

Workers' Compensation Appeal Tribunal

Decision # 3

Claim No.: 98-0063

Date of Hearing: August 24, 2000

Date of Decision: September 28, 2000

Appeal Committee Members

| | |
|-------------------------------------|-------------------|
| Presiding Officer: | Heather MacFadgen |
| Member representative of employers: | Hank Ambrose |
| Member representative of workers: | Joseph Radwanski |

In attendance: The Worker (via teleconference connection)
The Worker's representative – Michael Travill
Reporter/Recorder – Doug Ayers

Location: Boardroom 1B Main, 419 Range Road
Whitehorse, Yukon Territory

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Introduction

The worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Internal Review Committee ("IRC") dated January 15, 1999. The worker's appeal was originally set down to be heard by an appeal panel of the Board on October 19, 1999 but this hearing was cancelled after the worker requested, on October 6, 1999 that the hearing be postponed.

In its decision, the IRC upheld the April 1, 1998 decision of a board adjudicator denying the worker any entitlement to wage loss benefits, medical treatment or chiropractic treatment. The worker argues that he is suffering an ongoing disability that arose out of and in the course of employment. The adjudicator's decision was made under board Policy CL-40, CL-42, CL-47, and GC-07 under the authority of section 23 of the *Workers' Compensation Act* ("Act").

On April 1, 2000, the Workers' Compensation appeal tribunal came into existence under amendments to the *Act* known as Bill 83. On May 15, 2000 the worker appealed the IRC decision to the new tribunal and the appeal was heard by an appeal committee of the tribunal as established by the tribunal Chair under section 18.3(1) of the *Workers' Compensation Act*, 1992 as amended by SY 1999, c.23, s.11.

This hearing was originally set down for hearing on July 13, 2000. On July 12, 2000, the workers' advocate requested an adjournment. The hearing was rescheduled and held on August 24, 2000 in Boardroom 1B Main, 419 Range Road, Whitehorse, Yukon.

At the outset of the hearing, the appeal committee determined that it had jurisdiction under section 18.2(a) and 90.(1) (c) of the *Act* to hear the appeal.

The worker attended the hearing via teleconference connection and gave evidence by affirmation. The worker was represented by Worker's Advocate, Mike Travill. One other witness attended a portion of the hearing to give evidence by affirmation via teleconference connection. No one appeared on behalf of the employer. The proceedings were recorded by court reporter Doug Ayers.

The appeal committee considered all of the worker's record as provided by the board as well as board policies CL-40, "Disability", CL-42, "Arising Out of and in the Course of Employment," CL-47, "Pre-existing Conditions," and GC-07, "Role of the Medical Consultant," also provided by the board as relevant to the matter under appeal according to section 18.3 (4) of the *Act*. In addition, the following documents were marked as Exhibit 1 in the hearing:

1. Letter from Dr. Igor Krizan to Dr. F. Hicks, dated July 7, 1998.
2. Letter from Dr. Igor Krizan to Dr. F. Hicks, dated December 16, 1998.

3. Diagnostic Imaging Report – examination completed May 18, 1999 by Dr. R. Reid.
4. Diagnostic Imaging Report – examination completed May 27, 1999 by Dr. W. E. Casey.
5. Orthopaedic Clinic Note by Dr. Igor Krizan dated May 27, 1999.
6. Letter to S. Hogeboom, Office of the Worker Advocate, from Sonja Hoskins, Registered physiotherapist dated November 3, 1999.

Lastly, prior to the hearing the Workers' Advocate was given a File Summary and tabbed Documents relating to the appeal prepared by tribunal staff for easy reference to documents from the worker's record during the hearing.

At the outset of the hearing, the Chair stated that new evidence submitted at the hearing would be provided to the board, unless the worker or his representative raised an objection to doing so. Neither objected.

Evidence from the Worker's Record

In order to properly address and understand the issues in this case we think it is necessary to set out a fairly extensive account of the history of this claim as revealed in the worker's record. As part of this account, we will comment on that history. In order to protect the parties' privacy, in any quote or reference to the worker or employer by name, we have substituted the word "worker," or "he," or "employer," etc. We have also used initials rather than the full name of doctors, other professionals, as well as any witnesses.

NOTE: Many of the doctor's medical reports are handwritten with numerous medical abbreviations. For the convenience of the reader, in the excerpts from medical reports included in this decision, such abbreviations are spelled out. If any words or abbreviations are uncertain (due to unclear handwriting), they are followed by a question mark in square brackets [?]. Gaps due to unreadable words are indicated by [. . . ?].

- (1) The Internal Review Committee ("IRC") concluded that the worker suffered a minor soft tissue injury to his rib and lower back when he fell against a guardrail on a platform on which he was working on December 7, 1997. However, the IRC finds that this injury did not prevent him from working or impair his earnings. The IRC also concludes that the worker's "now longstanding low back pain results from the degenerative changes of his lumbar spine and is not related to falling against [the] guardrail." Finally, the IRC notes that there is no medical evidence before them that the worker's condition is an aggravation of a pre-existing condition.

- (2) The worker's Notice of Appeal dated May 15, 2000 asks that the tribunal overturn the IRC decision and find that the worker's condition – that is, ongoing back pain – arose out of and in the course of employment. The worker seeks “compensation for a continuing disability including time loss and medical costs, as well . . . any rehabilitation services and/or earnings loss” to which the worker may be entitled.

The worker and his representative reject the IRC's conclusions that the worker's low back pain:

1. is a result of degenerative changes in the lumbar spine; and,
2. is not related to the fall against the guardrail at work.

- (3) The first Worker's Report of Injury/Illness is dated December 9, 1997 (unsigned). It states that the worker was using scooping equipment when the accident occurred on December 7, 1997. It states that the worker injured his back when he fell against equipment. It also states that the worker returned to work on December 10, 1997.

- (4) The second report is dated January 16, 1998 and signed by the worker. It states that the worker injured the left side of his back when a loose piece of collaring hole let go, causing him to fall back. It lists two witnesses: (1) R.L. who was collaring with the worker, and (2) K.A. who was the scoop operator.

Also this report states the worker earned \$18.00 per hour for a 40-hour work week.

The report as well as a handwritten note attached states that the worker kept working on light duty (until laid off December 18, 1997).

- (5) The Employer's Report of Injury/Illness dated March 4, 1998 is signed by the P/R (Payroll) Supervisor. It states that the worker injured the left side of his back when a “piece of loose” fell causing him to fall back. The report notes that the worker received first aid from a nurse at the work site and was not absent from work – but on “light duty.”

Also the report states that the worker began work on November 11, 1997 and was paid \$18.00 an hour for a 40-hour week as a permanent worker.

- (6) The Doctor's First Report by Dr. S. is dated December 9, 1997. He diagnoses trauma to ribs and prescribes rest and muscle relaxants. Under “Worker's present condition” he states, “lower back and lower ribs; complains of chest pain; EKG done; no apparent disability. He also states that work restrictions (left blank) would last 1 – 6 days with permanent impairment not likely.

- (7) Another doctor's report (Dr. H.) is dated January 7, 1998. He reports that the worker has low back pain into the left buttock and down left leg with decreased range of motion in the lumbosacral spine. Under "Treatment Plan," Dr. H. suggests X-ray of lumbosacral spine with follow-up of results in one week.
- (8) The X-ray report of Dr. DeS. dated January 7, 1998 states, "Lumbar spine: Marginal osteophyte formation is noted throughout the lumbar spine. The vertebral bodies and intervertebral disc spaces are otherwise normal. Degenerative changes of the lower facet joints are present. The bony alignment is normal."
- (9) Dr. H.'s report dated January 16, 1998 states that the worker "still complains of pain and stiffening – worse with activity". X-ray results show significant degenerative changes. Under Treatment Plan - "Referred to chiropractor for manipulation and exercise program. (No physiotherapy available locally.)" Under Capacity for Work, "Off work for present." There is a handwritten slash through Estimated Date Fit to Return to Work.
- (10) Dr. H's report dated February 13, 1998 notes that the worker still complains of low back pain which is mechanical in nature and that the *sciatica* has improved; decreased range of motion, stiff. Dr. H. referred the worker to a chiropractor for manipulation and stated that he was "off work" with his estimated date fit to return to work "uncertain."

[**Note:** Dorland's Pocket Medical Dictionary 25th edition, defines *sciatica* as "neuralgia along the course of the sciatic nerve, most often with pain radiating into the buttock and lower limb, most commonly due to herniation of a lumbar disk.]

- (11) Dr. W's chiropractic report is dated February 26, 1998 to the board's benefit entitlement clerk. Dr. W. reported that the worker had been injured holding back a piece of equipment and he had been bedridden with lower back and left leg pain as a result of the accident. Under Relevant Exam Findings, Dr. W. states, "Sensory, motor and reflexes to the lower limbs was normal. Straight leg raise was 60 degrees bilateral. Orthopaedic challenging of his hip was normal. Gross range of motion was decreased 25% in right lateral flexion. Slight antalgia. L4 and L5 facet joint dyskinesia. Localized tenderness.

From the X-ray interpretation, Dr. W. felt that the worker had a facet joint syndrome with mild nerve root irritation secondary to a strain type injury. He states, "Long term prognosis is good as his condition is improving. I expect a total of 8 – 20 treatments to stabilize area. If he can see me twice a week, expect one to two months total recovery time.

- (12) In Dr. H.'s report dated March 4, 1998 he states that the worker is [. . . ?] and that he is seeing a chiropractor and [?] improved [?] still little central lumbar spine function; no sciatica. Dr. H.'s clinical findings state, "Straight leg raises 90°. While sitting pain at back; deep tendon reflexes strength [checkmark]. His diagnosis is, "resolving mechanical lower back pain" and "Treatment Given" states, "continue with chiropractor." Dr. H. reports that the injury is preventing the worker from performing pre-injury work but that light modified work can be performed. He reports that there was no similar problem in the past. [Emphasis added.]
- (13) The benefit entitlement clerk's memo to the medical consultant dated March 4, 1998 asks for a medical opinion on whether or not the worker's ongoing back problems are a result of his work-place injury and inquiring whether or not the medical treatment is appropriate.
- (14) The medical consultant's report dated March 6, 1998 states, "I find it difficult to relate the sciatica to the incident that occurred at work It appears that the worker was able to continue working until the job shut down. . . . In this claim the injury appeared relatively minor. Indeed the worker was able to continue working until he was laid off on December 18, 1997. . . . In the absence of a continuity of symptoms for the month following the injury, I would find it difficult to relate the worker's continuing problems to the worker's condition as reported by Dr. S., the initial treating physician. (Emphasis added) It would appear that the medical consultant assumed no sciatica at time of injury because is it not mentioned in the first treating physician's report. He does ask if there is any evidence from the supervisor or co-workers of the worker having sciatica following the injury. [See evidence from worker in hearing, that leg pain began shortly after the incident at work.]
- (15) In a series of notes to file by the benefit entitlement clerk, dated from February 17, 1998 to March 30, 1998, the relevant excerpts are as follows:

February 17 - worker phoned this A.M. He is having problems with his back.

February 23 – Returned worker's call. . . . he has been off due to the shutting down of the Faro mine. Worker advised that his back has been getting worse. I asked worker to give me a description of what his back has been doing. When the accident first happened, he was taking pills and it was getting some better. However, after a week and a half his back got worse again. Worker advised that he was not doing anything to have caused it. I asked worker when it bothers him the most. He advised when he is stooping his legs ache and in the lower part of his back he has pain. . . Worker is just getting ready to look for work and he doesn't want to go back to work if his back is not what it should be . . . Worker advised that

his doctor mentioned possible arthritis; however, worker stated the chiropractor advised he had a slipped disc.

March 10 – Spoke with D.R. [representative of employer] . . . again. I questioned D. further about what kind of work the worker did after his injury. D. advised that when he spoke with the supervisor that he was given to understand that the worker was on light duty for one day and after that resumed regular duties. . . . Worker advised that he was on light duty and that he advised his crew boss that his back was bothering him but that he was going to try and stick with the job as it would soon be ending. Worker also stated that he checked in regularly with the nurse on site. . . contacted E.S., Crew Boss. He advised that the day the worker went to the doctor that E.S. himself did the jumbo. However, the day following and the rest of the time, the worker operated the jumbo. E.S. advised that the worker was the only zoom operator on site. E.S. said that that the worker may have thought he was doing light duty, but he was doing regular work. I asked E.S. if the worker mentioned that his back was bothering him and E.S. said everyone pretty much there [k]new the worker was complaining of his back hurting.

March 12 - . . . G.G. . . . called me. She was the cook and first aid attendant at the mine while the worker was there. G. saw the worker every day at meal time and the worker related the problems he was having with his back. Based on the worker’s boss and the first aid person we now have a continuity regarding the worker’s back. (Emphasis added)

March 13 - . . . Worker advised that he is claiming for time loss.

March 30 – Call to D.R. [employer] to obtain a job description. He stated the worker was employed working on a 3 boom jumbo. This piece of equipment is used to drill into the rock. As noted it consists of 3 booms set on a platform approximately 3 feet off the ground. Basically three types of rigs are used. Two are mobile and the middle one is usually stationary. The work is fairly light in nature basically requiring standing all day and working the hydraulic controls. Once the holes are drilled he fills them with dynamite – a bag of A-mix (explosive) weighs 60-70 lbs. If he couldn’t lift it alone . . . there was another guy working with him if he needed help. Mr. R. couldn’t recall but stated there may have been an automatic loader on site. He suggested I speak with our mine safety officer to get a better idea of the work. I spoke with the mine safety officer and he showed me pictures of the equipment in question. He also stated that the work being performed would be multifaceted and most would require some physical effort.

- (16) Dr. H.’s report dated March 19, 1998 states, “recheck back, the chiropractor – note pain improved but still aggravated by activity; occasional [?] parasthesia with leg; extension decreased and painful. No spasm or scoliosis [. . . ?].” “Under Clinical Findings”, “flexion, [. . . ?] 80 degrees and tight hamstring. Dr. H.’s diagnosis is “lower back pain resolving.” For “Treatment Given” he states, “needs work

hardening program before returning to work.” Dr. H. states . . . that the injury is preventing the worker from performing pre-injury work and that the estimated date to return to pre-injury work is 4 weeks [?]. The doctor report states that there was not a similar problem in the past. [Emphasis added]

(17) A memo from the claims adjudicator to the medical consultant dated March 30, 1998 asks whether or not the current diagnosis is medically compatible with the injury of December 1997.

(18) The medical consultant responds in a report dated March 31, 1998. He states, In reviewing the chiropractor’s report . . . I note that there is a change in description of the initial incident. . . . by the next day ‘stiffened’ to lower back and within a couple of days he was bedridden with lower back and left leg pain.

The chiropractor notes osteophytes throughout the lumbar spine with sclerotic changes to the lower facet joints and he felt that the worker was suffering from a facet joint syndrome with nerve root irritation from a strain.

I have previously commented that acute low back strains normally heal fully within six weeks.

The chiropractor does not comment on the worker’s ability to work. His attending physician in a report dated March 4, 1998 notes that the worker can perform light duties. Since the nature of soft tissue injuries usually involves gradual healing, one would expect that the worker would have been able to continue with employment.

Sciatica can occur spontaneously. Simple low back strains normally resolve fairly quickly. The longer that the pain continues, particularly in the absence of significant trauma, the more likely that an underlying condition may be a contributing factor.

After age 50, there is a long list of potential differential diagnoses particularly with persistent symptoms. It may therefore be helpful to obtain an orthopedic consultation or more sophisticated investigations. Based on the history available, I find it difficult to relate the worker’s continuing problems to the initial incident.

- (19) The adjudicator's decision dated April 1, 1998 denies the worker further entitlement for medical treatment, chiropractic treatment or lost time. The adjudicator states, "The medical consultant and I have reviewed your claim. Based on the available information, entitlement for the accident is allowable. It appears that the injury was of a minor nature as there was not time lost from work and you were able to perform your regular work. The nature of soft tissue injuries such as the one you sustained in December usually involves gradual healing so you would have been able to continue with your employment. If you were fit to perform your pre-accident work then you would not be entitled to compensation benefits for lost time."

"Based on the present diagnosis I cannot relate the current problems with your back to the minor injury in December. It is the medical opinion that if you had suffered from acute sciatica at the time of the accident it would have been difficult for you to continue with your normal employment. As well, the longer the pain continues, particularly in the absence of a significant trauma, the more likely it is that an underlying condition may be a contributing factor." [Emphasis added.] [Note: the worker provided evidence both to the adjudicator (see paragraph 20) and in the hearing that (a) it was difficult to continue working and also that (b) he was unable to do his regular work (see paragraphs 27, 31, and 32).]

- (20) A letter from the worker to the claims adjudicator dated April 13, 1998 states; "I went back to work on light duty. The only time I used the jumbo was to drive it to a parking place and I have witnesses to that effect. I worked in pain and couldn't walk upright and still can't walk without pain. Whatever is wrong with my back was caused by the accident I had on Dec 7/97. I reported daily to the manager and first aid. Also I was taking pills for pain and getting first aid treatment. On my return home I went to Dr. H. when appointment was available. I was declared not fit to work from January 7/98. I should've been declared not fit for work from date of accident. Even the first aid said she couldn't understand why the doctor sent me back to work, even on light duty, my back was so bad. . . My ribs healed but the lower back never."
- (21) The worker requests a review of his file and it is forwarded to the IRC and set down for hearing on November 26, 1998.
- (22) A letter from the worker to the workers' advocate dated November 2, 1998 states, "I did not go back to work on jumbo after my accident – I have witnesses that can verify that as they were also there when I had the accident. These witnesses are: R.L., . . . and K.A. . . . I am still unable to return to work. I have not received a clearance from my family doctor yet to enable me to return to work. . . . I am still not physically fit to return to work – I can't sit, get up, or even walk without severe pain."

(23) In his letter to the chair of the appeal panel dated March 22, 1999, the worker states, “My back wasn’t bad until I had the accident while working at [the mine]. My mistake was when I followed orders and went back to work on light duty (suffering pain in my back all the while I worked). You stated Dr. H. did not find any work restrictions; then explain why he filled out slips for E.I. stating I wasn’t fit for work. . . . I’m still under doctor’s care and I have no clearance to return to work. Dr. I.K. stated on December 16, 1998, that I was not a candidate to return back to work.”

“ . . . when I saw Dr. S. [in . . . , Yukon] on December 9, 1997 . . . I was diagnosed with rib trauma and trauma to the lower back. This trauma (to my lower back) which was caused by the accident, is still present today and has never healed. . . . How can you say that my present back problem is due to degenerative changes? I was working with no problems until the accident. Wouldn’t these ‘changes’ you refer to have been evident prior to my accident? Well, they weren’t and I was quite capable of continuing to work up until my accident.” [Emphasis added]

Evidence and Argument from the Hearing

New Medical Reports

(24) The following new and additional reports were filed with the tribunal by the worker’s advocate prior to the hearing (and entered as Exhibit 1):

- (a) The report of S.L. Hoskins, registered physiotherapist, to Ms. Hogeboom, Office of the Worker Advocate, dated November 3, 1999 which states:
. . . patient presented with constant low back pain which he describes as being present since a lifting accident on December 17, 1997. The worker has been unable to function in activities in daily living secondary to symptoms of sharp pain in his low back that also radiates to his left lateral thigh. These symptoms disturb sleep and were exacerbated with prolonged sitting or any other bending maneuvers.

On objective exam the worker had fifty percent on lumbar flexion, right side bending, and right rotation. Extension, left side bending, and left rotation were within normal limits. Repeated movement testing into flexion caused irritation L4-L5 intervertebral space whereas repeated extension movements alleviated this discomfort. Resisted left paraspinal strength testing reproduced typical pain. Hypotonicity was palpable through the worker’s left paraspinal musculature. Neurological testing was unremarkable. . . .

Clinical Impression: From objective examination, this patient had left paraspinal muscle strain and weakness throughout his left lower extremity.

There was clinical evidence of intervertebral irritation that was **not arthritic in nature**. [Emphasis added]

Progress to Date: The worker has been treated for five physiotherapy sessions. Treatment has focussed on left quadriceps, gluteal, and paraspinal muscle strengthening as well as hypertonicity relaxation exercises.

The worker is progressing well and is currently able to sleep undisturbed. . . .

Prognosis: This patient should fully recover from the muscle weakness with continued strengthening until mid December, 1999. After that I recommend that he attend work hardening center since he has been deconditioned for two years. [Emphasis added]

- (b) The report of Dr. I.K., Orthopaedic Surgeon, dated (written), May 27, 1999 which states:

. . . patient with chronic low back pain returned for checkup. According to the patient he has persistent back pain with radiation to both lower extremities, more left than right. Pain is mostly over the buttock area, thigh but usually not below the knee.

Clinically, today patient is in no distress, walks with no limp. LS spine has no deformity. There is tenderness on palpation in the lumbosacral junction. Mild spasm of paravertebral muscles. Range of motion is still quite well preserved,

X-ray of the LS spine shows slightly more progress degenerative spondylosis as described before, no new development present.

This patient has degenerative spondylosis. Again I can't find any obvious radiculopathy and from this point of view I don't think he's candidate for CT scan or myelogram. I believe patient should have course of intensive physiotherapy with strengthening exercise of abdominal and paravertebral muscles, course of anti-inflammatory medication and NSAID'S.

I agree that patient is not candidate for return back to heavy physical work like in the mines. . . . If persistent discomfort in the legs will persist in 3 – 4 months I can reassess patient again in respect of possibility to arrange myelogram and CT scan but I believe at this stage there is no indication for this. (Emphasis added)

- (c) Dr. C., MD, FRCP (C), RAD. in a report dated May 27, 1999 states:
LUMBAR SACRAL SPINE

Evidence consistent with arthritic change at mainly the right but to a mild degree also at the left side facet of L4-5 and there is a slight forward listhesis of about 4 mm of the upper four lumbar segment on L5 associated with these findings.

Elsewhere, there are mild to moderate sized anterolateral vertebral osteophytes, there is some bridging at L2-3 to the right.

The disc spacing at L2-3 appears mildly narrowed. There is disc space thinning associated with osteophytes and Schmorl's nodes at T11-12 and T12-L1.

PELVIS

The projected portion of the SI joints appears normal. There are mild changes of osteophyte lipping at the right hip region. Also there is a little traction spurring of the right lesser trochanter. Pelvic phleboliths probable (incidental). There is some mild branch like sclerosis at the anterior aspect of left iliac crest of questioned significance.

- (d) Dr. R., MD., FRCR. in a report dated May 18, 1999 states:
Bone Scan
Mild patchy uptake in the lower lumbar spine particularly on the right side at the L5-S1 level would be consistent with degenerative change.

There is mild increased uptake at the right AC joint but this is commonly seen at a normal variant particularly if the patient is right handed. The examination is otherwise unremarkable.

- (e) Dr. I.K., Orthopaedic Surgeon, in a letter to Dr. H., dated December 16, 1998 states:
. . . patient with low back pain returned for checkup. . . he was seen by me on July 7/98 . . . treatment with muscle relaxants, NSAID'S and physiotherapy was recommended as well as hardening program. According to the patient he had some improvement mostly pain in the legs, still persistent back pain. He feels that something is torn apart in his back, mostly when he's performing some physical activity.

. . . patient . . . has still persistent tenderness over the lumbosacral junction, mobility is well preserved but terminal hyperextension is painful as well as terminal hyperflexion.

Flexion extension studies showed no instability. Oblique views showed moderate-severe osteoarthritis of the facet joints on both sides, mostly at the level L3-S1, L3, 4, L4, 5 and L5-S1.

This patient has mechanical back pain. No signs of radiculopathy and in respect of this I don't think further investigation like myelogram and CT scan is indicated. I agree that the patient at this stage is not candidate for return back to his physically demanding job and I believe also that any rehabilitation for physically demanding job at this age is not very realistic. In respect of this we have two options: one is to prolong his exposure to physiotherapy as well as hardening work program; other option is to try to apply for di[s]ability. At this stage I don't there is any indication for surgical intervention. [Emphasis added]

- (f) Dr. I. K., Orthopaedic Surgeon, in a letter to Dr. H., dated July 7, 1998 states: . . . Miner injured his back on Dec.7/97 Apparently heavy object was falling on him and he suffered hyperextension type of injury. He developed gradual onset of pain with most intensity 2 days after his injury. At this time pain was localized in back with radiation to left lower extremity. He was seen by family doctor, put on medication with ability to return back to work. His pain however was getting gradually worse and he reached the point that he was not able to cooperate and continue with his job.

. . . Because of persistent pain patient now sent for assessment.

Physical examination: Patient is in no distress, however walks in slightly semi-flexed position in LS spine, flattened lumbar lordosis, mild spasm of paravertebral muscles. There is tenderness in the lumbosacral junction but mostly on sacral and coccygeal bone. Range of motion is limited, . . . active dorsiflexion is painful. There is component of instability with painful hyperextension.

X-ray of the LS spine shows flatt[r]ened (spelling error) lumbar lordosis, moderate osteoarthritic changes with formation of the osteophytes in the level L3, 4, overbridging on the right side, osteoarthritis of the facet joints.

Patient has mostly mechanical back pain even though there is a history of pain radiating to left lower extremity unless there is involvement of disc L4, 5.

Patient should have intensive treatment with muscle relaxants, NSAID'S, physiotherapy with diathermy, strengthening abdominal mostly and paravertebral muscles, gradual mobilization, work hardening program would be excellent after probably 3 –4 weeks of physio.

I would recommend also flexion extension studies of the LS spine as well as oblique view.

The Worker's Testimony

- (25) The worker says he is 58 years old and has worked as a miner for the past 40 to 41 years.
- (26) The worker says in December of 1997 he was a jumbo operator in a mine. The jumbo is a machine on wheels that is driven like a vehicle and used to drill holes into rock for blasting. As part of his job after the blasting was done, the worker would secure the ground with a bolting machine.
- (27) The worker says that at the time of the accident they were in a tunnel digging through some rock. The worker had just done what was needed to secure the scrap [from a blasting]. He had scaled down the ground, and knocked the loose pieces down. He had started drilling again and had noticed a piece of rock [that might be loose]. He had talked to his co-worker and asked him to secure this area with strapping [?] in case the piece of rock let go. However as he was drilling, the piece of rock let go even though the worker tried to hold it in place [with his drilling equipment]. When this piece of rock let go, pieces of it came down onto the machine the worker was operating and pieces of it bounced the worker onto the railing. The worker says he was dizzy for a minute and then he got up and told his co-worker that he had a burn down his back. The worker says that it became worse although he worked for an hour after the accident. Then the worker says he reported the accident to his boss and he told his boss that he was going to camp [to see the first aid attendant]. The worker says the next morning he was pretty stiff and had sore ribs but he stayed there at the camp. The following day he went to the doctor complaining of sore ribs and a sore back and the doctor gave him some pills. The worker says he then stayed on light duty until he was laid off on December 18th.
- (28) The worker says that the rock that came loose was about 4 feet thick and approximately a 4 by 4-foot block of rock. The worker estimates that it weighed anywhere from 600 to 800 pounds. He says it was a “dead rock”, that is, a rock that doesn't snap or bang before it lets go.
- (29) The worker describes the platform on which he was working at the time of the accident as approximately 6 feet wide and 10 feet long. It was raised by the scoop operator with a bucket. This platform had a railing on it as well as the equipment used to secure the rock.
- (30) The worker says that the only part of the platform that was open was the part facing the bucket operated by the scoop operator. He says that to get off the platform you

had to go out over the railing where the bucket went into the platform. He says that the bucket picked up the platform [with a device] like a pair of scissors.

The worker says the scoop operator would watch the worker who would make motions directing the scoop operator on where to move the platform. The worker says that the platform at the time of the accident was approximately 14 to 15 feet off the ground. He says the platform has to be 6 feet back from the machine used to drill the wall. He says he was drilling 2 feet into the rock at the time of the accident. He says that when the piece of loose fell, it hit the platform and parts of it came over onto the worker as he was standing on the platform: the rock “busted” and landed in front of him. He says a worker must always be facing the bad piece of ground. At the time [of the accident] he was holding the drill, and he could see the rock breaking and he was trying to get his co-worker back and trying to back away himself. The worker says a couple of pieces hit him and knocked him against the railing. He says he hit the railing around his rib cage. The worker says he is 5 feet 11 inches and weighs approximately 190 pounds. The worker says he was operating a machine that was 6 feet away from the rock and had a 2-foot steel drill. He says he didn’t get into the rock 2 feet before the accident, only approximately 1 _ feet. He says the rock when it broke loose broke the starter steel. He says the manager was standing 30 to 40 feet away from the crew as it worked, and that when the piece of loose came out, some of it headed towards where the manager was standing.

- (31) The worker says that the leg pains started the next morning [after the accident] before he saw the doctor. He says currently he does not get leg pain all the time; there might be a day or two when the leg pain stops. He says that if it was steady pain, [he would be unable to tolerate it].
- (32) The worker says that after he saw the doctor, he returned to the light duty consisting of “passing this and that to the shifter while timbering up a wall.” The worker says that after his accident there was very little drilling occurring on his shift because the crews were waiting for shotcrete. Shotcrete is a chemical like concrete used to keep the air from getting to the ground. The worker says that the machine to do the “shotcreting” arrived two days before he left his employment.
- (33) The worker says that when he went home for the Christmas break he was told by the employer that he was going to be called back but he never was. He says that [afterward] he was called to go elsewhere with other mining employers, but could not go [due to his injuries]. The worker says that he was not aware of the employer calling any other workers on his shift to go back.
- (34) The worker says that he did not see another doctor until January 7, 1998 because he had been given pain killing pills by the first doctor and he figured his back would

get better. But after three weeks, it did not; so he thought he should see another doctor.

- (35) When asked whether his back pain was the same or worse than it was after the accident, the worker says that it usually gets better, then he does something and it gets worse again, especially if he twists and lifts anything.
- (36) The worker says that since his accident he has been on a little bit of employment insurance and now he is on welfare. He says that the little money he had saved has been spent on medical services. He says he also has had to borrow money from a friend.
- (37) The worker says he went to a physiotherapist 16 miles away from where he lives. She advised him that he needed more physiotherapy services than she could provide to him. However those services were located 50 miles away. He says he explained to the physiotherapist that he couldn't go because he had no money to travel there. The physiotherapist said she would try and do something about this, but he has not heard from her.
- (38) The worker says that before his work place injury of December 7, 1998 he had never been off with a back injury.

The Co-worker's Testimony

- (39) K.A. was the scoop operator for the worker's crew at the time of the accident. The witness says that he has known the worker for 15 to 20 years.
- (40) K.A. says that at time of the accident they were doing rock bolting. There were 3 people on the crew [the worker, K.A. and R.L]. K.A. says the platform was attached to the scoop which he operated to lift the other two workers up and down while they were installing rock bolts.
- (41) K.A. says that he didn't see the accident, that is, he did not see the piece falling because he had his co-workers lifted up on the platform. But K.A. says that he heard it. He says the piece of loose had pinned the worker against the rail.
- (42) K.A. says that immediately after the accident, the worker was fairly white and in a lot of distress. He says then they had a smoke and everything stopped because the worker was hurt. K.A. says the ground conditions "weren't so great."

- (43) K.A. says that after the accident the worker was not working his regular job because he couldn't. K.A. says the worker went back to work on light duty and was not able to do his rock bolting work.
- (44) K.A. says that after the accident although he himself was doing his regular duties, the worker wasn't there. They weren't working together anymore for the rest of the period [before Christmas]. K.A. says he himself was not rock bolting everyday as he had other duties such as mucking and loading rounds.
- (45) K.A. says that after the accident he would see the worker standing on the side.
- (46) K.A. says that in the final week of work in December 1998, drilling was more or less winding down. Mostly there was clean up work and the word was that things were coming to an end [at the mine].
- (47) K.A. says that after the accident the worker's back was bothering him and after sitting he would have a job getting up.
- (49) K.A. says that before the accident the worker appeared to be strong and agile. The worker could work long hours and do a good job. But K.A. says after the accident he seemed to have lost his strength and it seemed like he had a lot of back pain.
- (50) K.A. says that he and the worker travelled back to their home province together [at Christmas]. K.A. says he visited the worker at his home and he was in "fairly rough shape and trouble." K.A. says the worker lives fairly close to him in their home province.
- (51) K.A. says the worker is an excellent miner. He says that he had never noticed the worker having any problems with his back prior to the work place accident. He says he worked on many jobs with him prior to the one in which he was injured. (For instance, he says that he worked with the worker in Saskatchewan for 1 _ years.)
- (52) K.A. says that he has been able to find work since the closure of the mine, but he has had to find it out of his home province on a permanent basis.

- (53) K.A. says that he thinks that the worker would have had the same opportunities for work after the mine closed as he did, if the worker had not been hurt.

The Workers' Advocate Submissions

- (54) The workers' advocate submits that the issue in this case is whether or not the board has ongoing responsibility for:
- a. earnings loss over the period from December 18, 1997 to the present;
 - b. payment for medical investigation and treatment as required.
- (55) The workers' advocate says that the medical evidence on the file makes it clear that the worker is unfit for his pre-accident work. Although he might be fit for light duty work, mining is not that type of work. The workers' advocate points out that the board accepted that the injury was compensable. He submits that there is no evidence in the record of the claim that the worker ever recovered from the effects of the December 1997 workplace injury.
- (56) The worker's advocate points out that the medical consultant's report dated March 31, 1998 does not state that the worker had recovered from his injury. However, this report does state that acute back strain normally heals within six weeks. In this regard, the workers' advocate submits that Section 19.5 of the *Act* requires that determinations with respect to compensation claims must be made on the merits and justice of the case. He submits that this means that an individual's particular recovery [of lack of it] rather than general averages in terms of healing times, should be considered in a particular compensation claim.
- (57) The workers' advocate further submits that the presumption in Section 5 of the *Act* requires that where a disability arises out of or in the course of employment it is presumed to be work related unless the contrary has been shown. It is his submission that the contrary has not been shown. In this regard, the workers' advocate filed two excerpts from Terence Ison's Workers' Compensation in Canada, Second Edition, pages 36 – 38, which states:

3.3.27. Arising out of and in the course of

Where an injury arose in the course of employment, the claim must be allowed unless there is affirmative evidence of an alternative cause, and evidence that the employment was not contributory.

3.3.38. Neglect of presumption

In practice, this statutory presumption has commonly been ignored,

and it has even been replaced by contrary presumptions in the processes of adjudication. For example, a Board doctor may render an opinion that the injury was not caused by the employment. That opinion may rest upon nothing except the absence of any positive data about employment etiology. When that happens, the statutory presumption is, in effect, reversed. . . . To reach conclusions that way is clearly illegal.

- (58) The workers' advocate submits that the evidence from the file is that the worker was disabled by his work place injury which arose out of his employment and that subsequently this disability gradually worsened and there was no recovery, despite repeated efforts at treatment.
- (59) The workers' advocate submits that the adjudicator's decision to terminate the worker's compensation (dated April 1, 1998 in a letter to the worker) is incorrect for several reasons. First, the adjudicator states that the worker was able to perform his regular work after his workplace accident. The workers' advocate submits that the evidence of the worker and the witness from the workplace is that the worker was unable to continue with his regular work and in fact was only able to do light duties until he left his employment. Second, the adjudicator states in this letter, "the longer this pain continues, particularly in the absence of a significant trauma, the more likely it is that an underlying condition may be a contributing factor." The workers' advocate points out that the evidence of the workplace accident from the worker is that it involved a significant trauma. The workers' advocate also points out that many people work with pre-existing conditions which do not limit their capacity to do the job. He says, "disability" is defined as a workplace "incapacity". The workers' advocate submits that prior to the workplace injury there was no incapacity due to any pre-existing condition. Moreover, the workers' advocate submits that the board must show - - that is, in some way "demonstrate" - - that an underlying condition was responsible for the worker's incapacity in order to rebut the presumption that the disability is work-related. There is no evidence that the worker had recovered from the injury. There is evidence of some degenerative changes that were present prior to the disability. The workers' advocate submits that in determining whether or not the degenerative changes are responsible for the worker's condition, it is important to note that the degenerative changes would have been present the day before the accident, when the worker was having no difficulty working as well as in the days after the accident, when the worker was unable to do his regular work and could only perform light duties, in pain. The workers' advocate submits that this evidence is most consistent with a conclusion that the worker's disability was as a result of the accident, not an underlying condition such as the degenerative changes.

Issues

The appeal committee has determined the issues are as follows.

1. What legislation and policies should be used to determine the worker's entitlement (if any) in this case?
2. Does the worker have a disability arising out of and in the course of his employment or has the "contrary" been "shown"? That is, has it been "shown" that the worker's incapacity is not work-related?
3. Should section 19.5 of the *Act* with respect to the "merits and justice of the case" be applied, and if so, how?
4. Is the worker entitled to medical aid under section 28 of the *Act*?
5. Is the worker entitled to compensation for loss of earnings under section 3 and 22 of the *Act*?

Analysis on Issue #1: What legislation and policies should be used to determine the worker's entitlement (if any) in this case?

The worker was injured in a workplace accident on December 7, 1997. Section 90 of the current *Act*, the "transitional provision," states "where a worker is entitled to compensation as a result of a disability in . . . March 31, 2000 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000." Therefore, we find that the *Workers' Compensation Act*, S.Y. 1992 as amended up to the date of injury in 1997 is the legislation to be used to determine the issues of entitlement in this case.

We further find that Policy CL-40 titled "Disability" effective 93-11-10 is relevant. This policy states that a disability is the limiting, loss or absence of the capacity of an individual to meet occupational demands. It also states that "disability" is an administrative finding assessed by non-medical means. In addition, Policy CL-42 titled "Arising out of and in the Course of Employment" effective 93-11-17 is relevant to the determination in this case. This policy states under "**B. Unless the Contrary is Shown**" that "a disability is presumed to have arisen out of and in the course of employment or vice versa, unless it can be shown, not proven, that the disability was not work-related."

The appeal committee also considered the application of Policy CL-47 titled "Pre-existing Conditions" effective 94-04-01 to this case, specifically the provision stating "a non-compensable pre-existing condition is a condition that did not arise out of and in the course of employment. It is not work-related."

Analysis on Issue #2: Does the worker have a disability arising out of and in the course of his employment or has the “contrary” been “shown”? That is, has it been “shown” that the worker’s incapacity is not work-related?

In our view, the worker does have (1) a disability (2) arising out of or in the course of his employment. There are two components to our analysis of the evidence. First, we must determine whether or not the worker has a “disability”. Disability is defined in the section 101 of the *Act* as a “work-related incapacity.” As noted earlier, it is further defined in Policy CL-40 as “the limiting, loss or absence of the capacity of an individual to meet occupational standards.” In our view, there is clear evidence, both from the worker himself and from his treating physicians, that the worker has lost (or is limited in) his capacity to meet the occupational standards of his job. Immediately after the injury he could no longer do his regular duties but instead was limited to light duty work. We accept his evidence, corroborated by others, that he worked in considerable pain, despite medication. It is far from clear that he could have continued with such light duties had he not been laid off approximately a week after his injuries. The evidence indicates his symptoms of pain and difficulty in moving worsened in January 1998.

Second, we just determine whether or not this disability arose out of or in the course of employment. If so, it will be presumed to be work-related and therefore compensable unless shown to the contrary. “Arising out of and in the course of employment is defined in Policy CL-42 as follows:

C. Arising Out of Employment

“Arising out of employment” means that a disability was caused by a worker’s employment. It must be linked to, originate from, or be the result of, in whole or in part, an activity or action undertaken because of a worker’s employment.

[Note: There are two “C.” sections listed in Policy CL-42.]

C. Arising in the Course of Employment

“Arising in the course of employment” means the disability must be linked to a worker’s employment in terms of time, place and activity. It is the direct result of an activity, action, procedure, or conduct undertaken during a worker’s employment.

Specifically, we find that the worker’s ongoing symptoms of low back pain and [intermittent] sciatica are a direct result of his fall against the guardrail while drilling on December 7, 1997 rather than as a result of pre-existing degenerative changes in his lumbar spine. We make this finding for several reasons. First, there is no evidence that the worker had ever experienced incapacitating back and leg pain prior to his injury, despite degenerative changes which were almost certainly present prior to that injury . The worker’s symptoms have been continuous since the workplace injury [as

acknowledged earlier by the board in a benefit entitlement clerk's note to file dated March 12, 1998]: they were experienced for the first time immediately after the accident. Given this close temporal connection between the fall against the guardrail and the onset of symptoms, we find that the most likely explanation for and cause of the worker's disability is the workplace injury. In particular, we note that the most recent physiotherapist report dated November 3, 1999 states that on examination "there was clinical evidence of intervertebral irritation that was not arthritic in nature." [Emphasis added.] In addition, both treating physicians have emphasized the "mechanical" nature of the worker's disabling back and leg pain.

Finally, in our view it has not been "shown" that the worker's condition is not work-related. As Terence Ison points out on page 37 of his text, Workers' Compensation in Canada (2nd Edition):

Where an injury arose in the course of employment, the claim must be allowed unless there is affirmative evidence of an alternative cause, and evidence that the employment was not contributory.

In this case, we have found that the employment was contributory with respect to causation. Although there is affirmative evidence of degenerative changes, we find that these changes did not "cause" the disability. We find that both (1) the evidence of sudden onset of symptoms after the fall as well as (2) the evidence of no prior workplace incapacity prior to the fall are more consistent with the conclusion that the worker's disability is due to the workplace injury rather than a conclusion that the disability is due to any pre-existing degenerative changes.

In other words, we find that the degenerative changes are less likely to be the cause of the disability than is the work injury and therefore the presumption in section 5 of the *Act* - - that the worker's disability is work related - - is not rebutted.

Analysis on Issue #3: Should section 19.5 of the *Act* with respect to the "merits and justice of the case" be applied, and if so, how?

Section 19.5 of the *Act* states:

Decisions based on merit

Subject to paragraph 18.2 (b), the decisions, orders and rulings of an adjudicator, hearing officer or the appeal tribunal shall always be based on the merits and justice of the case and in accordance with the *Act*, the regulations and the policies of the board.

This provision was enacted after the date the worker's work-related disability arose. However, we find that it applies to this case because this provision is procedural in nature and because it states that the appeal tribunal's decisions, orders and ruling "shall always" be based on the "merits and justice of the case." In our view, the words "shall always"

make it clear that this provision should operate prospectively and retrospectively with respect to appeals.

We also agree with the workers' advocate's submission that the worker's lack of recovery since the workplace injury must be considered in order to do justice on the merits of this case. We find that this lack of recovery indicates that the injury for this particular worker was more serious than either he or the earliest treating physicians initially believed it to be.

Analysis on Issue # 4: Is the worker entitled to medical aid under section 28 of the *Act*?

Section 28 of the *Act* states:

Medical aid

- 28.** (1) The board may provide a worker with any medical aid, including services, devices, or equipment, necessary to grant relief from a work-related disability.
- (2) All questions as to the necessity, character and sufficiency of any medical aid shall be determined solely by the board.
- (3) The board may contract with medical practitioners, nurses, hospitals, and other professionals and institutions for the provision of medical aid to any worker who is entitled to compensation.
- (4) When the board is required to provide, or agrees to provide, assistance to a worker under this section, no action lies against the worker, the worker's employer, or any other person for payment in respect of the assistance.
- (5) The board may pay a worker a subsistence allowance, in an amount set by order of the board, where the worker is receiving medical aid away from their ordinary place of residence, if the worker's living expenses are not being paid by the employer.
- (6) The board may pay for special expenses related to the disability, such as expenses incurred for replacing clothing damaged from wearing a prosthesis provided by the board.

In our view, the worker is entitled to medical aid "to grant relief from a work-related disability." According to earlier reports, the worker's symptoms appeared to be improving with chiropractic treatment. As well, the physiotherapist who most recently examined the worker in November 1999 said that he was progressing well with treatment

(i.e., able to sleep undisturbed by pain) and she recommended muscle strengthening and attendance at a work hardening centre. The orthopaedic surgeon in 1999 also recommended “intensive physiotherapy” and medication as well as further medical investigation should the worker’s leg pains not subside (see paragraph 23).

Analysis on Issue #5: Is the worker entitled to compensation for loss of earnings under section 3 and 22 of the *Act*?

Section 22 of the *Act* states:

Compensation for loss of earnings

22. (1) Where a worker is entitled to compensation, the board shall pay compensation to the worker in an amount equal to 75 percent of the worker’s weekly loss of earnings from all employment.
- (2) The method and manner of making a payment under subsection (1) will be determined by the board.

We find that initially [that is, in the first 10 days following the worker’s workplace injury], the worker’s injury did not prevent him from working or impair his earnings. However, we find that the worker returned to work on light duties three days after the injury (December 10) and that he continued with light duties until he was laid off approximately one week later (December 18). He was unable to do his regular work. We also note that the worker worked in pain as was documented by the benefit entitlement clerk in notes to file dated March 1998 with respect to her conversations with the worker’s crew boss, E.S., and with G.G, the first aid attendant. This pain continued throughout the time he returned to work and afterward. He was also on medication to treat his symptoms as he worked. We find that the medical evidence provided by Dr. H. (see paragraphs 12 and 16) and Dr. I.K. (see paragraph 24 (e) where he states, “I agree that the patient at this stage is not candidate for return back to his physically demanding job.”) is sufficient to establish that the worker had a “work related incapacity” for the purposes of the definition of “disability” in section 101 of the *Act*. We note that on January 16, 1998, Dr. H. had noted in his report under “Capacity for Work” that the worker was “off work for present.” Also, on March 4, 1998, Dr. H. states, “the injury is preventing the worker from performing pre-injury work but that light modified work can be performed.” [Note, at this time the worker was receiving chiropractic treatment and “improved.”]

Therefore we find that this worker’s disability has caused a loss of earnings as his disability prevented him from performing his pre-injury work as of January 16, 1998.

Conclusion

The appeal is allowed. The decision of the IRC is reversed and varied as follows:

1. The board must provide medical services to the worker according to section 28 of the *Act* and reimburse him for the costs of any necessary medical services that the worker has paid for himself;
2. The board must pay compensation to the worker for his loss of earnings according to section 22 of the *Act* beginning from January 16, 1998 when his treating physician determined he did not have the capacity to meet the occupational demands of his pre-injury work.

Dated this 28th day of September, 2000 in the City of Whitehorse, in the Yukon Territory.

Hank Ambrose, Member

Heather MacFadgen, Presiding Officer

Joseph P. Radwanski, Member