

Workers' Compensation Appeal Tribunal

Decision # 7

Claim No.: 96-0214

Date of Hearing: August 31, 2000

Date of Decision: December 15, 2000

Appeal Committee Members

Presiding Officer:	Janet Wood
Member representative of employers:	Hank Ambrose
Member representative of workers:	Karen Waroway

In attendance: The Worker
The Worker's representative – Michael Travill
Observer from the Workers' Advocate's office - Julie Docherty
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 September 17, 1999.

In its decision, the IRC upheld the July 6, 1999 decision of a board adjudicator and stated that "The requirements of Board Policy CL-47 have not been satisfied in this case". The adjudicator's decision of July 6, 1999 advised the worker that it was the determination of the Claimant Services Branch that his surgery on June 19, 1998 was not related to or as a result of his February 7, 1996 back injury.

The worker and his representative disagree that the surgery is not related to the February 1996 injury. The worker argues that the February 7, 1996 accident aggravated his pre-existing condition and that surgery was required as a result of that accident.

The worker requests that the appeal committee find that requirements with respect to "Entitlement to Compensation" under Policy CL-47 are met, and that he is entitled to compensation benefits including medical expenses, one of those being for back surgery.

On April 1, 2000, the Workers' Compensation appeal tribunal came into existence under amendments to the *Act* known as Bill 83. On May 16, 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.

The hearing was scheduled and heard on August 31, 2000 in Boardroom 1B Main, 419 Range Road, Whitehorse, Yukon. The hearing was adjourned pending receipt of further information from the surgeon and that information was received November 6, 2000. The appeal committee considered the surgeon's information and the workers' advocate's response to it on November 25, 2000.

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 and gave evidence under oath. The worker was represented by worker's advocate, Mike Travill. 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 policy CL-47, entitled "Pre-existing Conditions", effective date April 1, 1994 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 Exhibits in the hearing:

Exhibit 1: Position Description, date completed January 07, 1989

Exhibit 2: Page 401 - 404 - Yukon Work Futures

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.

Issues

The appeal committee has determined the issues are as follows:

1. Have the requirements of Board Policy CL-47 been satisfied?
2. Is the worker entitled to compensation, including time loss and medical costs, as a result of the accident?

Evidence from the Worker's Record

- (1) The Internal Review Committee ("IRC") concluded that "the worker's requirement for surgery resulted from spinal conditions that were present prior to the incident of February 7, 1996. There is no diagnosis of an injury or condition from the accident that can be shown to make the worker's pre-existing condition(s) worse. The requirements of Board Policy CL-47 have not been satisfied."
- (2) The Worker's Notice of Appeal dated May 15, 2000 and received by the tribunal on June 5, 2000 asks that the Tribunal overturn the IRC decision and find that requirements with respect to "Entitlement to Compensation" under Policy CL-47 are met and that the board accept responsibility for the effects of the work-related accident of February 7, 1996, one of those being the requirement for back surgery. The worker is seeking compensation as a result of the work-related accident of 1996 including any time loss and medical costs. The worker and his representative reject the IRC's decision to confirm the adjudicator's reasons that the surgery on June 19, 1998 "was not related to or as a result of your minor contusion to your low back of February 7, 1996 which required no medical treatment until February 3, 1997."
- (3) The Worker's Report of Injury/Illness dated February 8, 1996 states that the worker was operating a steamer when the wind caught the door and pulled it out of the helper's hand. The door then hit the worker in across the back.

The report also states the worker earned \$21.47 per hour for a 40-hour work week as a permanent worker and that he did not lose any time away from work because of the injury.

- (4) The Employer's Report of Injury/Illness dated February 8, 1996 and signed by the Road Foreman states that the worker was operating a steamer and the wind caught the door and hit the worker. The worker was not given first aid at the work site.

The report states the worker began working for the company on July 16, 1990 and that he was paid \$21.40 per hour for a 40-hour work week as a permanent employee. The report also states that the worker was not absent from work as a result of the injury/illness.

- (5) The Doctor's First Report dated February 3, 1997 by Dr. Fast states the worker complains of "chronic back pain, worse since accident of early 1996 . . . also complains of weakness right knee." The diagnosis is chronic low back pain. Dr. Fast checks the "yes" box under Any Factors that Might Complicate Recovery? and states, "laminectomy L3-4 + L4-5 1993 – degenerative disc disease." Under Is Permanent Impairment Likely?, "unknown" is noted. The doctor states, "see copy of my referral letter to Dr. Loomer/Pate of 4 Feb."
- (6) Dr. Fast's referral to Dr. Loomer or Dr. Pate states, "In early 1996, a heavy door hit him in the back, at work. I don't know how much this has contributed to his present symptoms. . . . I would appreciate your assessment and consideration of CT or MRI imaging." A handwritten note on the bottom says, "X-rays T + L spine ordered; to be done at WGH."
- (7) The benefit entitlement clerk's letter dated February 10, 1997 states, ". . . I am unable to relate your medical condition from your visit February 03, 1997 with Dr. Fast, to your February 07, 1996 injury. Your claim was accepted as a no time loss claim, with no medical treatment required at the time of your injury."
- (8) A note to file by the benefit entitlement clerk dated February 12, 1997 states, "spoke to . . . at Dr. Carew's office. She advised that worker was in on Nov 95 with low back pain. X-ray done and Nov 96 no mention of work related injury."
- (9) A letter from Dr. Fisher, spinal surgeon, dated November 18, 1997 reports, ". . . Because of a debilitating spinal condition, [the worker] has been advised that he

should discontinue working while awaiting a surgical date. . . . wait of up to three to four months. . . . Until such time he is to remain off work.”

- (10) The worker appeals the decision of the benefit entitlement clerk in a Notice of Claim Review to the IRC on November 16, 1998 and a hearing date is set down for March 11, 1997.
- (11) A note to file by the manager of claims dated February 24, 1999 states, “The Chair of the IRC after conversations with the Worker Adv office has identified that there was potentially new evidence for review by the adjudicator. File passed to the adjudicator with the following new documents . . .”
- (12) Dr. Fisher’s report to Dr. Carew, dated June 19, 1997 states:

[The worker] has a rather complex spine history dating back to 4 or 5 years ago when he had an insidious onset of low back pain and bilateral lower extremity discomfort. He was initially thought to have vascular claudication, . . . investigated and found to be essentially normal. He then saw Dr. Don Griesdale, a neurosurgeon, who scanned him and diagnosed spinal stenosis. . . . there were no apparent intra or post operative complications. . . . He was off work for 5 months, then returned to work with no symptoms. He was essentially doing well until 1 year ago when he was struck by a steam door. . . [emphasis added]. This caused back pain. It was not terribly disabling over the next few days, and he was able to continue working. His pain, however, in the back began to get progressively worse and soon his legs became symptomatic, roughly in January 1997.

Imaging Studies: AP, lateral x-rays of the lumbar spine from 1992 were reviewed. They show a grade I L4-5 degenerative spondylolisthesis. . . .The February 1997 x-rays...again show the L4-5 degenerative spondylolisthesis. It may have progressed 1mm but not much... there is no listheses at L3-4...I repeated the standing lateral x-ray of the lumbar spine and there appears to be little change in the degree of spondylolisthesis. [emphasis added]

Assessment and Plan: [The worker] has a recurrence of his low back and spinal stenosis that appears to be getting worse. This could be due to dynamic instability causing impingement or inadequate decompression. The back mechanism of his injury and its effect on it is somewhat hard to figure into the whole recurrence pattern, but nevertheless I think that a CT myelogram is indicated to re-evaluate the newer elements.

- (11) In a Post-myelogram CT by Dr. Nugent, dated September 2, 1997, he states, "Previous lumbar decompression five years ago for spinal stenosis. Has recurrent symptoms now."
- (12) The Operation Report by Dr. Fisher, Spinal Surgeon, dated June 19, 1998 lists the operative procedure and findings. Dr. Fisher's pre-op diagnosis is:
- 1) spinal stenosis L3-L5
 - 2) pars defect L3
 - 3) degenerative spondylolisthesis/iatrogenic
 - 4) spondylolisthesis L4-5.
- Post-op diagnosis is stated as "same."
- (13) Dr. Lapointe's radiological consultation dated June 18, 1998 reports under 'Impression', "Extensive spondylosis and hip osteoarthritis."
- (14) In Dr. Fisher's discharge summary dated June 24, 1998, following the heading 'Most Responsible Diagnosis,' Dr. Fisher reports, "Degenerative/iatrogenic spondylolisthesis with spinal stenosis and L3 4 isthmic posterior instability in spinal stenosis. . . . [The worker] still had significant left hip and knee pain postoperatively secondary to arthritis. . . . With respect to his back, he should do no heavy lifting, twisting or bending for the next three months. He needs a stand AP lateral X-ray of the lumbar spine in three months."
- (15) Letters from the worker's co-worker, dated January 20, 1999, and Acting Foreman, dated October 8, 1998, relate the accident and that the door struck the worker with considerable force. Both state that the worker complained of increasing pain in his back as time went on.
- (16) A letter from the road foreman, dated October 3, 1998, states:
- ...[The worker] was hit with a steamer door as a result of an ore truck going by. [The worker] came in that night in obvious pain and filled out an accident report. Over the course of the next two years [the worker] consistently complained about pains in his back and legs. He quite often had to take a day or two off, either to try to rest his back or to see a doctor. . . .
- (16) Dr. Fast's report dated February 23, 1999 lists date of visit(s) as Jan 31, Feb 3, 10, Mar 24, May 16, June 20, Sept 28, 1998; May 29, Jun 30, Jul 3, 8, 10, 14, 17 and today 99 Feb 23 with the statement, "Reports not submitted after WCB denied his claim 97 Feb 10. Dr. Fast states, "On examination, back full range of motion;

well-healed scar, no tenderness; motor sensory, reflex function – no deficit, SLK 75 degrees bilateral.” Further, “pre-existing lumbar disc and degenerative disease, made worse by injury of 96 Feb 7, [emphasis added] disabled him until Sep 98.”

(17) The benefit entitlement clerk’s memorandum dated March 1, 1999 to the medical consultant requests that he review the file and asking the question, “Could the surgery of June 19, 1998 be related to the accident of February 07, 1996.”

(18) The medical consultant’s report dated March 4, 1999 states:

From the reports, I understand that the worker had a laminectomy at L3-4 and L4-5 in 1993. This was not a compensation responsibility. Full details are not available but Dr. Fisher’s report of June 19, 1997 suggests that the worker had a four or five year history of insidious onset of low back pain and lower extremity discomfort. Initially this was thought to be related to vascular claudication but ultimately was found to have spinal stenosis. . . .

On June 19, 1997 the worker was assessed by Dr. Charles Fisher. . . . He reviewed the x-rays which showed degenerative spondylolisthesis. . . . His assessment was that the worker had a recurrence of low back and spinal stenosis that is gradually getting worse.

An x-ray of June 18, 1998 showed extensive spondylosis in the lumbar spine and osteoarthritis of the left hip.

The development of arthritis in the back with a build up of calcium deposits compressing the nerves appears to be the most significant cause of this worker’s condition.

The treatment that the worker has received is appropriate. However I am unable to relate it to the incident that occurred at work in 1996.

(19) A letter from the benefit entitlement clerk to the worker dated February 10, 1997, states, “As I explained when I spoke to you today, I am unable to relate your medical condition from your visit February 03, 1997 with Dr. R. Fast to your February 07, 1996 injury.”

- (20) In a letter from the benefit entitlement clerk to the worker dated March 05, 1999 she states, "Upon receipt of new medical information, your file was reviewed again and referred to our medical consultant, Dr. Charles Fisher's pre-operative diagnosis of June 19, 1998 was spinal stenosis L3 to L5, a pars defect at L3 and degenerative spondylolisthesis/iatrogenic spondylolisthes L4-L5. The post-operative report of June 25, 1998 confirms that these diagnosis were correct. Please be advised that it is the determination of the Claimant Services Branch that your surgery on June 25, 1998 (incorrect date?) was not related or as a result of your minor contusion to your low back of February 07, 1999 (incorrect date?)."
- (21) In the IRC decision dated March 11, 1999 the issue is "whether the worker's surgery of June 19, 1998, resulted from the accident of February 7, 1996 . . ." The IRC concludes, "Relying on the evidence of Dr. Charles Fisher, a specialist, . . . the worker's back pain and lower extremity problems, reported on February 3, 1997, are shown to be caused by spinal stenosis. The evidence does not show that the blow to the worker's back by a door in any way aggravated his spinal stenosis." The IRC confirms the adjudicator's decision of March 5, 1999.

The worker appeals the decision to the appeal panel of the board.

- (22) Dr. Fisher's report dated May 19, 1999 states:

[The worker] showed me a recent document [Note: appears to refer to IRC decision of March 11, 1999] regarding his compensation claim for the above injury. I was disturbed by the conclusion which states, "relying on the evidence of Dr. Charles Fisher, a specialist, the ROC concludes the worker's back pain and lower extremity problems, . . . are shown to be caused by spinal stenosis".

This is not a correct statement. [emphasis added] [The worker] did have pre-existing disc degeneration in his lumbar spine as well as spinal stenosis secondary to degenerative spondylolisthesis at the L4-5 level. At the time of [the worker's] initial presentation to me on June 19th, 1997 there was both low back and bilateral lower extremity discomfort. The lateral symptom is secondary to spinal stenosis. The biggest problem for him at that time was the back pain which could have been caused by a number of different factors. [The worker] was doing well prior to this accident in January of 1997. This accident caused him low back discomfort and also a manifestation of lower extremity symptoms. It is difficult to know the exact mechanism of which this injury caused his back pain to occur but certainly it played a role in the development of his back pain for which he underwent surgical treatment. The spinal stenosis was a secondary problem, but the main reason for the surgery was for stabilization of the L3-4 and 4-5 levels so as to improve his back pain. The injury served to aggravate a pre-existing condition and may well have destabilized the L4-5 level through a hyperextension force. [emphasis added]

...I would hope in the future that the board would consult me regarding making any conclusions based on interpretations of my consultations and operative reports, the conclusions of which are not valid.should there be any future appeal I would expect to be contacted if there is to be any interpretation of my opinion.

- (23) The benefit entitlement clerk's memorandum dated June 17, 1999 to the medical consultant asks that he "review subsequent to your report of March 04, 1999 and advise if there is any change to your decision."

The medical consultant's report dated July 2, 1999 states:

There appears to have been some misinterpretations of some of the evidence available on file.

Dr. Fisher is correct in suggesting that all his problems were not due to spinal stenosis. . . . By way of further clarification, the iatrogenic spondylolisthesis could have been due to inadequate decompression or dynamic instability from the previous back injury.

Dr. Fisher notes that the worker was doing well prior to an accident in January of 1997. The accident in question occurred in February 1996 so I'm not sure if there might have been a subsequent injury. . . . However, in this instance, the first medical report was one year after the work place incident. . . .

. . . However, I do find it difficult to relate the need for surgery to the incident that occurred at work in February 1997.

- (24) A letter from the benefit entitlement clerk to the worker dated July 6, 1999 states:

Upon receipt of new medical information, your file was reviewed again and referred to our medical consultant,

Dr. Charles Fisher's pre-operative diagnosis of June 19, 1998 was spinal stenosis L3 to L5, a pars defect at L3 and degenerative spondylolisthesis/iatrogenic spondylolisthesis L4-L5. The post-operative report of June 25, 1998 confirms that these diagnosis were correct.

Dr. Fisher's report of May 19, 1999 re-confirms these three-diagnosis post-operatively.

Please be advised that it is the determination of the Claimant Services Branch that your surgery on June 19, 1998 was not related or as a result of your minor contusion to your low back of February 07, 1996, which required no medical treatment until February 03, 1997.

Evidence and Argument from the Hearing

New Medical Reports

(25) Dr. Fisher's letter of September 29, 2000 states:

[The worker] had a pre-existing condition, but prior to February 7th, 1996 he was working full time and was asymptomatic. In my opinion as a fellowship trained spinal surgeon, the injury probably aggravated the pre-existing condition and destabilized the L4-5 and possible the L3-4 levels through a hypertension force. This resulted in back pain. The surgery was for treatment of this back pain and the associated spinal stenosis. Therefore, in my opinion, the surgery in June 1998 was a result of the back pain and instability induced by the injury of February 7th, 1996. There is nothing to suggest that [the worker's] symptoms would have arisen if he had not been in the February 7th, 1996 accident. He was remaining asymptomatic in a fairly vigorous occupation. If he had had an insidious recurrence of his lower extremity symptoms without a significant injury, then this would be a different scenario and related to his pre-existing problem. In my opinion, this is not the case.

The Worker's Testimony

(26) The worker says in February 1996 he was a labourer with YTG. His job included, among other things, changing blades and tires on equipment, servicing vehicles, shoveling sand in winter, and "chaining up" the grader. It involved a lot of labour and heavy work.

(27) The worker describes his condition prior to the accident as good and without pain. He "felt good all over" and was able to do his job, and also trap at night, with no chronic pain and no problems.

(28) The worker says that at the time of the accident he and a co-worker had been steaming a culvert and the worker was putting away wrenches in the back of the steamer. While the worker was putting away the wrenches, a co-worker was opening the back door. A gust of wind caught the door, pulling it out of the co-workers hand, and the door swung around and hit the worker.

- (29) The worker describes the steamer as consisting of a steel box, a boiler and a water tank, that “hooks onto culverts to thaw them”. On the back of the unit is an opening of approximately 7’ x 7’ with a double door. Each door section is about 3.5’ x 7’. The door is insulated and the outside is heavy metal and has bolts on it.
- (30) The worker says he was in pain after the accident but thought it might be muscle pain and used liniment and took Tylenol 3, which he had for knee problems.
- (31) The worker says that from the time he was hit by the door the pain continued to get worse. He continued to use lineament during the day and take Tylenol 3 at night, sometimes 2 or 3 in a night. Prior to the injury he took only 1 or no Tylenol 3 for his knee pain, but increased his consumption because of the back pain. Eventually the worker saw Dr. Carew, who referred him to Dr. Fisher. The worker says that it was the right part of his back that was hit and he also developed pain in his right leg.

The Workers’ Advocate Submissions

- (32) The workers’ advocate submits that the issue in this case is whether or not the June 1998 surgery resulted from the work place injury in February 1996, and whether the board has responsibility for:
 - a) earnings loss over the period November 1997 to present [but subject to S.3(3) which limits earnings loss to 24 months];
 - b) medical expenses, including the June 1998 surgery.
- (33) The workers’ advocate submits that the work place accident was clearly recorded, and that although the worker continued to perform the duties of his job, he did so in pain which got progressively worse over time, and which required surgery to correct.
- (34) The workers’ advocate says that the worker did have a pre-existing condition at the time of the accident, and that all the practitioners involved knew of this. He says that the worker’s position description [Exhibit 1] and the excerpt from Yukon Work Futures [Exhibit 2] demonstrate that the worker’s occupation was physically demanding, yet the worker was able to meet the demands of his job without pain until the accident of February 7, 1996. He submits that the evidence on the file makes it clear that the pre-existing condition was aggravated by the work place injury, and that the surgery in June 1998 was a direct result of the work place

accident. He disagrees with the IRC's findings that the requirement for surgery was due to the pre-existing condition.

- (35) The workers' advocate refers to Dr. Fisher's letters of June 19, 1997, and May 19, 1999 which indicate that the surgery was a result of the work place accident. He points out that the reference in Dr. Fisher's letter of May 19, 1999 to an accident in January 1997 is an error. The correct date is February 7, 1996 and there was no subsequent injury in January 1997.
- (36) 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 its is presumed to be work related unless the contrary has been shown. It is his submission that the contrary has not been shown. He points out that the claim was accepted as work-related by the board, and that the board has failed to show that the disability arose from something other than the workplace accident..

Analysis on Issue #1 Have the requirements of Board Policy CL-47 been satisfied?

Board Policy states, in part:

B. Entitlement to Compensation

A pre-existing condition may not negate a worker's entitlement to compensation benefits.

If it can be shown that the pre-existing condition is worsened by the compensable condition, the pre-existing condition shall be considered compensable to the extent that the pre-existing condition has deteriorated as a result of the compensable condition

- (37) In our view the worker does satisfy the requirements of Board Policy CL-47.
- (38) The worker has a history of degenerative disc disease, for which he underwent surgery in 1993. Medical reports indicate that he returned to work with no symptoms 5 months after the surgery.

- (39) The worker was performing in his physically demanding job at the time of the accident. We find that there is clear evidence, from the worker himself and from his co-workers, that the onset of the worker's pain was coincident with the work place injury. We also find the medical reports of the attending surgeon compelling. In his May 19, 1999 post operative report Dr. Fisher states "The injury served to aggravate a pre-existing condition and may well have destabilized the L4-5 level through a hyperextension force.", and in his September 29, 2000 letter to the appeal committee he further states "... in my opinion, the surgery in June 1998 was a result of the back pain and instability induced by the injury of February 7th, 1996. There is nothing to suggest that [the worker's] symptoms would have arisen if he had not been in the February 7th, 1996 accident."
- (40) Further, we find that there is no evidence that the work place injury is not the reason for the surgery. X-rays taken in February 1997 show little change in the degree of spondylolisthesis since those taken in 1992.
- (41) Therefore, we find that the worker's surgery was required as a result of the aggravation of a pre-existing condition, by the work place injury, and that the requirements of board Policy CL-47 are met.

Analysis on Issue #2 Is the worker entitled to compensation, including time loss and medical costs, as a result of the accident?

- (42) We find that the worker's claim has already been accepted by the board. It was the application of board Policy CL-47 that was at issue. It therefore follows from our finding that the requirements of Policy CL-47 have been met, that he is entitled to time loss benefits and medical costs.
- (43) Further, it is our finding that since the worker filed his appeal after March 31, 2000, he is entitled to interest in accordance with Section 19.4 of the current *Act*.

Conclusion

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

1. The board must provide compensation to the worker for his loss of earnings according to section 22 of the *Act* beginning from November 18, 1997 when the treating physician advised him to discontinue working while awaiting a surgical date.

2. The board must provide medical services to the worker according to section 28 of the *Act*, including the surgery in June 1998, and reimburse him for the costs of any necessary medical services that the worker has paid for himself.
3. Interest is awarded under section 19.4 of the *Act*.

Dated this **15th** day of **December 2000** in the City of Whitehorse, in the Yukon Territory.

Karen Waroway, Member

Janet Wood, Presiding Officer

Hank Ambrose, Member