Workers' Compensation Appeal Tribunal

Decision #17

Claim No.: **94-0042**

Date of Hearing: April 20, 2001

Date of Decision: June 18, 2001

Appeal Committee Members

Presiding Officer: Janet Wood
Member representative of employers: Jan Stick
Member representative of workers: Joe Radwanski

In attendance: The Worker's representative - Julie Docherty
Reporter/Recorder - Doug Ayers

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

Introduction

By her Notice of Appeal dated February 14, 2001, the worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Hearing Officer dated September 7, 2000.   .

In the decision under appeal, the Hearing Officer upheld the February 27, 1995 decision of a board adjudicator to terminate the worker's temporary total disability benefits as the worker's condition was not the result of her work activities.

The worker and her representative, the workers' advocate, say that the adjudicator was wrong to terminate benefits because the worker had not fully recovered from her injury at work and remained unable to return to her pre-injury employment as a result of that injury.

The workers' advocate asks that the appeal committee find that in light of evidence prior and subsequent to the Hearing Officer's decision, the worker has a loss of earnings as a result of a work-related disability which prevents her from returning to her pre-accident employment.

The hearing was held on April 20, 2001 before an appeal committee of the tribunal 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 "*Act*").

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 did not attend the hearing; her arguments were presented by her representative. No one appeared on behalf of the employer.

The appeal committee considered all of the worker's record on claim provided by the board as well as board policies CL-30 Suspension, Reduction and Termination of Compensation, CL-42 Arising Out of and In the Course of Employment, CL-47 Pre-existing Conditions, 51 Pre-existing Conditions – Aggravation, also provided by the board, according to section 18.3 (4) of the *Act.*

During the hearing, the appeal committee accepted as exhibits:

Exhibit 1: Workers' Compensation Health and Safety Board Appeal Panel decision – File No. 91-0769 dated February 22, 2000
Exhibit 2: pages 214 – 217, *Workers' Compensation in Canada, 2nd Edition*, T. G. Ison
Exhibit 3: pages 58 & 59, 106 & 107, *Workers' Compensation in Canada, 2nd Edition*, T. G. Ison

Issues

1. What legislation and policy should be used to calculate the worker's entitlement in this appeal?

2. Did the worker have a compensable injury when TTD benefits were terminated in February 1995?

BACKGROUND

(1) The worker injured her knee December 31, 1993 while working as a janitor, a job she had held since 1985. No specific incident of injury occurred, however the worker had been moving heavy furniture without assistance, and began to experience pain in her knee. The pain became progressively worse as the day went on and the worker reports that by the end of the day it was so bad that she had to be carried to the car to get home.

(2) The worker was seen by Dr. Skinner on January 13, 1994. Dr. Skinner reported that there was "no evidence of ligamentous injury" and diagnosed a diseased medial meniscus, which had been degenerating for some time but was asymptomatic.

(3) The worker's janitorial job at the time of injury was part-time, for 4 hours daily. In addition to the janitorial job the worker was employed as a teacher for two hours daily. The worker remained off work for 2 _ months, returning to work March 14, 1994.

(4) In a report dated March 24, 1994 Dr. Skinner notes that the worker "still gets sudden sharp pain, losing power" and "aches by end of shift". Dr. Skinner referred to worker to Dr. Timmermans, who examined her April 6, 1994 and reports"…she has some symptoms referable to the medial compartment, but she seems to have good mediolateral stability, no laxity of the cruciates and a full range of motion. I agree with you that an arthroscopic examination is indicated. She may have a minor miniscal injury." He estimated a further period of disability of "one month or more" and the current work capacity as "light work".

(5) In fact the worker has not yet returned to work. She continued to experience pain in her knee and the latest medical reports on file indicate that she remains unable to return to her pre-injury employment.

(6) On February 27, 1995 the worker was notified that her benefits were being terminated as her condition was not the result of her work activities, and no further treatment had been suggested. In her letter the adjudicator states: "It is acknowledged that your work activities aggravated this condition, however, the results of your recent examination confirm your condition has plateaued, and your ongoing symptoms are due to arthritis, which is not covered under this claim."

(7) Benefits were extended to March 15, 1995 in order to allow the worker some time to seek avenues of employment.

(8) The worker appealed the adjudicator's decision to the Hearing Officer, who upheld the adjudicator's decision and found that the worker did not have a compensable injury when benefits were terminated in February 1995.

Analysis of the Issue/Reasons

Issue #1: What legislation and policy should be used to calculate the worker's entitlement in this appeal?

(9) We find that the worker was injured arising out of and in the course of her employment as a janitor on December 31, 1993.

(10) 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."

(11) Therefore, we find that the *Worker's Compensation Act,* SY 1992 as amended up to the date of the injury in 1993 is the legislation to be used to determine the issues of entitlement in this case. Specifically, section 3 of that *Act* says "a worker who suffers a work-related disability is entitled to compensation . . . ." We interpret this to mean that the right to entitlement arises at the time the worker suffers a work-related disability, and in this case it arises in December 1993.

(12) With respect to relevant policies, we note that of the policies submitted to the tribunal by the board as being relevant to this case only CL-30 was cited by the Hearing Officer in his decision. We note that Policy CL-30 is referred to in the "Issue" section of his decision as "Pre-existing conditions" and in the "Analysis" section as "Pre-existing condition – Aggravation". However, Policy CL-30, as

provided to the tribunal by the board, is titled "Suspension, Reduction and Termination of Compensation". Among the policies also provided by the board as relevant are Policy CL-47 "Pre-existing Conditions" and Policy No. 51 "Pre-existing conditions – Aggravation" and it appears that the Hearing Officer has relied on these, and not on CL-30 in his analysis.

(13) Board policies under section 18.3(3) are "binding" on the tribunal: we therefore characterize them as having a "rule-based character with statutory force". In other words, they are a form of "delegated legislation with statutory force" [see Newfoundland Supreme Court decision, *DGH Construction Limited v. Newfoundland (Workers' Compensation Commission)* [1997] N.J. No. 53] which held that policies of the Newfoundland Workers' Compensation Commission were more than administrative directions: the Commission's policies were delegated legislation with statutory force. In the Newfoundland legislation considered by the court, the statute provided that the board "shall" make policy, and that the appeal body must apply those policies. These provisions, which formed the basis for the judge finding board policy to have statutory force, are very similar to those in the Yukon legislation.

(14) Of the policies provided, only two were passed on or before the date of the workplace injury/disability: CL-42 was passed in November 1993 and No. 51 was passed in November 1989. Policies CL-30 and CL-47 were not passed until 1994.

(15) We will not examine the application of Policy CL-42 (Arising Out of and In the Course of Employment) because the issue that it addresses is not one that is under appeal. The injury was accepted as arising out of and in the course of employment. A note to file from the adjudicator dated June 14, 1994 states "I was satisfied that the worker's recent knee flare up in early Jan 94 was a direct result of her employment duties. . . ." This decision has never been rescinded. It is the extent to which the remaining disability is attributable to the workplace injury that is at issue.

(16) Policy No. 51 and Policy CL-47 deal with entitlement on the basis of an aggravation of a pre-existing condition and therefore in our view come within section 90(1)(a) of the *Act* - the transition provision. We interpret this provision to mean that policies such as No. 51, (subsequently CL-47), dealing with entitlement, are to be applied as they existed at the time of the workplace injury. CL-47 was not in place at the time of the worker's injury in 1993. Therefore, we have determined that Policy No. 51 is the policy that applies to this claim.

(17) Policy CL-30 deals with limitations to entitlement and therefore, in our view, also comes within section 90(1)(a) of the *Act* – the transition position. Since it was not in effect at the date of injury we find that it is not relevant to this appeal. In any

event, it does not appear that this policy was applied. The Hearing Officer refers in his decision to Policy CL-30, however, the titles he applies are "Pre-existing Condition" and "Pre-existing Condition – Aggravation". His analysis includes repeated references to aggravation of a pre-existing condition and the existence of such a condition is well documented throughout the file. We have therefore assumed that his reference to Policy CL-30 is an error and should read either Policy CL-47 Pre-existing Conditions, or Policy. No. 51 – Pre-existing Conditions – Aggravation.

Issue #2: Did the worker have a compensable injury when TTD benefits were terminated in February 1995?

(18) Board Policy No. 51 – Pre-existing Conditions – Aggravation states, in part:

"… the Claims Adjudicator must monitor the claim for involvement of a pre-existing condition and in consultation with the medical advisor determine,

(1) If the accident caused the condition to become symptomatic or contributed to the deterioration of a pre-existing disability.

(2) …

A claim will be accepted only in the first instance.

(19) The first report of Dr. Skinner, in January 1994, raises the possibility of an underlying condition when he diagnoses "a diseased medial meniscus, which had been degenerating for some time but was asymptomatic."

(20) Dr. Timmermans performed an arthroscopy April 15, 1994 and reports: "There were *moderate degenerative changes* in both compartments." [Emphasis added]. "I think this woman probably has degenerative arthritis with perhaps an acute flare up."

(21) The issue is raised again by the medical consultant in his report of June 7, 1994, when he states "I suspect that the major problem is osteoarthritis of the right knee. Generally this develops over time and is not usually related to a single incident, except in instances of acute trauma to the joint. The relatively sudden onset of pain in December is more suggestive of a musculo-ligamentous strain which might be related to moving heavy furniture at work. Normally this would resolve within 6-12 weeks. Consequently *much of her current problem may be related to a pre-existing condition although the diagnosis is not completely clear cut*." [Emphasis added].

(22) The adjudicator's note to file June 14, 1994 states:

"June 1, Claim thoroughly reviewed this date. I was satisfied that worker's recent knee flare up in early Jan 94 was a direct result of her employment duties. . . . I am also aware that worker may have aggravated a pre-existing condition and some of her problems may be as a result of degeneration."

(23) Therefore, although it is not specifically stated in the file, it appears from the documentation up to that point that the adjudicator accepted the claim on the basis that "the accident caused the condition to become symptomatic or contributed to the deterioration of a pre-existing disability" in accordance with Policy No. 51.

(24) The worker remained on compensation until February 1995 when she was advised:

"The arthroscopic surgery you underwent in November 1994 confirmed that the problem with your knee is degenerative joint disease, arthritis. As this condition is not the result of your work activities, and there has been no further treatment suggested, we cannot continue to extend coverage under this claim.

It is acknowledged that your work activities aggravated this condition, however the results of your recent examination confirm your condition has plateaued, and your ongoing symptoms are due to arthritis, which is not covered under the claim."

(25) The Hearing Officer, in his decision of September 7, 2000, references page 58 of Ison's book, "Workers' Compensation in Canada". Ison states that the test for determining causative significance is: Would the worker be suffering from the disability but for the employment event, exposure, or circumstance? He further states that it is not necessary that the worker's employment be the *most* significant factor in her ongoing condition; it is sufficient that the employment as *a* significant contributing factor.

(26) The Hearing Officer says: "Given that there is no evidence of an acute trauma, medical knowledge of degenerative arthritis would indicate that development and continuation of symptoms was not caused by the workplace events. Rather, as Dr. Skinner alludes, the onset of symptoms could have occurred at another time and place just as easily. This would imply that the workplace activity was not a significant contributing factor, and that therefore there is no ongoing compensable injury. … An aggravation would imply that some event took place that made the existing condition worse. There is no evidence that this occurred."

(27) We assume he refers to Dr. Skinner's December 12, 1994 report to Dr. Pate, where he states: ". . . [The worker] is having great resistance accepting the fact that this is a degenerative knee problem and at best triggered by some incident at work, but that this may have occurred, in my opinion, spontaneously while off work. . . . I expect her to be intermittently symptomatic in that knee for the rest of her life."

(28) We note that, while this may be so, the disability did *not* occur "spontaneously, while off work". The board has already accepted that it occurred as the result of workplace activities. This is stated very clearly by the adjudicator in his note to file of June 14, 1994, which says: "I was satisfied that worker's recent knee flare up in early Jan 94 was a direct result of her employment duties. . . ." The fact that other activities *could* have caused such an injury in this particular worker is not relevant.

(29) Board Policy No. 51 – Pre-existing Conditions – Aggravation states, in part: "The Board will allow entitlement … where an accident causes a deterioration (temporary or permanent) of a pre-existing noncompensable disabling condition to the point where a worker is no longer able to perform all aspects of the job.

Time loss payments will be made for the duration of the impairment attributable to the aggravation factor, but shall *cease where it is established that the sole cause* of *the continuing impairment is a pre-existing condition*, or unrelated to the accident." [Emphasis added]

(30) Although degenerative disease was identified after the injury occurred, prior to that the worker was *entirely* asymptomatic. The disease, prior to the injury, did not interfere with her ability to perform her job.

(31) Medical reports identify the degenerative changes as *minor, early, moderate,* and Dr. Pate detects very little change from the examination taken 1 year after the accident to one taken 2 years later. The radiologist's report 3 years after the accident still cites *minor osteoarthritic change.* It does not therefore appear that the disease is progressing at any significant rate.

(32) In Dr. Pate's December 11, 1997 report, he says: "We have no way of knowing the condition of the patient's knee prior to her described injury. It is my opinion that the most likely situation is that the patient had some degree of underlying degenerative arthritis affecting her right knee, that was asymptomatic prior to the injury, and that *the injury caused that condition to become symptomatic.* In other words, it appears that *the injury has aggravated the underlying condition*. *Certainly it does not appear that the patient's aggravation of her knee symptoms has recovered to any degree at all.* She certainly describes ongoing symptoms and limitations which are consistent with her examination and operative findings." [Emphasis added]

(33) We find that the disease was entirely asymptomatic prior to the injury, and has progressed very little in 3 years since the injury. We accept the opinion of Dr. Pate, an orthopaedic specialist, that the *aggravation* has not recovered.

Accordingly, we find that the pre-existing condition is not the sole cause of the continuing impairment.

(34) Referring again to Ison, and applying the test: "Would the worker be suffering from the disability but for the employment event, exposure, or circumstance?" we find that the answer is no.

(35) What must now be determined, according to Policy No. 51, is what significance the injury has and what proportion of the worker's ongoing impairment is attributable to the aggravation.

(36) Board Policy No. 51 – Pre-existing Conditions – Aggravation also states, in part:

> Where a pre-existing condition is permanently exacerbated by work injury the Board will establish what proportion of the impairment is attributable to the aggravation.
>
> (1) Where it is evident that the precipitating event and its immediate consequences were so severe that a permanent impairment would have resulted regardless of a pre-existing condition, the Board will not prorate the permanent impairment rating.
> (2) Where the precipitating event was of moderate significance and medical evidence demonstrates only a minor pre-existing condition with no indication of previous impairment, it will be presumed that any residual impairment was a direct result of a compensable aggravation.
> (3) Where the precipitating event was of moderate or minor significance and medical evidence demonstrates a moderate to advanced pre-existing condition proration of the award will apply.

(37) The worker does not report a specific incident or injury, but rather the gradual onset of pain over a 3-day period of moving heavy furniture. The initial doctor's reports describe swelling and inflammation.

(38) It is therefore not evident that the event and its immediate consequences were of a severity to cause permanent impairment regardless of a pre-existing condition, and accordingly, it does not fit the criteria described by Policy No. 51 (1).

(39) Nonetheless, the affects of the injury were clearly significant. The worker experienced disabling pain at the time, to the point where she was unable to walk to her car. Dr. Timmermans' arthroscopy report 4 months after the injury describes "… an *extremely inflamed edematous, thickened synovium that bulged into the joint at all points*. " As pointed out earlier, Dr. Pate, in December 1997, states "… it

does not appear that the patient's aggravation of her knee symptoms has recovered to any degree at all."

(40) We find that the precipitating event was of at least moderate significance.

(41) A November 14, 1994 radiologist's report of examination states, under "Right Knee – Comparative View of Left" - "*Mild to moderate osteoarthritis*, primarily involving the medial compartment. *Mild varus deformity*. *Mild osteoarthritis* of the patellofemoral articulation." [Emphasis added]

(42) An arthroscopy was performed by Dr. Pate on November 16, 1994. His report states: "In summary, this patient has *early degenerative change* affecting the medial femoral condyle. [Emphasis added].

(43) Although we have no way of knowing the condition of the worker's knee prior to the injury it is clear that the pre-existing condition would not be described as "advanced" at that time; the radiologist's report 3 years after the accident still cites *minor osteoarthritic change.*

(44) We find that the worker's pre-existing condition at the time of the injury was "minor" or, at most, "minor to moderate", but that it was not "moderate to advanced". We further find that there was no indication of a previous impairment. Accordingly, we find that it does not fit the criteria described by Policy No. 51 (3).

(45) In our opinion the worker's circumstances are best described by Policy No. 51 (2). That is "the precipitating event was of moderate significance and medical evidence demonstrates only a minor pre-existing condition". As such, we find that Policy No. 51 requires that "it is presumed that the residual impairment is as a direct result of the compensable aggravation."

(46) Accordingly, we find that the worker had a compensable injury when TTD benefits were terminated in February 1995.

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 her loss of earnings according to section 22 of the *Act* beginning from the date in 1995 when benefits were terminated.

2. Interest shall be paid in accordance with board policy developed under section 19.4 of the current *Act* on compensation payable as a result of our decision. As this policy is not yet developed, it is unclear at this point as to how it will or will not apply to this case.

Dated this **18th** day of **June, 2001** in the City of Whitehorse, in the Yukon Territory.

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Joe Radwanski, Member

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Janet Wood, Presiding Officer

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Jan Stick, Member

Summary for the Reader

Decision under review: hearing officer's decision – September 7, 2000

Sections of Act considered or applied by hearing officer: s.5, 17.(1), 19.5

Policies considered or applied by hearing officer: CL-47, No. 51

Decision made by hearing officer: The worker did not have a compensable injury when benefits were terminated in February of 1995.

Appeal Committee decision summary: The worker did have a compensable injury when benefits were terminated in February 1995. The injury was of moderate significance and the underlying degenerative condition was minor. The worker had no impairment prior to the workplace injury. In these circumstances board policy requires the presumption that the residual impairment was as a direct result of the compensable aggravation.

Sections of the Act considered or applied by appeal committee: s.5, 17.(1), 19.5

Policies considered or applied by appeal committee: No. 51

Issue addressed by appeal committee:

1. What legislation and policy should be used to determine the worker's entitlement in this appeal?
2. Did the worker have a compensable injury when TTD benefits were terminated in February 1995?

Decision made by appeal committee:

1. The board must provide compensation to the worker for her loss of earnings according to section 22 of the *Act* beginning from the date in 1995 when benefits were terminated.

2. Interest shall be paid in accordance with board policy developed under section 19.4 of the current *Act* on compensation payable as a result of our decision. As this policy is not yet developed, it is unclear at this point as to how it will or will not apply to this case.