written award, reinstated the worker, finding that he was unsatisfied, "on the balance of probabilities (more likely than not)," that the worker could not be accommodated without imposing undue hardship on the employer. The arbitrator ordered the parties to meet and develop a route for the worker to drive which would accommodate the worker's health needs while also not placing undue hardship on the employer.

[17] However, the arbitrator declined to order that the employer pay the worker damages for lost wages after August 26, 2010. He found that, while the employer had the primary obligation to adhere to the accommodation agreement, the worker also had an obligation to pursue the duties described in the agreement, as he was a party to it and had an interest in it. The worker did not meet this obligation. Rather, among other issues, he made comments to his co-workers which left the impression that he could not be accommodated; he did not raise the issue of a review of the agreement; he did not suggest additional duties which he could undertake; and he did not ask about an automatic truck before July 30, 2010. Further, while the worker did receive some medical employment benefits, there was no evidence that he had tried to mitigate his loss by making efforts to find other work after his termination.

[18] In this appeal, the employer argued that the issue of the worker's entitlement to wage loss benefits has already been determined by a labour arbitrator in the arbitral award. In this regard, the employer submitted that the worker is attempting to relitigate the same issues as were before the arbitrator, and is estopped from doing so. It also argued that making different submissions in different proceedings in order to attempt to obtain benefits amounts to an abuse of process.

[19] Subsection 31(1) of the *Administrative Tribunals Act* (ATA) provides, among other things, that a tribunal may dismiss all or part of an application if:

> (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> …

(g) the substance of the application has been appropriately dealt with in another proceeding.

[20] Section 31(2) of the ATA provides that before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.

[21] While the employer did not specifically cite section 31 of the ATA in its submissions, I note that under section 245.1 of the Act, WCAT is bound by it. It is therefore appropriate for me to consider the employer's arguments with respect to abuse of process and relitigation within the framework of subsections 31(1)(c) and 31(1)(g) of the ATA, respectively.

[22] At the oral hearing, I provided the parties with copies of section 31 of the ATA, and invited their submissions on the issue of whether the worker's claim for wage loss benefits should be summarily dismissed on the basis of section 31. The employer's representative advised that it was not formally seeking a summary dismissal, but was raising the abuse of process and issue estoppel argument as reasons why the worker's claim should not be accepted. The worker's representative submitted that the criteria in section 31 of the ATA have not been met in this case, for reasons which I will address shortly.

[23] Prior to the oral hearing, I also asked the appeal coordinator to provide the parties with the Supreme Court of Canada's (SCC) recent decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 (*Figliola*). At my request, the appeal coordinator invited the parties' submissions on whether, and to what extent, *Figliola* applies to the May 2011 arbitration decision.

[24] In *Figliola* several complainant workers sought compensation from the Board, but were unsuccessful. They appealed to the Review Division, arguing, among other things, that the policy underlying the Board's decision was discriminatory on the grounds of disability under section 8 of the British Columbia *Human Rights Code* (Code). The review officer denied the workers' discrimination complaint.

[25] The workers appealed this decision to WCAT; however, before the appeal was heard, the Act was amended, removing WCAT's authority to apply the Code. Based on the amendments, the complainants' appeal of the review officer's human rights conclusions could not be heard by WCAT, but judicial review remained available. Instead of applying for judicial review, the complainants filed new complaints with the Human Rights Tribunal, repeating the same section 8 arguments about the Board's policy that they had made before the Review Division. The Board brought a motion asking the tribunal to dismiss the new complaints, arguing that under subsections 27(1)(a) and 27(1)(f) of the Code, the tribunal had no jurisdiction, since complaints had already been "appropriately dealt with" by the Review Division. The tribunal rejected both arguments and considered the workers' complaints.

[26] Section 27(1)(f) of the Code is substantially similar to sections 31(1)(g) of the ATA, and provides as follows:

> **27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> …
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

[27] The majority of the SCC determined that the tribunal's decision in this regard was patently unreasonable because it based its decision to proceed with the complaints, and relitigate them, on predominantly irrelevant factors having to do with the process and merits of the review officer's decision, and in doing so it ignored its true mandate under section 27(1)(f) of the Code. The minority, concurring in the result, found, among other things, that the tribunal had failed to consider whether the substance of the complaints had been addressed by the review officer. It concluded that the flexible and global approach of section 27(1)(f) requires looking at various factors, including:

- The issues raised in the earlier proceeding;
- Whether those proceedings were fair;
- Whether the complainant had been adequately represented;
- Whether the applicable principles had been canvassed;
- Whether an appropriate remedy had been available; and
- Whether the complainant chose the forum for the earlier proceedings.

[28] In its submissions on this issue, the worker's representative argued that the decision in *Figliola* is distinguishable and therefore has no application in this appeal. She argued that the earlier proceeding was an arbitration involving a wrongful dismissal action, whereas the WCAT appeal involves entitlement to workers' compensation. The underlying intent and purpose of the two schemes are different.

[29] The worker's representative submitted that the issues and substance of the two proceedings are also different, as the issue before the arbitrator was whether the worker was wrongfully terminated under the collective agreement and whether the employer failed to accommodate his injuries. By contrast, the issue before WCAT is the worker's entitlement to compensation under the Act, and, specifically, the review officer's finding that the worker's December 7, 2009 back issue was a temporary aggravation of a pre-existing degenerative low back pain, which resolved. The issue of the worker's entitlement to benefits, including wage loss, health care, vocational rehabilitation, and permanent disability, flows from this decision.

[30] Finally, the worker's representative submits that the arbitration decision does not address the issue to be determined in the WCAT appeal. The fact that wage loss was addressed in a different context does not impact the jurisdiction of the panel in this proceeding to consider the issue of the duration of the worker's disability and the benefits that flow from this disability, in the context of entitlement under the Act.

[31] The employer's representative acknowledges that the issues addressed in *Figliola* are not identical to those in the WCAT appeal; however, it says that the principles in the *Figliola* decision are applicable to this appeal. The worker sought to be compensated at arbitration for the wage loss occasioned by his August 27, 2010 termination because he said he was capable of being accommodated; however, he now seeks Board wage loss benefits for the same period on the basis that he was disabled from working.

[32] The employer's representative also argued that the matter was *res judicata* because the parties are the same, the arbitrator's decision was final, and the issues could be described as the same – whether the worker was to be compensated for lost wages post August 27, 2010. He submits that any difference in the issues creates only a fine distinction.

[33] Alternatively, he argues that *Figliola* is applicable because it is an abuse of process for the worker to pursue wage loss recovery at the arbitration on the basis that he was capable of working in an accommodated position during the period in question, and then to seek Board wage loss benefits for the same period on the basis that he was disabled from working. These two claims are incompatible with each other; having lost the first claim at arbitration, the worker cannot be permitted to then pursue the second claim under the Act, as this amounts to a relitigation of the issue that was before the arbitrator.

[34] I have carefully reviewed the parties' submissions on this issue, as well as the applicable statutory provisions and caselaw. I will consider the employer's arguments with respect to section 31(1)(c) (abuse of process) and 31(1)(g) (*res judicata* or relitigation) of the ATA, in turn.

[35] The majority in *Figliola* summarized, at paragraphs 26 to 33, the common law doctrines of collateral attack, *res judicata*, and abuse of process, which it found were expressed in statutory mechanisms such as section 27(1)(f) (and by extension, section 31(1) of the ATA).

[36] Though not specified by the employer's representative, the species of *res judicata* most likely to apply in this case is issue estoppel, which exists where three preconditions are met; the same issue has already been decided, the earlier decision was final, and the parties were the same in both proceedings.

[37] The majority in *Figliola* cautioned that decision-makers should not apply the criteria for issue estoppel too strictly, when interpreting provisions such as section 31 of the ATA.

Such sections do not codify the actual doctrines or their technical explications, but rather, they embrace their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. Nonetheless, the majority found that it is necessary to consider, among other things, whether the previously decided legal issue was essentially the same as what that being complained of to the tribunal.

[38] In this case, the parties do not dispute that the arbitrator's decision was final,[1] and the parties in both the arbitration and the WCAT appeal are the same. However, I find that the issues before the arbitrator are substantially different from those before me.

[39] While the worker was not entitled to lost wages as damages in a collective agreement dispute, he may nevertheless be entitled to wage loss as a disability benefit under the workers' compensation system. In this regard, I note that entitlement to compensation for lost wages arises in a number of contexts, including government employment insurance, private disability insurance, employment law, and workers' compensation law, each of which has its own criteria and conditions. For this reason, while I understand the employer's representative's argument that wage loss was at stake in both proceedings, in my view, this is a better description of the remedy sought, rather than the issue to be determined, in each proceeding.

[40] The issue to be determined before me, as the worker's representative argues, is whether the worker's compensable temporary aggravation of his pre-existing back pain resolved by August 27, 2010, and if not, whether this condition temporarily disabled the worker from his employment after that date. This issue is one of disability law, which is determined with reference to a specialized body of law and policy, in particular, the Act and the RSCM II.

[41] By contrast, the issue before the arbitrator was whether the employer had failed in its duty to accommodate the worker by terminating his employment. This issue is one of employment law, which is determined by the parties' collective agreement, as well as a different, and equally specialized, body of law and policy. The arbitrator clarified in his decision that the accommodation issue had to do with the worker's "knee permanent disability chronic pain situation," and therefore he did not consider post-discharge evidence about the worker's back injury of December 2009. The fact that the arbitrator's decision focused on the worker's accommodation with respect to his knee injury, and expressly did not consider the worker's low back injury, which forms the basis of the WCAT appeal, points to fundamentally different issues before each of the proceedings.

[1] Where, as in this case, the parties choose not to pursue judicial review, the decision is final. See *Figliola*, at paragraph 51.

[42] In addition, it is unclear whether the standard of proof in both proceedings is the same; while the balance of probabilities is applicable in both proceedings, it is uncertain whether, like WCAT, the arbitrator was bound by a presumption in favour of the worker, such as the one in section 250(4) of the Act.

[43] I acknowledge that there is some overlap in both proceedings between the issues, and the evidence used to resolve them. In this regard, the sworn testimony of witnesses in the arbitration is relevant to the determination of the issues in this appeal. I will return to this issue later in the decision.

[44] For all of these reasons, I am unable to accept the employer's representative's argument that the issues in the worker's WCAT appeal are *res judicata*, and I therefore find that the criteria in subsection 31(1)(g) of the ATA have not been met in this case.

[45] With respect subsection 31(1)(c) of the ATA, I note that the majority in *Figliola* quoted with approval from the SCC's decision in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (*Toronto City*), and stated that even when *res judicata* is not strictly available, the doctrine of abuse of process may apply where allowing the litigation to proceed would violate principles such as, "judicial economy, consistency, finality and the integrity of the administration of justice." In *Toronto City*, the court emphasized that the application of the abuse of process doctrine is unencumbered by the specific requirements of *res judicata*, and offers the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process.

[46] The employer's representative has argued that the worker's WCAT appeal amounts to an abuse of process because the worker has made inconsistent arguments in the arbitration proceedings and the WCAT appeal. In one, he argued that he was capable of working at the time of his termination, and, in another, he argued that he was disabled from work as of the same date. For the reasons discussed later in this decision, I agree with the employer's representative that the worker's statements in the two proceedings are inconsistent. However, I am unable to find, on the evidence before me, that the worker's WCAT appeal amounts to an abuse of process. I make this finding because the doctrine of abuse of process is primarily aimed at preventing relitigation to preserve the integrity of the administration of justice. As I have already determined that the issues before the arbitrator were substantially different from those before me, I am unable to find that the worker is "relitigating" the issues in the arbitration proceeding.

[47] Further, as the worker's rights and obligations under his collective agreement are different from those in the workers' compensation system, I am unable to find that his pursuit of these rights, through a WCAT appeal, constitutes an assault on the administration of justice.

[48] In the circumstances of this case, I find that, without more, the worker's inconsistent statements do not amount to an abuse of process; rather, they create a conflict in the evidence which must be considered and resolved in deciding his claim. For all of these reasons, I am unable to accept the employer's representative's argument that the worker's inconsistent statements in both proceedings constitute an abuse of process, and I therefore find that the criteria in subsection 31(1)(g) of the ATA have not been met in this case.

[49] As discussed above, I have considered the effect of the worker's, and other witnesses', sworn evidence in the arbitration decision. The arbitration decision refers to several statements made by the worker and other employees of the employer, under oath, during the arbitration proceeding. In the context of the WCAT appeal, these statements constitute hearsay evidence, in that they are a second-hand account of what these witnesses said, which are offered by the employer's representative for their truth value. Under item 11.5.1 of the MRPP, hearsay evidence is admissible in WCAT proceedings; however, I must determine its reliability in deciding what weight to give it.

[50] In this case, the worker's representative did not argue that the witnesses' sworn evidence in the arbitration proceeding is inaccurate or otherwise unreliable. I have considered that the witnesses' statements were made under oath and that they were quoted by a tribunal member in a quasi-judicial decision. For all of these reasons, I am satisfied that the worker's statements in the arbitral proceeding, as recounted in the arbitration decision, are reliable, and I have considered this evidence in deciding this appeal.

[51] Finally, the worker and his representative have made submissions about whether the worker's prior claims should be reopened with respect to his low back injury, whether the low back injury should be considered a compensable consequence under one of the worker's earlier claims, and whether the worker's low back injury should be accepted as a permanent condition. However, none of these issues were determined by the Board or Review Division decisions underlying this appeal. For this reason, I find that these issues are not properly before me, and I decline to make any finding with respect to them.

[52] Subject to the requirements of the Act, it may be open to the worker to request an initial decision from the Board on these issues.

**Background and Evidence**

[53] The medical and other evidence related to the worker's injuries has been summarized in the Review Division decision underlying this appeal. I need not repeat this background in detail because decisions of the Review Division are publicly available on the Internet at worksafebc.com. I will therefore set out only the evidence relevant to deciding the issue in this appeal.

[54] At the time of his injury, the worker was a 57-year-old driver for the employer. In a physician's first report to the Board, dated December 10, 2009, the worker reported that he had been moving a beer keg on December 7, 2009 when he felt a sharp pain in his low back. He kept working and the next night the pain was in his left buttock and posterior thigh. Dr. Gornall, the worker's attending physician, noted that the worker planned to keep working and would avoid lifting or awkward movements; however, his knee pain compromised his ability to position himself properly for warehouse work. The worker reported occasional low back spasms, which were relieved with stretching.

[55] The employer's January 8, 2010 report to the Board reiterates the worker's mechanism of injury.

[56] The worker has had several previous claims with the Board, which were reviewed by the worker's representative and by the worker at the oral hearing.

[57] As a result of a 1982 workplace incident, the worker's claim was accepted for a permanent right knee injury and osteoarthritis. He was given a permanent functional impairment award (PFI) of 4.99% under this claim.

[58] In January 1985, the worker had a claim for a lumbar back strain; no wage loss was paid for this claim.

[59] In September 1986, the worker had a slip and fall injury at work in which he injured his right hip, arm, and low back (sprain/strain). He had pain down both legs as a result of this injury. A CT scan from January 1987 indicates that the worker had a central disc protrusion at L5-S1.

[60] In 2005, the worker's claim was accepted for a permanent right knee injury, which resulted in the worker being awarded a PFI of 1.83% in August 2005.

[61] The worker also had a claim in April 2007, involving his left ankle. An occupational rehabilitation 2 (OR2) program progress report from November 30, 2007 notes that the worker reported a new onset of low back pain during his treatment. A December 27, 2007 OR2 program discharge report notes that the worker reported an increase in discomfort in his back, starting eight days earlier.

[62] A May 20, 2008 medical and return-to-work planning (MARP) discharge report notes that the worker developed low back pain while doing a work simulation of picking up crates. The report notes that the back pain was fairly well localized in the lowest part of the spine.

[63] In 2009, the worker's claim was accepted for a left knee permanent aggravation of pre-existing arthritis, and an ankle, and foot injury. The worker was granted a PFI for his lower extremity and chronic pain of 18.16%. At a functional capacity evaluation in

April 2009, the worker complained of pain in his low back, which he said he had injured in the past, and which was giving him more trouble as of the date of the evaluation.

[64] The worker has a history of degenerative disc disease in his lumbar spine. The worker's chiropractor, Dr. Johnson, noted that a December 18, 2007 lumbar spine x-ray revealed that the worker had moderate to severe degenerative disc disease with decreased disc heights at L4-5 and especially at L5-S1. The x-ray report notes that L4-S1 disc spaces are moderately narrowed with degenerative spondylosis and the lower facet joints are arthritic.

[65] Dr. Johnson examined the worker on June 2, 2006 and his exam notes from that date indicate that the worker had extensive back symptoms, including in the lumbar and right sacral areas of his spine. The worker saw Dr. Johnson frequently during the following periods; from June 2006 until February 2007; from November 2007 until January 2008; in April 2008; and from January 20, 2010 until October 2010.

[66] The worker testified that he likely did not see Dr. Johnson in 2009 because he could not afford it. He stated that it was normal for him to have a "twinge" every now and then. The worker testified that his previous low back injuries subsided and resolved over time. He stated that he had not taken time off work for his lower back in 2009.

[67] A report by Dr. Gornall from January 16, 2010 references treatment for the worker's pre-existing bilateral knee pain, and does not discuss the worker's low back symptoms. The worker testified that he was receiving bilateral knee treatments in the form of injections.

[68] On January 20, 2010, Dr. Johnson reported that the worker pulled his lower back while moving a keg at work. He diagnosed a sprain/strain of the worker's left side lumbar region and recommended that the worker reduce low back extension including by no longer moving kegs. Dr. Johnson's exam notes from that visit indicate that the worker was experiencing lumbar and right-sided sacral symptoms in the same areas in which he had reported symptoms in 2006, with the addition of symptoms at L-5. In a letter to the worker's representative, Dr. Johnson clarified that his reports from January 23, 2010 onward, should refer to a disc lesion as a diagnosis rather than a sprain/strain; however, due to an administrative error, this diagnosis did not appear on his reports.

[69] The worker testified that he did not do much about his treatment until January because he was busy; after that, he went to chiropractic treatments regularly.

[70] On March 6, 2010, Dr. Gornall reported that the worker had ongoing low back pain for which he was seeing a chiropractor three times a week. The worker was also taking Tylenol No. 3, Ralivia (100 milligrams once daily and 200 milligrams once daily) and Arthrotec but was still working full time. In a report from March 15, 2010, Dr. Gornall also noted continuing low back pain, and increased the worker's Ralivia to 200 milligrams, once daily.

[71] On cross-examination, the worker agreed that he had been taking Tylenol No. 3 for his knee pain when he returned to work in June 2009, from a previous claim.

[72] In Dr. Gornall's March 31, 2010 report, the worker reported ongoing knee pain; however, there is no discussion of lower back pain. With respect to the worker's physical work restrictions, the report states that the worker was taking Ralivia, 200 milligrams, once daily, for chronic knee pain.

[73] An April 26, 2010 report from Dr. Johnson stated that the worker has a sprain/strain to his left-side lumbar region. He noted that the worker is unable to flex his knees and needs knee surgery. For this reason, he performs full lumbar spine flexion to move hundreds of beer kegs each shift. Dr. Johnson stated that the ongoing chiropractic care and spinal decompression therapy he provides keeps the worker able to work.

[74] Dr. Gornall's May 29, 2010 report notes that the worker was taking Ralivia 100 milligrams, twice a day, as well as Arthrotec daily, but does not record the worker complaining of low back pain. In a July 3, 2010 report, Dr. Gornall indicated that the worker was seeing his chiropractor three times a week for low back pain and cramps that extend into the legs. Chart notes from that date indicate that the worker had right and left L4 and L5 pain in his legs, radiating from his back. He was working full time on modified warehouse duties. The worker continued to take Ralivia and Arthrotec at the same dosage.

[75] The worker underwent decompression treatment with this chiropractor in the spring of 2010, which he said worked well for a while, and which he says allowed him to continue at work. The worker testified that his lower back symptoms were increasing in the summer of 2010, with bending and twisting and making orders aggravating his lower back. He testified that in particular, he had worsening pain behind his knees, and in his lower back and buttocks. The worker testified that, by the end of June or mid-July, he had to repeatedly stop and take rest breaks during the 100 kilometre, one-hour commute to and from work. He testified that he had started taking Tylenol No. 3 again for the pain. On cross-examination, the worker was asked if he had advised his chiropractor that he was getting worse in the summer of 2010; the worker said that he was "pretty sure," but that he was seeing Dr. Johnson three days a week and he knew the worker's condition.

[76] On July 5, 2010, the worker had an x-ray of his lumbar spine. The x-ray report noted a comparison with the previous study of December 18, 2007, and states that disc height loss was again noted at L4-L5 and L5-S1, with a slight increase in disc height loss at L2-L3 compared to 2007. The report also notes facet joint degeneration within the lower lumbar vertebrae along with a slight scoliosis of the lumbar spine.

[77] At the oral hearing, the worker was asked about a conversation with Mr. N, the manager of operations, in July 2010 in which they had discussed whether the worker could drive a truck; the worker testified that his memory is not very good for the time in question

and that he has been having memory problems since being in the hospital for knee surgery in the fall of 2011. He testified that he said he could not drive an automatic truck at that point. In cross-examination, the worker again stated that his position at this time was that he could drive the automatic truck, although, again, he stated that his "mind was not working very well." He agreed that he did not tell Mr. N at this meeting that he could no longer do the modified duties; he stated that he wanted to keep working. The worker also agreed that he did not tell Mr. N that his pain was getting worse.

[78] The worker testified that in July and August 2010, the worker started going home early sometimes because of pain, but a lot of the time because the work was done. He stated that he always clocked out from work when he left; but there were meetings with Mr. E, who is a manager of human resources, and Mr. N about this issue. The worker acknowledged, on cross-examination, that he continued on the same nightshift modified duties from June 2009 until August 2010. He also agreed that he never told his employer that he could not do his job duties, although he says that they knew he was in pain.

[79] On August 20, 2010, Mr. E called the worker to inquire about a meeting which the wanted to worker to attend. The worker advised Mr. E that he had gone home early and that driving to work caused him "excruciating pain." Mr. E. put the worker on three days' paid leave of absence. The worker testified that Mr. E knew of his back condition. When asked whether he had told Mr. E that he could no longer do the modified duties, the worker stated that he could not remember the conversation, due to his cloudy memory. The worker also could not remember whether he told Mr. E that driving caused him a lot of pain. The worker agreed that he did not tell Mr. E that he needed a week off; rather Mr. E suggested it. The worker stated that he wanted his job and he still does.

[80] At the oral hearing and in the arbitration proceeding, Mr. E testified that he did not know of the worker's December 7, 2009 back injury. Mr. N also testified at the arbitration that he was unaware of the worker's December 7, 2009 back injury.

[81] Dr. Gornall's report from August 25, 2010 indicates that the worker had low back pain, with worsening sciatica at L4-5 distal, to anterior shin, with the right being worse than the left. He noted that chiropractic treatments were no longer effective in relieving the worker's sciatica symptoms, and driving and sitting aggravate his symptoms. Dr. Gornall indicated that the worker was not capable of working full time, full duties, noting that the employer had provided a paid leave of absence. Dr. Gornall referred the worker for a CT scan.

[82] The worker testified that, at this point, he told Dr. Gornall that he wanted to go on wage loss benefits because he was in pain. When asked what Dr. Gornall's advice was, the worker testified that he said it was up to the worker to determine whether he was

capable of working. He also testified that Dr. Johnson told the worker that he needed time off to heal.

[83] On August 27, 2010, the employer terminated the worker's employment on the basis that the worker had not fulfilled his duties under the accommodation agreement. The worker testified that he was surprised at his termination. He stated that he had problems bending and twisting and problems picking up the gear and kegs from the ground. He said that after making up 10 or 20 orders he would get very sore. He said that he probably would have been able to do the automatic truck job, but as time went on he was getting more and more back problems and weakness in his legs. He testified that by August 2010, the worker was taking a lot of painkillers and it was unsafe to drive.

[84] The worker had a lumbar spine CT scan on August 31, 2010. The report from the scan summarizes the findings as follows:

> There is multilevel degeneration with moderate to severe spinal stenosis L4/L5, mild to moderate degeneration L3/L4. There is suspect impingement of the descending right L4 nerve root within the right L3/L4 lateral recess, lateral recess stenosis descending L5 nerve roots at the L4/L5 level and suspect impingement of the exiting right L4 and L5 nerve roots. There is suspect impingement of the descending left S1 nerve root.

[85] In a September 7, 2010 memo of the worker's conversation with a Board vocational rehabilitation consultant, the worker discussed his termination from his employment on August 27, 2010. He discussed his duties under the accommodation agreement and stated that he has continued to attend work despite his December 7, 2009 back injury and he expressed concern that he should be on wage loss benefits due to his back; however, he did not state that he was unable to perform his accommodated duties. He reported that he was concerned that the timing of his termination is suspicious, as he was to be bumped up to a more senior position as the result of a retirement. He stated that his union was grieving the dismissal.

[86] The worker next saw Dr. Gornall on September 10, 2010, who again noted worsening sciatica at L4-5 distal, to anterior shin, with the right being worse than the left. He noted that the worker's job had been terminated because he could not do the job. He stated that the worker had back pain with right sciatica, worsened hip, and was favouring his left knee. The report refers to Arthrotec but not to Ralivia or other pain medication. The worker was not capable of working full time, full duties, according to Dr. Gornall.

[87] Dr. Gornall's report from September 24, 2010 again noted that the worker was off work, was receiving daily chiropractic treatment for low back pain, but had no improvement yet. Dr. Gornall noted that the worker was not capable of working full time, full duties.

[88] On October 8, 2010, a Board case manager (CM) asked Board medical advisor, Dr. Kotze, for a clinical opinion on whether the worker's currently accepted diagnosis of a lumbar strain/sprain was still valid or whether there was a more medically plausible diagnosis and whether there is objective medical evidence that the worker's disability as of August 26, 2010 was as a result of the accepted back injuries under this claim.

[89] On October 12, 2010, Dr. Kotze provided an opinion in which she stated that the worker sustained a temporary aggravation of his low back pain during the December 2009 workplace incident. However, she was unable to conclude that the worker's current disability due to back pain was related to the back strain sustained on December 7, 2009 through aggravation, activation, or acceleration. Rather, the disability appears to be related to the expected progression of age-related degeneration. In summary, Dr. Kotze's opinion was that:

- A review of chiropractic and medical chart notes indicates that the worker has a long pre-injury history of low back pain, and the presence of significant pre-existing degenerative changes in the lumbar spine;
- He has been receiving regular ongoing chiropractic treatment for his back since at least 2006, though not in 2009;
- There are gaps in the medical reports referring to back pain between January 2010 and March 2010, then again to July 2010.
- In August 2010 the worker was reported to have worsening sciatic symptoms. However, his symptoms were now also reported as right-sided, whereas they were initially left-sided;
- During the worker's PFI exam under the 2007 claim in April 2009 he reported increasingly troublesome low back pain;
- In essence, the worker clearly had steadily increasing low back pain even prior to the accepted injury incident in December 2009. After this incident, his back pain increased at much the same rate as it had prior to the incident. The pain appears to be primarily related to his known degenerative disc disease in the lumbar spine;
- The incident of December 2009 appeared to cause a transient (temporary) aggravation of his low back pain beyond what could be expected from the known age-related degeneration. However, there is no evidence that this aggravation is ongoing. If it were, one would have expected to see disability significantly earlier than August 2010;
- There is no evidence that the December 2009 incident accelerated the worker's age-related lumbar degeneration faster than it would have progressed in the absence of this injury;
- The worker's current regimen of chiropractic treatment only started on January 20, 2010, more than six weeks after the reported injury incident. These treatments refer to left leg pain, not the right leg symptoms of which the worker currently complains; and

- She was unable to conclude that the worker's current disability due to back pain is related to the back strain accepted on December 7, 2009 through aggravation, activation, acceleration, or aggravation. Rather, the disability appears to relate to the expected progression of the worker's age-related degeneration.

[90] In a November 3, 2010 letter to Dr. Gornall, Dr. Johnson stated that he had been treating the worker for low back pain and radiation since January 20, 2010. He wrote that the worker found this helpful and it allowed him to keep working. However, the combination of the worker's work duties and the limited range of motion in his knees has been a constant aggravating factor for his lumbosacral region and his neurological signs and symptoms have been worsening. The worker experiences motor weakness in his legs and radicular pain. Dr. Johnson felt that the worker had reached maximal medical recovery with him and he could only offer supportive care at that point.

[91] The worker testified that his back symptoms improved after he was terminated. He stated that he was on Ralivia during January and February 2011, and the pain subsided and he felt that he could work again and do his accommodated duties at this time.

[92] Dr. Gornall saw the worker on December 10, 2010 and noted that the worker's back had improved over the past two weeks with a different chiropractic treatment. The worker was awaiting a referral to an orthopaedic surgeon, Dr. Crosby. Dr. Gornall noted that the worker continued to be disabled from work with "ongoing multiple factor disability with [the Board]." [Block capitalization removed.]

[93] On December 13, 2010, Dr. Johnson wrote a letter to the worker's representative in response to the Board's October 18, 2010 decision. He notes that, contrary to Dr. Kotze's findings, there were notations in his chart notes of objective clinical findings of back, pelvic, and bilateral leg symptoms in January through September 2010. He also stated that he advised the worker in January 2010 that his condition was worsening with this work and it was unlikely that he would be able to continue with this kind of work in the foreseeable future. He concluded that it is well-recognized that the mechanics of lifting a heavy load in flexion, then twisting the lumbar spine, greatly increases the probability of a disc injury. In the worker's case, he lifted the heavy keg and then twisted his low back to swing the keg around, when it abruptly caught a nail. This would have significantly increased the torsional load on the worker's lumbosacral junction. It was his professional opinion that the worker's work injury of December 7, 2009 activated a discal injury/lesion in his lumbar spine.

[94] Reports from Dr. Gornall in January 2011 also record ongoing back pain and that the worker's disability from work was due to back and knee problems. Dr. Gornall noted that the worker's back pain limits standing and stairs, while the worker's knee instability limits his mobility. In a February 21, 2011 report, Dr. Gornall stated that the worker was not able to do full duties with a standard transmission truck. He cannot lift and bend to load the truck due to his back.

[95] The worker's union grieved the worker's dismissal on the basis that the worker was capable of continuing to be accommodated in the position he was doing in August 2010 or driving an automatic truck. In February and April, an arbitration hearing was held, in which the worker and several other employees of the employer gave evidence. The resulting arbitration decision contains the following evidence:

- Mr. N testified that, in the summer of 2010, the worker was complaining that he had to take time off because of knee pain, due to moving trailers;
- Mr. N and Mr. E testified that they did not know of the worker's December 7, 2009 back injury;
- Mr. N testified that the worker said, on July 30, 2010, that he would like to try driving the automatic truck;
- The worker testified that he was on modified duties in June 2009 as a result of bilateral knee problems;
- The worker testified that he twisted his back in December 2009 but kept coming to work; he said that he could drive with an automatic truck, that he would be able to load and unload at liquor stores and pubs, probably not as fast as others, but he could get it done;
- The worker was asked about a particular liquor run, and testified that he could move empties carefully, as he had worked with empties every night during the agreement. He testified that he knew the customers on this route really well;
- The worker testified that he was in pain when he went up and down stairs, but that he went upstairs for breaks with the other employees every night;
- He stated that he followed the accommodation agreement and never received any concerns from the employer prior to the July 2010 meeting; he understood that the expectation was for him to come in and do the best he could and do delivery if they got an automatic truck;
- He stated that he would get all the bills in order, route them with each driver, plug in pallet jacks, print and staple bills, remove wrapping from kegs, stack kegs and make orders, make sure breakage came off the trailer, sweep floors, and empty the garbage;
- The worker's chiropractor had told the worker to take some time off because he would hurt himself if he continued; however, the worker's attending physician suggested that he probably should not continue with warehouse work but never said that he should not drive truck; and
- The worker stated that while forklift driving hurt, it is not the same as saying that he could never do it.

[96] The arbitrator clarified that the accommodation issue had to do with the worker's knee permanent disability chronic pain situation, and therefore he did not consider the worker's back injury of December 2009.

[97] When asked about his statements under oath at the arbitration hearing, the worker testified that he does not remember testifying that he could have continued with his modified duties at the time of his termination. He again stated that he was having a lot of trouble with his memory; that he runs into people and is unable to remember who they are. He testified that he had extreme difficulties and does not understand a lot of things.

[98] On May 10, 2011, another Board medical advisor, Dr. Biro, reviewed the worker's medical information in the context of the worker's entitlement to coverage for chiropractic treatments and stated that the issue had been adequately and specifically addressed in Dr. Kotze's opinion, and nothing had changed to date.

[99] In a May 28, 2011 report, Dr. Gornall stated that the worker had degenerative disc disease of the spine with moderate to severe spinal stenosis causing leg pain, numbness, and weakness.

[100] Dr. Gornall noted in a June 27, 2011 report that the worker was back at work on a modified program. He still has sciatica in his back and his knee limits work but allows truck driving again with an automatic transmission and no heavy lifting.

[101] In a September 21, 2011 letter to the worker's representative, Dr. Gornall provided a medical opinion on causation, which states, in part;

- It is difficult to separate acute from chronic injuries when there is a soft tissue injury to the back which is based on a strain rather than trauma;
- the worker continues to have low back pain which varies in intensity and, at that time, the left side seemed worse than the right side as far as nerve root signs extending into the worker's leg;
- Some days are worse than others, but his pain is always worse at the end of a shift. The worker takes Tramadol at night for the pain;
- The fact that the worker walks with a limp favouring his left knee may also be aggravating his lower back;
- Dr. Gornall has no doubt that the worker has a chronic degenerative condition in his back, with moderate to severe spinal stenosis with nerve root impingement on both sides;
- He believes that this is all chronic and likely existed prior to the December 7, 2009 injury;
- However, the December 7, 2009 injury aggravated the worker's back and it would take very little in the way of inflammation or swelling to exacerbate this condition and give rise to nerve root compression, which the worker seems to have had for the last 20 months, at variable intensity;
- The December 7, 2009 injury exacerbated the worker's pre-existing condition; and
- In Dr. Gornall's opinion, this condition is likely a permanent impairment to some extent. The bony condition of the spinal stenosis will not repair itself on its own, but

any irritation or inflammation in the area seems to compromise the nerve roots and cause both the described pain and disability.

[102] The worker saw Dr. Crosby on September 30, 2011. In an October 3, 2011 report to Dr. Gornall, Dr. Crosby described the worker's December 2009 work injury, and wrote the following with respect to the worker's condition:

- The worker's overall symptoms of back pain and leg pain have improved somewhat but they have plateaued over the last year and the worker is quite worried;
- His main complaint is pain down his left leg in the morning, which dissipates later in the day;
- The worker reports that he is left with a low level of back pain that he did not have prior to the twisting injury;
- The worker is likely suffering from left hip arthritis;
- The CT scan shows degenerative disc disease at the worker's lower two levels, to a significant degree, which is compounded by multifactorial spinal stenosis;
- The worker's L4 facets are slightly arthritic, but the L5-S1 facets are worse and are probably giving the worker mechanical back pain when he extends backwards;
- There is a possibility of a nerve root impingement of the traversing nerves at L5-S1, explaining his left sided sciatica; and
- Dr. Crosby recommended an L5-S1 epidural steroid injection on the left side.

[103] The worker testified that Dr. Crosby said the worker's 2009 injury caused a hematoma and his bending and twisting were causing nerve root damage; however, Dr. Crosby's report does not discuss a hematoma, disc injury, or lesion.

[104] The worker testified that he is currently on pain medication and Durolane injections for his knees.

[105] The worker's wife gave sworn evidence at the hearing, the relevant portions of which are summarized as follows:

- The worker had hurt his back in the past but when he went back to work in June 2009, his back was fine;
- After the worker's December 2009 injury, he was up and down a lot at night, he was not sleeping, he could not sit for a long period of time, he could not do a lot of things he had previously done. He had to cancel their holiday and he could no longer work on his hot rod;
- He had pain in his legs and was taking extra medication and chiropractic treatments;
- The worker continued to work, and he loved his job;
- The worker had problems with his knees before 2009 but had no problems with travelling, sleeping, or driving;
- When the worker returned to work after he was reinstated, his back symptoms were better because he had rested and he was driving truck; and

- On cross-examination, the worker's wife agreed that under the worker's modified duties agreement, resulting from his knee injury, the worker had to take breaks between standing and sitting; however, she stated that he could still drive long distances with that restriction.

[106] Mr. E also testified at the oral hearing, the relevant parts of which are summarized below:

- He testified that neither he, nor Mr. N, are in the warehouse more than once a month, as they are at the head office, which is in a different city;
- After returning to work in June 2009 on modified duties, the worker never reported that he could not continue with these duties;
- He testified that the worker's employment was terminated because he was a supernumerary in the accommodated position, and the employer thought that the worker could not return to driving;
- With respect to the August 20, 2010 meeting, Mr. E stated that the worker advised that he had left early because he had finished his work, but that he was in too much pain to return to work for the meeting. Mr. E said that the worker should take a few days of paid leave to let him review the worker's situation with Mr. N;
- On cross-examination, Mr. E testified that the worker's employment was terminated because he was not doing some of the job duties in the accommodation agreement, including driving a forklift;
- Mr. E stated that the worker advised that he was able to drive an automatic truck with a special route for him, and the employer said they would look at that;
- He agreed that the employer did not want to accommodate the worker any further; and
- On redirect, Mr. E clarified that the worker's performance of his modified duties did not change between July 2009 and the time of his termination. He said that the worker did the same basic things, but they were not what the employer wanted him to do.

**Submissions**

[107] The parties provided verbal and written submissions in this appeal. The worker also provided submissions before the Review Division. I have reviewed these submissions, as well as the medical and other evidence on file.

[108] The worker's submissions, in this appeal and before the Review Division, are summarized as follows:

- The worker injured his back while moving a keg of beer at work on December 7, 2007. He continued to work until August 27, 2010, at which time he could no longer work due to the effects of his injury;

- The worker's symptoms continued to deteriorate over time, with increasing pain and sciatica;
- The worker's attending physician and his chiropractor both told him he should not be working; however, he continued to do so;
- The worker escalated his chiropractic treatments, but by August 2010, the worker's physician reported that chiropractic treatment was no longer effective in relieving the worker's sciatica symptoms;
- The August 2010 CT scan shows that the worker has multilevel degeneration in his low back, with suspected nerve impingement;
- The preponderance of evidence shows that the worker did not experience ongoing back symptoms after July 2009 until December 2009;
- The worker did not have any chiropractic treatment or other back treatment after returning to work in 2008 until he attended Dr. Johnson after the December 2009 injury; his symptoms since then are constant and worsening;
- The worker said that he did have back pain prior to the December 7, 2009 injury, but he did not have ongoing or deteriorating symptoms prior to this injury, and this is supported by the 2007 claim documents, including the OR2 program discharge report and the MARP discharge report;
- The worker has pain in his lumbar back and buttocks, lumbar muscle spasms, and pain in both legs, mostly his left. He has problems walking and has limitations with sitting, standing, and walking;
- The worker was having problems at work driving the manual transmission truck due to his knees and back and he was having issues with lifting;
- The worker gave evidence that he was having increasing difficulties at work with his knees and back and, by the summer of 2010, his chiropractic treatments were no longer effective;
- On August 20, 2010, the worker told his supervisor that driving to work caused excruciating pain and that he was taking painkillers; the worker left early that day and was on paid leave from August 23 to 26, 2010 when his employment was terminated;
- Policy item #22.30 provides that compensation extends not just to the immediate injury but to any separate conditions and diseases that arise from it. Policy item #22.00 states that if a work injury was a significant cause of a further injury, then the further injury is sufficiently connected to the work injury so that it forms an inseparable part of the work injury;
- In this case, the mechanism of injury of lifting a 170-pound keg on December 7, 2009 initiated a discal injury/lesion in the lumbar spine which is causing the worker's disability;
- The evidence supports that the worker continued to suffer from his back injury, receiving regular and consistent treatment, and undergoing medical investigations by August 2010;
- The employer's submissions with respect to the arbitration should be disregarded as that proceeding dealt with labour issues not Board issues;

- The worker states that he has a hematoma in his lower spine as a result of the December 2009 incident;
- After the worker was terminated, there was no longer any suitable employment for him, given his multiple disabilities. It is irrelevant whether or not the worker was terminated for cause, because the analysis is whether the worker remained temporarily disabled and whether there was suitable employment available to the worker; and
- The worker requests reimbursement for the expense of obtaining the opinions of Drs. Johnson and Gornall.

[109] For these reasons, the worker requests that I allow his appeal and vary the Review Division's decision by finding that the worker's compensable low back injury had not resolved by August 27, 2010 and that the worker is entitled to temporary disability benefits as of that date.

[110] The employer's submissions, in this appeal and before the Review Division are as follows:

- The review officer did not make any errors of policy and the worker's appeal should be dismissed;
- The worker's absence from work, which began on August 27, 2010, was not related to his back injury, but rather it was based on his termination, which resulted from the employer's belief that the worker could not drive a delivery truck because of his knee condition;
- At the May 2011 arbitration, the worker asserted that he was fit to perform driving duties at the time of his termination. The arbitrator accepted this evidence and reinstated the worker on this basis;
- On his own evidence, the worker was not disabled from working between August 27, 2010 and June 3, 3011 and therefore he cannot be entitled to any wage loss benefits;
- The worker did not file any lost time claim relating to his December 7, 2009 injury up until his August 27, 2010 termination;
- Also, his duties did not change after the December 7, 2009 work incident;
- The worker's assertion that his condition had deteriorated since December 7, 2009 to the point where he could no longer work on August 27, 2010 are not credible; the worker continued to attend work regularly until his termination. It was the termination, not the injury, which resulted in the worker's absence from work;
- In the worker's September 7, 2010 conversation with a Board CM, the worker did not stated that he was unable to continue working;
- There is no medical evidence to substantiate that the worker's condition had deteriorated to the point where he could no longer work on August 27, 2010. Any deterioration was as a result of the worker's degenerative condition, not the December 7, 2010 incident;

- The worker has a long history of pre-injury lower back pain, including the presence of significant, pre-existing degenerative changes in the lumbar spine;
- The worker had been receiving regular ongoing chiropractic treatment since at least 2006;
- On September 9, 2009, the worker's attending physician had reported increasing lower back pain, which he reported was worsening in October 2009;
- While the worker and his spouse testified as to his worsening condition after December 7, 2010, there is no objective medical evidence to support this, and the worker admits that his memory is poor for this time frame;
- Further, his oral hearing evidence is inconsistent with his arbitration evidence and his September 2010 conversation with the Board CM;
- The employer disputes that the worker began leaving early from work in the summer of 2010; rather this occurred after the worker returned to work on modified duties in July 2009;
- The worker has chronic pain for which he is in receipt of a PFI; it is expected that the worker will suffer from pain; and
- Much of the worker's reported pain was due to his knee condition, as he confirmed in his evidence to the arbitrator, and as can be seen in the permanent limitations that had been accepted on the worker's file.

[111] For these reasons, the employer requests that I deny the worker's appeal and confirm the Review Division's decision.

**Reasons and Findings**

*1. Did the worker's compensable lumbar back strain/strain and/or temporary aggravation of his pre-existing degenerative back pain resolve by August 27, 2010*

[112] The law and policy that applies to this appeal is found in sections 29, and 30, and 31.1 of the Act and Chapter 5 of the RSCM II.

[113] Sections 29 and 30 of the Act provide that the Board will pay compensation to a worker where the worker has a temporary total or a temporary partial disability as a result of his compensable injury or disease. Once a worker's condition has become permanent, his entitlement to benefits is determined based on section 23 of the Act, which concerns permanent disabilities. The worker's entitlement under section 23 of the Act, however, is not before me in this review. Section 31.1 mandates termination of temporary wage loss benefits if the worker ceases to have the disability for which he is receiving compensation.

[114] I find that the following policies in the RSCM II are relevant to this appeal:

- Policy item #33.00, "Introduction," provides, in part, that wage loss benefits are payable where an injury or disease resulting from a person's employment causes a

period of temporary disability from work. These benefits usually commence shortly after the initial acceptance of a claim;

- Policy item #34.10, "Meaning of Temporary Total," sets out that in order to be paid benefits under section 29(1) of the Act, a worker must have a temporary total physical impairment or psychological impairment because of an injury. A "temporary" physical impairment is one which is likely to improve or become worse and is therefore not stable, with such change being reasonably foreseen in the immediate future;

- Policy item #34.54, "When is the Worker's Condition Stabilized," provides that a condition will be deemed to have plateaued or become stable where there is little potential for improvement or where any potential changes are in keeping with the normal fluctuations in the condition which can be expected with that kind of disability. The policy explains that if a worker's condition has not yet stabilized and is still temporary, the worker will be maintained on temporary disability benefits under section 29(1) or 30(1) of the Act;

- Policy item #35.10, "Meaning of Temporary Total," states that workers will be considered to have a temporary partial disability when, even though they would ordinarily be considered as temporarily totally disabled, they do in fact continue to carry out their previous job, in part, or perform some other type of light work; and

- Policy item #35.30, "Duration of Temporary Disability Benefits," provides that the Board will terminate temporary wage loss benefits under sections 29 and 30 of the Act once the worker's temporary disability ceases.

[115] The result of the applicable law and policy is that I must determine whether, as of August 27, 2010, the worker was temporarily disabled by his compensable lumbar strain/sprain and/or his temporary aggravation of his pre-existing degenerative low back pain. In my view, neither of the worker's compensable injuries remained disabling as of that date. I set out my reasons for this conclusion below.

[116] The worker has a long, documented history of pre-injury low back complaints, from 1986 until April 2009. The worker saw his chiropractor regularly at least as early as June 2006 for his low back complaints; his exam notes from that date indicate that the worker had extensive back symptoms, including in the lumbar and right sacral areas of his spine. The worker saw Dr. Johnson frequently during the following periods; from June 2006 until February 2007; from November 2007 until January 2008; in April 2008; and from January 20, 2010 until October 2010. It does not appear that the worker saw Dr. Johnson in 2009; however, the worker testified that this was likely because he could not afford to attend. The worker also has a documented history of moderate to severe degenerative disc disease, facet arthritis and spinal stenosis, all of which pre-dates the December 7, 2009 injury.

[117] The worker stated that he had "twinges" in his back from time to time, but he had not missed work due to his low back before the December 2009 injury. However, I note that the worker also did not miss work due to back pain after his December 7, 2009 workplace injury. The worker saw Dr. Gornall shortly after the December 7, 2009 back incident, and he reported low back pain radiating into his left buttock and thigh. However, he did not seek any further treatment for his back until his January 20, 2010 visit to his chiropractor, Dr. Johnson, because, according to the worker, he was busy during this time. However, I infer from this evidence that, after the December 7, 2009 incident, the worker's low back symptoms were not significant enough for him to miss work or seek medical treatment for approximately six weeks. The worker also did not miss work due to his low back injury at any point in the eight months following his injury. The fact that the worker's low back symptoms following the injury merited neither medical treatment for six weeks nor missed time from work for over eight months makes it difficult to relate the worker's condition in August 2010 to a seemingly minor injury in December 2009.

[118] Dr. Gornall's reports to the Board indicate that the worker next reported low back pain at two visits in March 2010, and one visit in each of June and July 2010. A report from Dr. Johnson from April 2010 indicates that the worker is able to continue working due to decompression therapy. The worker visited Dr. Gornall next on August 25, 2010, and he reported worsening sciatica at L4-5 distal to anterior shin, greater on the right side than the left. Dr. Gornall stated that chiropractic treatments were no longer effective in relieving the worker's sciatica symptoms. I note that there are significant gaps in the worker's reports to Dr. Gornall of low back pain. In addition, Dr. Gornall stated in his December 10, 2009 letter, confirmed in his September 21, 2011 opinion, that the worker first presented with pain in his left buttock and posterior thigh, but by August 27, 2010, he was reporting sciatica in both legs, but worse on the right. I note that the worker reported right-sided sacral symptoms to Dr. Johnson in 2006.

[119] The gaps in the worker's reports of back pain to Dr. Gornall, combined with his changing low back symptoms, also makes it difficult to draw a causal connection between the worker's symptoms in August 2010 and his December 7, 2009 injury. The fact that the worker has significant degenerative disc disease in his low back, as well as a long history of intermittent low back symptoms, also makes it difficult to relate the worker's sciatica in August 2010 with his December 7, 2010 injury.

[120] I acknowledge that the worker saw Dr. Johnson regularly from January 20, 2010 until after the date of injury, and that the Board covered these chiropractic treatments. However, I do not consider that this demonstrates that the worker's symptoms in August 2010 were caused by the December 7, 2009 workplace injury, since the worker had frequently seen Dr. Johnson for low back pain since at least June 2006. The worker testified that he did not see Dr. Johnson in 2009, but he stated that this was because he could not afford to do so.

[121] There are five medical opinions on file which address the worker's low back condition.

[122] Dr. Johnson provided a medical opinion on December 13, 2010, in which he opined that, because the mechanics of the worker's December 7, 2009 injury "greatly increases the probability of a disc injury," it was his opinion that the worker's December 7, 2009 injury activated a discal injury/legion in his lumbar spine. However, Dr. Johnson does not explain why, if the worker sustained an acute disc injury or lesion in the December 7, 2009 incident, his symptoms necessitated no time of work for eight months post-injury and no medical treatment, aside from stretching, for six weeks post-injury. Further, as the December 18, 2007 lumbar spine x-ray revealed, and the August 31, 2010 CT scan confirmed, the worker has a history of pre-existing multilevel, moderate to severe degeneration, stenosis and facet arthritis in his low back, as well as a long history of low back symptoms. Dr. Johnson's opinion does not mention, much less address, the worker's pre-existing low back history or its impact, if any, on Dr. Johnson's opinion on causation.

[123] By contrast, Board medical advisor, Dr. Kotze, reviewed the worker's extensive claim file and history of low back and bilateral knee complains. Her opinion was that the December 2009 incident appeared to cause a transient (temporary) aggravation of his low back pain beyond what could be expected from the known age-related degeneration. However, she concluded that there was no evidence that this aggravation was ongoing. If it were, one would have expected to see disability significantly earlier than August 2010. She concluded that there was also no evidence that the December 2010 incident accelerated the worker's age-related lumbar degeneration faster than it would have progressed in the absence of this injury. I acknowledge Dr. Johnson's notations in his December 13, 2010 letter with respect to Dr. Kotze's interpretation of his chart notes, in particular, that there were notes of the worker having right leg symptoms as early as January 2010. However, Dr. Kotze's opinion appears to be primarily based on the worker's long history of low back symptoms, his diagnosed pre-existing degenerative disc disease, and other back conditions, as well as the fact that, had the worker's aggravation from the December 2009 incident been ongoing, one would have expected to see disability earlier than August 2010. I also note that Dr. Kotze reviewed the worker's claim history and other medical records in rendering her opinion, whereas it is unclear whether Dr. Johnson did. Dr. Biro, another Board medical advisor, confirmed Dr. Kotze's opinion on May 10, 2011. For all of these reasons, where they conflict, I prefer Dr. Kotze's and Dr. Biro's opinion to that of Dr. Johnson.

[124] Dr. Crosby's September 30, 2011 letter does not expressly state a medical opinion with respect to whether the worker's current symptoms were related to his December 7, 2009 injury. However, Dr. Crosby reiterated the worker's mechanism of injury and stated that the overall symptoms of back and leg pain have improved somewhat, but have plateaued over the last year. He appears to attribute the worker's current condition to low back facet arthritis and possible nerve root impingement at L5 and S1. I note that Dr. Crosby's opinion does not mention a disc lesion, injury or hematoma.

[125] Finally, Dr. Gornall, on September 21, 2011 stated that it was difficult to separate acute from chronic injuries when there is a soft tissue injury to the back which is based on a strain rather than trauma. He confirmed that the worker's initial pain was worse on his left side than his right. He believes that the worker has a degenerative condition with moderate to severe spinal stenosis and root impingement, which is all chronic and likely existed prior to the December 7, 2009 injury. The December 2009 injury likely aggravated the worker's back, and it would take little inflammation or swelling to do so. Dr. Gornall stated that the worker's spinal stenosis is likely a permanent impairment and any irritation or inflammation in the area seems to compromise the nerve roots and cause both pain and disability. I interpret Dr. Gornall's opinion to mean that he considers that the December 2009 injury caused inflammation and swelling from a soft tissue injury, rather than a disc lesion or injury, as Dr. Johnson thought. He believes that the worker's condition is degenerative and chronic and states that any irritation or inflammation, such as the December 2009 injury, can cause the worker both pain and disability.

[126] I turn now to the worker's evidence. Under policy item #97.32, the worker's statement about his condition, even if it is uncorroborated, is evidence insofar as it relates to matters that are within the worker's own knowledge. In this case, the worker gave sworn evidence in the oral hearing, and, although I found the worker to be forthright, I find that his evidence in the oral hearing is, in some respects, unreliable. The worker stated at least eight times throughout the oral hearing that he has significant memory problems since his knee surgery in the fall of 2011. He testified that due to his memory problems, he gets confused very easily, his memory is cloudy, and he has a hard time remembering people who he has met before. He described having extreme difficulty and that he does not understand a lot of things now. The worker had difficulty recalling several significant facts and statements at the oral hearing, and he did not appear to be confident when answering some questions. For this reason, as noted below, where the worker's evidence conflicts with other, more reliable evidence, I have preferred that evidence to the worker's.

[127] I have considered the worker's evidence that his lower back symptoms were increasing in the summer of 2010, with bending, twisting, and making orders aggravating his lower back. He testified that, in particular, he had worsening pain behind his knees, and in his lower back and buttocks. The worker testified that, by the end of June or mid-July, he had to repeatedly stop and take rest breaks during the 100- kilometer, one-hour commute to and from work. He testified that he had started taking Tylenol No. 3 again for the pain.

[128] However, I note that Dr. Gornall's reports from visits in June, July, and August do not refer to prescriptions for Tylenol No. 3. I also note that while the worker stated that his low back symptoms increased and worsened in June and July 2010, Dr. Gornall's reports to the Board from those months do not refer to an increase in the worker's low back symptoms, nor did Dr. Gornall increase the worker's medication or otherwise change the worker's treatment at those visits. I note that both the June and July, 2010

reports note that the worker is capable of working full-time, full-duties. In Dr. Gornall's August 25, 2010 report, he did note the worker's worsening back symptoms and noted that the worker was not capable of working full time, full duties and that he was on a paid leave of absence from the employer. While the worker's representative submitted that Dr. Gornall told the worker he should not be working, the worker testified that Dr. Gornall did not express an opinion on this issue; rather, he left that decision up to the worker. For this reason, I am unable to conclude, from Dr. Gornall's reports, either that the worker's low back symptoms were increasing over the summer of 2010 or that Dr. Gornall concluded that he worker was incapable of working after August 27, 2010.

[129] Further, the evidence suggests that the worker also did not consider himself incapable of doing his modified duties after August 27, 2010. Mr. E testified, and the worker agreed, that he never told Mr. E or Mr. N that he was unable to do the modified duties. Rather, he testified at the arbitration, that he was doing his modified duties at the time of his dismissal. At the oral hearing, Mr. E confirmed that the worker gave this evidence at the arbitration hearing, and also that he had told Mr. N, at the termination meeting, that he could drive an automatic truck. The worker could not remember his evidence at the arbitration, and he denied that he had told Mr. N, at the July 2010 meeting, that he could drive an automatic truck. However, he testified that while he was having increasing difficulty filling orders, he was surprised at his dismissal on the basis that he could not do his modified duties. Where the worker's evidence conflicts with his testimony at the arbitration hearing, I prefer his evidence at the arbitration hearing because it was given closer to the events at issue, and it pre-dates the worker's November 2011 surgery and resulting memory problems. Further, where the worker's oral hearing evidence conflicts with that of Mr. E and Mr. N, I prefer their evidence to that of the worker because the worker did not seem confident in his evidence about his conversations with Messrs E. and N, blaming his earlier-described memory problems. In considering all of the evidence, I find that the worker believed that he was capable of continuing in his modified duties, or driving an automatic truck, at the time of his dismissal, and he disagreed with the employer's assessment that he was unable to work at that time.

[130] I acknowledge that the automatic truck job was not available to the worker at the time of his dismissal. However, the worker's evidence, both at the arbitration hearing and at his termination meeting, that he was capable of driving an automatic truck in August 2010 conflicts with his oral hearing testimony that, by the summer of 2010, he had to take several breaks while driving home from work because driving aggravated his low back pain, and that he felt that he was unsafe because of increased painkillers. I have already found that Dr. Gornall's reports from this time do not refer to a change in the worker's painkillers. I also find that, had the worker's low back pain been disabling as of August 27, 2010, the worker would not have stated to his employer and to the arbitrator that he could drive an automatic truck.

[131] On cross-examination, the worker was asked if he had advised his chiropractor that he was getting worse in the summer of 2010; the worker said that he was "pretty sure," but that he was seeing Dr. Johnson three days a week and he knew the worker's condition.

I acknowledge Dr. Johnson's statement that he advised the worker that his condition was worsening with his work and that it was unlikely that he could continue for the foreseeable future. However, this does not address the specific issue before me; that is, whether the worker was disabled on August 27, 2010 by his injuries from the December 7, 2009 incident. Dr. Johnson's comments in this regard appear directed at the worker's job duties generally, and their effect on the worker's degenerative low back condition.

[132] While I accept that the worker had low back symptoms between December 7, 2009 and August 27, 2010, I am unable to conclude from the evidence that the worker's low back symptoms in August 2010 were due to his December 7, 2009 injury. In making this finding, I have found the following factors to be persuasive;

- The worker's medical and claim file records indicate a long history of pre-existing moderate to severe degenerative disc disease, spinal stenosis, and facet arthritis, as well as low back pain, dating back to 1986;
- After an initial visit to Dr. Gornall on December 10, 2009, at which the worker was advised to stretch, the worker did not seek further medical treatment for his low back until six weeks later;
- The worker continued to work after the December 7, 2009 incident, and did not miss any time from work due to his low back symptoms until over eight months later, on August 27, 2010;
- There are gaps in the worker's reports of low back pain to Dr. Gornall between December 2009, March 2010, and July 2010. However, the worker did continue to see Dr. Johnson regularly from January 20, 2010 until after August 27, 2010;
- Dr. Kotze found, and Dr. Biro confirmed, that the worker's disability appeared to be related to the expected progression of age-related degeneration; if it was related to the December 7, 2009 workplace injury, one would expect to see disability earlier than August 2010;
- Dr. Gornall's opinion appears to support that the worker has a chronic degenerative back condition which is easily aggravated by irritation and inflammation, and that his left leg limp may be aggravating the worker's low back symptoms;
- The worker never advised his employer that he was unable to do his modified duties; and
- The worker's evidence suggests that he considered himself able do his modified duties, as well as drive an automatic truck, at the time of his termination on August 27, 2010.

[133] For all of these reasons, I deny the worker's appeal on this issue. I confirm *Review Reference #R0124342*.

*2. Is the worker entitled to temporary disability benefits after August 27, 2010 as a result of his December 7, 2009 workplace injury?*

[134] Under policy item #33.00, wage loss benefits are payable where an injury or disease resulting from a person's employment causes a period of temporary disability from work. In this case, I have found that the evidence is insufficient to establish that any disability the worker experienced on August 27, 2010 resulted from the December 7, 2009 work incident, and therefore the worker is not entitled to wage loss benefits after August 27, 2010.

[135] I therefore must deny the worker's appeal. I confirm *Review Reference #R012432*.

**Conclusion**

For the reasons set out above, I deny the worker's appeal. I confirm *Review Reference #R0124342*.

[136] The worker requested reimbursement for the expense of obtaining Dr. Gornall's September 21, 2011 medical opinion, in the amount of $180, and Dr. Johnson's December 13, 2010 medical opinion, in the amount of $89.80. Item #16.1.3 of the MRPP provides that WCAT will generally order reimbursement of expenses for producing written evidence, regardless of the result in the appeal, where the evidence was useful or helpful in the consideration of the appeal, or where it was reasonable for the party to have sought such evidence in connection with the appeal. I find that it was reasonable for the worker to have sought Dr. Gornall's and Dr. Johnson's medical opinion in this appeal. Therefore, in accordance with section 7 of the *Workers Compensation Act Appeal Regulation*, item #16.1.3 of the MRPP, and the Board fee schedule for such reports, I order the Board to reimburse the worker's expense in obtaining this written evidence.

[137] The worker did not request reimbursement for any other appeal expenses and no such expenses were apparent to me. Consequently, I make no other order for the reimbursement of appeal expenses.

Shannon Salter
Vice Chair

SS/gw