

# **Workers' Compensation Appeal Tribunal**

## **Decision # 26 – Board Direction to Rehear**

**Claim No.: 95-0593**

Reasons for Review: Received from the Board August 30, 2001

Date last document received: October 22, 2001

Pre-hearing conference: September 27, 2001

Dates of Documentary Review: November 30, December 3, 14, 15, 17

Date of Decision: December 21, 2001

### **Appeal Committee Members**

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Jan Stick
Member representative of workers:	Karen Waroway

### **Documentary Review**

**Location:** Boardroom 2A, 419 Range Road  
Whitehorse, Yukon Territory

## Summary for the Reader

**Decision under review:** Internal Review Committee (“IRC”) decision of August 1, 1997 (file claim #89-0465)

**Sections of Act considered or applied by IRC:** s. 17 of the *Workers’ Compensation Act*, 1992, (the “Act”), and ss. 42, 43, 46, and 62 of the 1986 *Workers’ Compensation Act*, as well as Board Order 1987/003

**Policies considered or applied by IRC:** Board policy No. 24 “Permanent Physical Impairment”

### Issues addressed by IRC:

1. Whether “compound interest should be paid on loss of earnings benefits from December 1992 to May, 1997”; and
2. a) whether “the percentage level of permanent impairment is too low” [5%]  
b) whether the “dollar amount of the permanent impairment lump sum award should be paid under the 1995/97 rate, and not paid under the 1989 *Workers’ Compensation Act*”

### Decision made by IRC:

“The IRC finds that the calculation of the permanent impairment lump sum award under the 1986 *Workers’ Compensation Act* and W.C.B.O. 1987/003 is correct. The payment of a permanent impairment lump sum award under the 1992 *Workers’ Compensation Act* is not authorized.”

**Sections of the Act considered or applied by appeal committee:** ss. 17, 18.1, 18.3, 20, 22, 90 of the *Workers’ Compensation Act*, 1992, as amended by S.Y. 1999, c. 23, s. 9; s.20 of the 1992 *Workers’ Compensation Act*; s.42 of 1986 *Workers’ Compensation Act*, as amended to April, 1989

**Policies considered or applied by appeal committee:** Policy No. 24 (also Board Order 1987/003)

### Issues addressed by appeal committee:

1. Did the IRC err in deciding that the worker’s 1992 and 1993 disabilities were recurrences of the 1989 disablement?
2. What legislation should be used to determine entitlement to a permanent impairment award for this worker?

**Decisions made by appeal committee:**

1. The worker's 1992 and 1993 disabilities are recurrences of his 1989 disability, and not the result of a new accident or injury. The 1989 disability is the cause of this worker's permanent disability.
2. The worker's entitlement to a permanent disability award must be determined according to the legislation in force as of April, 1989.
3. Board Order 1987/003 and Policy No. 24 do apply.

## Introduction

This is a rehearing of an appeal originally decided by this appeal committee on July 31, 2001. This appeal involves a small piece of a lengthy and complex claim which stretches back over a decade to 1989 when this worker first reported a workplace injury to the Yukon Workers' Compensation Health and Safety Board (the "board"). Dealing with his claim has become an ongoing and significant part of this worker's life.

In the first hearing of this appeal, the worker raised an allegation of bias against one of the members, but subsequently withdrew it.

He has also been before the tribunal on another matter in which he asked that the tribunal reopen a 1999 decision by an appeal panel of the board. (The tribunal found that because of the wording of the *Act*, it had no authority to reopen a final level decision it did not make.)

The worker needs finality. However, because of how the *Act* works, the tribunal cannot review all of his issues/concerns.

This worker's claim has a long and complex history with numerous adjudications and appeals on different issues and components of his compensation stretching back over a decade to 1989. Complicating the picture are:

- a) an investigation by the Ombudsman which led to an review and then re-adjudication of matters in 1997; as well as
- b) a prior compensable injury in British Columbia in 1982 which led to much analysis, numerous medical examinations and reports in an attempt to determine whether or not the British Columbia Workers' Compensation Board (the "B.C. board") had some responsibility for subsequent work-related disability in the Yukon.

We have determined that neither matter referred to above is directly before us on this appeal which is actually quite a narrow one, focussed as it is on a small part of this complex claim as follows:

- the assessment of the worker's permanent impairment and the award made by an adjudicator on June 13, 1996 in the amount of \$4,800 under s.20 of the 1992 *Act*,
- the recalculation of the 1996 award in March 1997 under legislation prior to the 1992 *Act* above, resulting in a reduction of the award from \$4,800 to \$2,000 and an overpayment;
- the review of this reduction in the award and the appropriate legislation to apply in this regard by the IRC – the appeal before us.

We will review the IRC's decision in greater detail but we note that on July 10, 2001, the worker informed the chair of the appeal committee that he did not wish to appeal all of the matters before the IRC in its August 1997 decision -- only the part of the IRC decision that determines that his permanent impairment award must be paid under the legislation and policies as they existed in 1989. He has abandoned his appeal with respect to the two other matters dealt with by the IRC:

- a) payment of compounded interest; and
- b) the percentage level of the impairment assessment.

We agreed in the initial appeal hearing to deal only with the issue of whether or not the IRC was correct in determining that the 1986 legislation as it was in place in 1989 must be applied to determine the worker's permanent impairment lump sum award. We will do so again.

The employer has been notified again of this rehearing and declined to participate.

The worker is representing himself and has agreed that the appeal can be dealt with as a documentary review. As part of this rehearing, the appeal committee has reviewed all the documentation provided by the worker for the initial hearing before this appeal committee.

### **Stay and Reasons for Direction to Rehear**

On August 29, 2001 the Chair of the Board wrote the tribunal stating Decision #21 had been stayed under s. 18.3(10) of the *Act*. In addition, the board provided its reasons as to why this appeal must be reheard as required by s. 18.3 (8) of the *Act*. The board can direct an appeal committee to rehear an appeal where it considers that appeal committee did not comply with the *Act*. In turn, the appeal committee must give fair and reasonable consideration on the rehearing to the provisions of the legislation that the board says are applicable. We will do this in detail in our analysis of the issues.

However, it is useful to summarize at the outset what the board says we must consider. The board says the appeal committee was wrong to use the transition provision [s. 90 in the current *Act*] to fix a date of causation for the worker's permanent impairment and then conclude that the worker's entitlement must be under the 1992 *Act*. Instead, the board says that either section 20(2) of the 1992 *Act* or section 42(1), as well as the definition of "accident", in the 1987 *Act* should be applied. The board says these sections make the date of the accident or the date that the impairment arose (which should also be linked to the date of the accident) the key to determining entitlement. Although the board's letter

does not explain why either section could be applicable, we assume that the board expects the choice of which legislation applies will depend on the tribunal's findings of fact.

The reason that determining the correct date is important is that it will also determine which legislation applies. In turn, the choice of legislation will determine the amount of compensation that can be paid for the worker's permanent impairment. This amount changes from earlier workers' compensation *Acts* to later ones. If a worker is entitled to a permanent impairment award under the 1992 legislation, he will receive a greater amount of compensation for it than he would receive had he been entitled under the 1986 *Act* for the same impairment. It is well known that injured workers have argued that it is unfair that if you are injured on December 31, 1992 (just before the 1992 legislation came into force) you receive significantly less compensation than a worker injured the next day in 1993. But that is how the legislation currently works. Benefits change from one *Act* to another. (It is always open to the legislature when amending the *Act* to say that an amendment applies regardless of the date of the worker's injury.)

In this appeal, the worker is arguing that his permanent impairment award should be determined under the 1992 *Act* rather than the 1986 *Act*. It is important to note that the 1992 *Act* comes into force at the beginning of 1993, not in 1992.

Under the *Act*, the appeal committee can seek and consider further information in coming to a decision. It is an inquiry-based process.

On this rehearing, the appeal committee sought legal advice on the statutory interpretation questions which are raised by the board's direction to rehear. We provided the resulting legal opinion to the worker so that he would have an opportunity to respond. He advised the tribunal that he had taken the legal opinion to the workers' advocate to discuss it with the advocate. The appeal committee also offered to discuss this opinion with him because he is representing himself and had said he did not understand it. The worker also said he did not understand the board's reasons for directing a rehearing. We encouraged him to contact the board for help on this and, if not, we said we would explain our understanding of it to him. The worker did not take us up on these offers.

Finally, because this is a rehearing, the members of the appeal committee have reviewed again and considered afresh the worker's entire record. We are not bound by the stayed decision in any way, including any findings of fact made in it.

## **Jurisdiction**

This is an appeal from an IRC decision. Section 18(1) states that a worker may appeal a decision made under s.17 to the tribunal. We interpret this to mean under s.17 at the time

the decision was made – in this case, the first level of appeal was decided by an IRC under s.17 as it existed on August 1, 1997. In addition, we interpret the transition provision s. 90(1.2) to mean that appeals of a s.17 decisions commenced after March 21, 2000 (as is the case here) are to be determined according to the current (not predecessor) legislation. This means that the appeal tribunal is the appropriate body to decide this second and final level of appeal.

We emphasize that s. 90(1.2) speaks to the question of jurisdiction, not “entitlement”. “Entitlement” is dealt with in earlier sections of s. 90, as we shall discuss shortly. The crux of this appeal is one of entitlement.

### **Terminology and the Dual Award System**

- (1) At the outset, in order to avoid confusion around terminology, we note that since 1983, compensation for work-related disabilities in the Yukon has been on the “dual award system”. That is, there are two different types of compensation that can be paid to a worker, depending on the particular circumstances. First, compensation for “impairment” as it is currently called (see s.20 of the current *Act*), and second, compensation for “loss of earnings” (see s.22 of the current *Act*).
- (2) If we go back to the 1992 legislation, the first type of compensation is still referred to as “compensation for permanent impairment”, and the second as “compensation for loss of earnings”, essentially unchanged from the current *Act*’s provisions.
- (3) However, if we go back yet again to the 1986 legislation, the terminology changes somewhat. The first type of compensation is now referred to as a lump sum award for “disability payment” (in s.42), and the second type is called “payment for loss of earning capacity” (in s.45).
- (4) The key point is that this appeal deals with the first type of compensation – not earnings loss or loss of earning capacity.

### **The Relevant Portions of the IRC Decision Under Appeal**

- (5) Bearing this in mind, we quote below the IRC’s fact finding, analysis and decision on the worker’s PPD or PPI:

#### **The Facts – Issue #2.(b)**

The worker is appealing the fact that the permanent impairment lump sum award paid to the worker should be paid under the 1995/97 rate and not under the 1989 *Workers' Compensation Act*.

The board authorized the payment of a permanent impairment lump sum award to the worker on June 13, 1996, in the amount of \$4,800. The award was paid pursuant to the *Workers' Compensation Act*, Statutes of the Yukon 1992, chapter 16.

In March 1997, an injury that occurred in 1992 was investigated by an independent adjudicator to determine entitlement. As a result of the investigation, it was determined that the 1992 disablement was a recurrence of the 1989 disablement. It was also determined, at that time, that the 1993 disablement was also a recurrence of the 1989 disablement.

In March 1997, the permanent partial impairment award was recalculated under the 1986 *Workers' Compensation Act*. The amount of the award was reduced from \$4,800 to \$2,000.

A recurrence results when a worker has returned to work following a compensable injury and later suffers a temporary or permanent disablement as a result of the same injury. A recurrence is not a new injury and does not result in a new claim. When a recurrence occurs, the legislation in effect at the time of the original disablement occurring applies.

In this case, the compensable disablement occurred in 1989. The 1986 *Workers' Compensation Act* was in effect at the time the disablement occurred. The 1992 *Workers' Compensation Act* was not in effect at the time the disablement occurred. The 1992 *Workers' Compensation Act* does not apply.

The IRC referred to section 42, Disability payment, of the 1986 *Workers' Compensation Act* that states:

- (1) Where a worker is entitled to compensation because of an accident occurring after 1982 that causes permanent disability he shall be paid, on account of the disability but not on account of any impairment of his earning capacity, a lump sum award in an amount calculated in accordance with subsection (2).***

***(2) The board shall by order establish a rating schedule for application in calculating the amounts of awards made under subsection (1).***

The board established through Board Order a rating schedule of the calculation of the amount of a lump sum award. Board Order, W.C.B.O. 1987/003, establishes the dollar amount that the worker may receive for a permanent impairment.

**Decision – Issue #2.(b)**

The IRC finds that the calculation of the permanent impairment lump sum award under the 1986 *Workers' Compensation Act* and W.C.B.O. 1987/003 is correct. The payment of a permanent impairment lump sum award under the 1992 *Workers' Compensation Act* is not authorized.

Here ends the quote from the IRC decision above.

**Issues**

1. Did the IRC err in deciding that the workers' 1992 and 1993 disabilities were recurrences of the 1989 disablement?
2. What legislation should be used to determine entitlement to a permanent impairment award for this worker?

**Evidence from the Record**

To provide a basis for our analysis of the first issue, we will review the medical evidence extensively. Much of this evidence is not in dispute but we summarize it, so the reader can follow the chronology of events in this claim and also have a context for our evaluation of the issues. Our comments for emphasis or clarification are provided in square brackets in this section of the decision.

***The 1982 Accident in BC***

- (6) In 1982 the worker suffers a compensable injury in BC when he trips and falls onto his left side, while carrying a heavy piece of equipment called a “power plant”. The injury is diagnosed as (1) a sprain of the left rotator cuff [refers to an injury in the shoulder joint] and (2) a small avulsion fracture of the spinous process of the C6 vertebra. [The spinous process is part of the sixth bone of the neck]. He recovers and returns to work in approximately 8 weeks. He receives

compensation benefits from the B.C. board for the period he is unable to work due to these injuries.

- (7) There is no evidence of the worker seeking ongoing medical attention secondary to this injury after 1982, and before the injury in 1989.
- (8) The July 30, 1982 x-ray report for the workers' cervical spine injury says: "...marked reversal of the normal cervical lordosis with a rather sharp angled kyphotic curve centered at C5. Disc spaces are maintained...There is a fragment of bone lying just inferior to the spinous process of C6...[which] may be a small avulsion fragment from this site." There is another x-ray lateral view taken of the worker's C6 vertebra. The report on this x-ray confirms the avulsion fracture as well as the mild cervical kyphosis centering on the C5 and C6 vertebrae.
- (9) [We note here the injury to the left side of the body as well as the changes observed at the C5 and C6 levels of the spine.]
- (10) In 1985, the worker moves to the Yukon and finds employment as a drywaller.

### ***The 1989 Accident in the Yukon***

- (11) On April 17, 1989 the worker is injured while doing drywall work.
- (12) The first doctor's report on April 19, 1989 says that the worker was using a screw gun to put in steel studs and was lifting drywall when his neck and right shoulder blade became really sore. The doctor diagnoses a muscular sprain of the worker's right trapezius muscle and neck. Treatment includes anti-inflammatory medication and the advice that the worker "ease back on irritating type work." This doctor also makes reference to the 1982 injury in BC in the "same area"; and he says the worker completely recovered from that 1982 injury. [Emphasis added.]
- (13) An X-ray report from April 19, 1989 finds: "C6 vertebral body is somewhat reduced in vertical height...cervical vertebrae throughout are intact...note is made of localised widening of C5-C6 interspinous distance...possibility of a hyperflexion injury with damage to the posterior ligaments at this level must be considered...disc spaces and facet joints throughout are well maintained...note made of a localized kyphotic deformity at C5-C6."
- (14) A doctor's progress report on April 22, 1989 states the worker is in marked distress with numbness and decreased strength in his right arm. The doctor's impression is that it may be a C6(?) nerve root impingement. Treatment includes

rest and medication. [Note: it is the doctor's question mark, indicating uncertainty as to the cervical level involved.]

- (15) A doctor's progress report on April 24, 1989 reports the worker is "feeling worse; in bed 2 days; right upper shoulder; right little finger numb [for 2 days]. The doctor refers the worker for more x-rays and physiotherapy.
- (16) An x-ray report dated April 25, 1989 of cervical spine (in flexion and extension) states, "...the vertebral bodies are relatively normal in height except for C6 which has some minimal anterior loss of height...no evidence of a ligamentous instability...no evidence of acute fracture or ligamentous instability is seen."
- (17) A doctor's progress report of May 1, 1989 states: "...neck pain decreased and right shoulder pain increased...holds his head flexed forward (too sore if held upright)". Treatment includes medication and considers physiotherapy.
- (18) A thoracic spine x-ray report dated May 5, 1989 states: "...paravertebral soft tissue swelling seen...disc spaces and vertebral bodies are within normal limits...no pathological abnormality is seen."
- (19) A doctor's progress report of May 5, 1989 states: "reviewed x-rays and worker is attending physio...experiences excruciating pain on right side with manipulation...notes trigger point at T3-4...". Treatment includes use of TENS unit and medication and physiotherapy.
- (20) A doctor's progress report of May 10, 1989 states: "...neck is fine...pain in right shoulder...index finger still numb...right posterior shoulder still hurts...arm not weak...T2-3 getting better." Treatment includes physiotherapy. The report notes... "do not aggravate."
- (21) A doctor's progress report of May 23, 1989 states: "...right arm still weak – tricep area...if sits too long neck gets stiff...right index finger still numb...with little repetitive work arm hurts." Treatment includes physiotherapy 2-3 times weekly.
- (22) A physiotherapy report of May 29, 1989 states: "...[worker] has been attending for neck pain and decreased range of motion...responded well to traction and manual therapy...experiences moderate to minimal right shoulder and neck (C.T.) pain with activity...increasing his physical work at home...to continue with physiotherapy."
- (23) A doctor's progress report of May 31, 1989 states: "...very stiff neck – will need flexion extension x-ray." Treatment is medication.

- (24) A doctor's progress report of June 6, 1989 states: "cannot hit a nail – decreased power in right arm...little control...left index finger is numb...gets worse the more he uses it...right shoulder at back still sore..." The treating physician refers the worker to a neurologist. [In this report a doctor states (for the first time) there is a probability of permanent disability.]
- (25) A doctor's progress report of June 16, 1989 states: "...right trapezius pain while working." Treatment suggests stretches and warm up before working.
- (26) The neurologist's report of September 5, 1989 states under Impression: "...right C7 root syndrome. Treatment includes firm cervical collar, a few weeks off work for symptoms to settle...and exercises to strengthen the paracervical muscles..." [Emphasis added to note the level of the cervical spine that the neurologist says is involved.]
- (27) The board accepts the worker's claim and opens claim #89-0465.
- (28) The worker's detailed account of the 1989 incident (provided subsequently to the board in a letter dated March 10, 1997) is as follows:

When I first hurt myself I was screwing heavy gauge steel studs to the [word missing] with self drilling screws. I had both my hands outstretched in front of me pulling towards my body at approximately head height. While I was doing this, I felt a strong twinge in between my shoulder blades and lower neck area. The pain did not stay for very long at that time; I did not think much about it figuring I might have pulled a muscle of something. The next two days at work the pain got worse in my lower neck and right shoulder. I think it was a Friday when I went to see my doctor. He told me I just sprained some muscles in my back. A day or two later, I could not move my upper right side of my body because of severe pain which was going in my right shoulder/neck area, down my right arm and right index finger. My wife drove me to emergency. I was in so much pain that I remember the doctor in emergency giving me Demerol to relieve the pain and a half hour later I was asking for more because of the severe pain. The next week I saw my doctor again and he told me to stay off work. I went to physio for treatment. I also was taking pain killers Atasol 30 and muscle relaxant – Flexeril. I went back to work in June/89 while still attending physio.

I remember my boss putting me on light duty work doing things such as cutting grooves with a hot knife in exterior styrofoam.

Through to the summer of 1989 I still had problems with my neck. I did not continuously go to my doctor about the problems because I knew he could do nothing about my neck problems. In Sept/89, I [saw] a specialist [Dr. A., neurologist] and he told me I had a pinched nerve which affected my right arm and there was nothing he could do about it. If you notice in Dr. A.'s report Sept/89, he states: 'Ideally he should be off work for a couple of weeks until his symptoms settle completely. He should also be instructed in exercise to strengthen the paracervical muscles and he may benefit from cervical traction.' I do not remember if I took time off work or even if I went back to physio . . . the above statement made by Dr. A. shows you that I was still having problems with my neck five months after my [April] injury. Also after my injury of April/89, I always had a problem wearing a hard hat, which made my neck and upper shoulders sore. In order to solve this problem of wearing a hard hat I convinced my boss to let me wear a small bump hat instead at work. I also stayed away from heavy drywall work (especially ceilings) whenever possible because of my injury. Instead I did a lot of the steel stud work and lighter drywall work while I was employed. [Emphasis added. We note the continuity of symptoms, modified work and ongoing problems.]

### *Events after 1989*

- (29) The worker is employed by the same employer from March 1991 to February 1992.
- (30) From March 1992 to the end of June 1992 the worker is employed by a drywalling company. In May 1992, a large sheet of drywall falls on him at work. He sees the doctor and is advised to take time off. His employer agrees that he should do light work only.
- (31) In a letter dated June 7, 1994 the worker's treating physician Dr.C provides a summary of treatment dates and treatments from Sept/89 to June/94, at the board's request. He says that after 1989, he saw the worker next on July 4, 1990. At this time the worker said he had slipped off a ramp about two weeks previously, falling backwards and catching himself with his left arm outstretched behind him. The doctor diagnosis upper back muscular sprain.
- (32) The worker continues with his own account of his condition after 1989 in his March 10, 1997 letter as follows:

I do not remember a May/90 incident, but I do remember a June/90 incident where I slipped on a ramp at work. As you will note that I did not see my doctor until two weeks after the incident which meant the pain persisted for a

long period of time and that's why I went to see my doctor. The pain was in my upper back and neck area is the same as the 1989 incident, only the pain was not as severe and there was no pain in my right arm. Dr. C. also stated it was a muscle sprain, in April/89 he also stated my injury was a muscle sprain (Refer in July 4/90, Dr. C.'s notes). This report indicates I continue to require pain killers on August 2/90. Dr. C. at that time referred me to physiotherapy in July of 1990. (Refer to out-patient referral). I do not have medical documentation from the physio department. In fact I do not remember even if I attended physio.

Around October of 1990 I started to build my own house. I finished building the majority of my house in early March/91. Between this period between October/90 to March/91 I cannot recollect any difficulties with my neck that stopped me from doing my work.

I went back to work for the 1989-90 employer in the middle of March/94 [a typing error -- should read March/91]. I had some problems with my neck I believe in around July/91. If I remember correctly I went to physio around that time. According to Dr. VanR.'s report dated Sept 11/95 there is a radiological report dated Aug 15/91. [We note April 15/91 also

appears to be typing error in a doctor's report and should be April 15/95 - - there are no April 1991 x-rays in the record.]

I worked for [the same employer] until Feb/92. I then went to work for a drywall company as a working foreman. At the beginning of this job I was running a crew of workers plus working myself. For the first two months (March, April) it was light steel & drywall work. At the beginning of May I was doing heavy drywall work and after about 2 to 3 weeks my neck and upper back started hurting bad enough that I had to go see a doctor. My family doctor was not in at the time so I saw Dr. W.

Dr. W. told me it was a muscle sprain and that I should take a few days off (Refer to WCB May 25/92 doctor's report). I discussed this with my boss and it was decided that I would not take time off because I was running the job and that could screw things up. Instead I would not wear my tools for a few days and I just made sure the job was getting done. If I remember correctly, I never wore my tools for a week or more. I did file an employee accident report and I gave it to my boss, I also told my boss to send the employee's report with his to WCB because I did not have time. It is my understanding that he never did send the employee's accident report or employer's report to WCB. I later filled out another in Dec/92. I doubt if you could confirm this with [the employer] because the last I heard he is someplace in Russia. I swear this is

true and accurate information as I can remember about this May/92 incident. I worked for [the drywall employer] until mid to the end of June/92, not August/92 as you have stated. [Emphasis added. We note continuity in symptoms, modifications to work to accommodate, and ongoing problems.]

(33) On May 25, 1992 Dr. W. files a doctor's report to the board documenting the worker's pain as coming on gradually over 2 weeks while he is working on a ceiling. Dr. W. documents mid-back pain radiating into the left shoulder and spasm of left rhomboid muscles. [Emphasis added - - side of body noted.]

(34) The worker's account of subsequent events in his March 10, 1997 letter is as follows:

I did take some time off work after June/92 because my neck and upper back was bothering me more and more repeatedly. I did not see my doctor often because I knew he could do nothing for me. When you work in the trade as a drywaller (ISM) you learn to put up with sore muscles and hope the soreness will go away in a couple of days. For this reason I did not go to the doctor as often as I should have and there is not much medical evidence to prove that I was having problems with my neck and upper shoulders between 1989-1992. I have had problems with my neck ever since the April/89 incident that started with minor incidents such as July/90, July-August/91, May/92 turning severe enough to stop me from further working in my trade.  
[Emphasis added to note continuity of symptoms and ongoing problems dating from 1989.]

***The Wood Chopping Injury – November 1992***

(35) On November 15, 1992 the worker experiences pain in his neck and shoulder again after chopping firewood to heat his home. He receives medical attention and is not employed between November 1992 and July 1993.

(36) An admission report from outpatient services at the hospital dated November 18, 1992 documents an examination of the worker as follows: "right middle back and arm hurts, pinched nerve – previous episode three years ago...sudden pain in back since Sunday...numbness, weakness in right arm...decreased range of motion [in] neck – pain increases with lateral flexion and forward flexion...tender right paraspinal, palpable spasm...MSK[musculoskeletal] pain." Flexeril and Naproxen are prescribed. The primary diagnosis is back sprain. [Emphasis added.]

(37) The worker explains the wood chopping incident in his March 1997 letter as follows:

Well there was not much really to this incident. In November of 1992 I was splitting wood, to me it was a household chore when your house is heated by wood (2 or 3 times a week). Of what I can remember is that I split wood for about 1 and a half hours earlier in the day and that evening some friends of mine came over and I went to open a case of beer with my right arm and could not open the case. My right arm and hand didn't hurt but it was numb and weak. The next morning when I woke up I was in severe pain in my upper back, neck and right arm. It was the exact pain symptoms as the April/89 accident. This onset took place on Sunday and the pain got so bad that my wife had to drive me to the hospital later that week (Refer to inpatient/outpatient services form dates Nov 18/92.)

I remember going to physiotherapy for about a month and then I found that it was not helping me any further, so I quit going there, but I did use a TENS machine at home. The electric shock seems to relax my back and neck muscles. [Emphasis added.]

### ***The March 1993 Injury***

- (38) There is no report to the board of this injury at the time it occurs. However, there is a March 12, 1993 referral by the worker's doctor to outpatient physiotherapy services. On April 8, 1993 Dr.B. sees the worker and says in a doctor's note to file that the worker is "initially improving from C7 impingement; past Sunday increased

pain and discomfort; pain down right arm ++; ring finger numb and numb[ness] going up arm, loss of sensation; Impression – C7 impingement." This injury is reviewed as part of a medical summary by Dr.C. later in the record. He says (in his June 1994 letter) that he next had contact with the worker on April 11, 1993, but there is no medical note of the nature of this contact. Dr.C. also says the worker was referred to Dr. A., the neurologist again in April, 1993. [Emphasis added. We note continuity of symptoms and diagnosis of C7 level injury as in Dr. A.'s diagnosis in 1989 - - see para. 26, page 11.]

- (39) The worker's account of this injury (in his March 10, 1997 letter) is as follows:

In March/92 [March/92 is a typo - - this refers to a March/93 incident] I was just shovelling some snow, it was not a lot of snow that I shovelled that day, I was just shovelling on the balcony and steps just to get some exercise. I don't know if shovelling snow exacerbated my injury or it was physiotherapy, because I went back to physio for the second time. I saw a different physiotherapist and she really didn't know what she should do, it seems like was getting worse after a session of physio. In April/93 I saw

Dr. A. for the second time. In his report dated April 28/93 he states, ‘He had a recurrence of this pain which came on spontaneously in November of 1992.’ He also states, ‘This patient does have degenerative disc disease in his cervical spine. He is at risk of developing further problems.’ He also states, ‘He has narrowing of the intervertebral disc space at C6-7.’ These above statements by Dr. A. tells me that I had a degenerative disc disease that I did not have in 1989, therefore this disc disease was caused by the April/89 accident. I would not have any of these recurrences (Nov/92, March/93, Sept/93) if I did not have this degenerative disc disease. [Emphasis added.]

I believe the above information in this report gives enough evidence to prove my injuries are directly related to the April 1989 accident. Please refer to the Workers’ Compensation in Canada, 2<sup>nd</sup> edition, by Terence G. Ison, LL.D., Page 110, 5.5.2. Significance “A recurrence of compensable disability usually entitles the worker to a revival of wage loss benefits, medical aid, and rehabilitation assistance if required. It is irrelevant whether the worker was employed or unemployed at the time of the recurrence.

I believe I should be paid wage loss benefits from Nov15/92 to July 18/93 while I was suffering recurrences of the April/89 injury.

- (40) Dr A., the neurologist, in an April 1993 consultation reports on a “flare-up” in March 1993, while the worker is doing drywalling work. [The doctor’s reference to drywalling is probably a mistake as the worker is not drywalling at this time.] This specialist states the worker is “at risk of developing further problems. I think that the type of work that he is doing in construction would put him at risk of developing further problems in his neck”.
- (41) On July 15, 1993 the worker writes to the B.C. board requesting that they reopen his old 1982 claim.
- (42) The worker returns to work with another construction company in July, 1993, with modified duties.
- (43) A memo to file by a British Columbia WCB adjudicator dated September 24, 1993 says that the worker’s modified light duties were screwing in stucco wire.

***The August 1993 Injury***

- (44) On August 27, 1993 the worker suffers neck pain at work, which renders him unable to continue working. The worker files a new claim with the Yukon board. This is eventually accepted as a new compensable injury and file number 95-0593 is opened.
- (45) The worker reports the August 27, 1993 incident (to the BC board) as follows: “[on] August 27, 1993 my neck and right arm was in pain. I could not continue working because of pain in my neck while I was screwing on stucco wire.” [Emphasis added to note continuity in symptoms.]
- (46) The worker sees Dr. C. on September 1, 1993. The doctor’s report states that the worker “was putting on stucco wire, looking up and reaching up...neck hurts since then”. The doctor also reports tenderness in the worker’s trapezius muscles and between shoulder blades: “this is re-injury of his old injury!! . . . he cannot do this type of work . . . he already has a permanent disability.” [Emphasis added.]
- (47) A report of the treating physician, Dr C., dated September 21, 1993, reports an “injury” on August 27, 1993. Based on his examination of the worker on September 17, 1993 Dr. C. states, “gets numbness in left arm dorsally, digits 2, 3, 4; goes away after 20-30 minutes; slightly on right arm . . . probably permanent disability . . . could be retrained . . . no overhead lifting . . . not old employment as of 93/09/22.” [Emphasis added.]
- (48) The treating physician’s report (Dr. C.) to the BC board dated October 20, 1993 is the same as above . . . “on welfare . . . needs retraining . . . why is BC not handling this claim?”
- (49) After reviewing the worker’s 1982 BC claim file, the B.C. board, concludes that the worker’s neck pain and ongoing difficulties are not caused by the 1982 injury. In a memo dated December 7, 1993 the B.C. board’s medical advisor states: “with the medical information before me, i.e., the symptomatology in 1982 under this claim being on the opposite side, the injury to the sixth cervical vertebral spine being considered an innocuous [producing no injury] one, the current difficulties involving the seventh cervical level, lack of medical attention, and the current diagnosis of degenerative disc disease, I am unable to reasonably associate this person’s present difficulties to the work related trauma of 11 years ago[1982].” [Emphasis added.]
- (50) A doctor’s progress report dated January 6, 1994 states, “. . . still gets sore in lower neck . . . C6-C7 area deep inside . . . go back to work, just not drywalling especially overhead, neck extended work . . . problem will recur.”

- (51) The medical consultant reports on January 25, 1994. He diagnoses C7 nerve root syndrome and more importantly states, “this condition will be permanent”. [Emphasis added.]
- (52) A file review dated May 6, 1994 states, “. . . worker caught between boards and both have some responsibility . . . almost impossible to clearly sort out.”
- (53) A doctor’s progress report dated May 24, 1994 states, “. . . worker received money from Yukon WCB . . . will go to rehab centre for assessment . . . problems with neck with any overhead work . . . ”
- (54) The worker is referred to the POWER Program on June 1, 1994 to determine work capabilities and restrictions.
- (55) The August 17, 1994 Functional Capacity Evaluation states, “. . . appears to have irritation to the C7 nerve . . . fit to return to work at a light-medium level . . . avoid over shoulder work and heavy repetitive neck movements . . . jarring or vibration.” [Emphasis added.]
- (56) In November 1994, the worker seeks full temporary disability for the period November 15, 1992 to August 1993.
- (57) A note to file in the record signed “I 1.6.95” states “by the end of August, 1993, he again had problems. This re-injury was on the job and there is an issue of whether it constitutes a new claim (i.e., new aggravation, new re-injury) or is a continuation of the 1989 claim. The latter position has been taken to date because of the non-specific mechanism of injury. The worker’s report of this event describes screwing stucco wire on a wall, i.e., normal work activity”.
- (58) This note to file also describes in the portion entitled “Medical Summary” the following: “On May 25, 1992 medical attention was again necessary. The doctor’s report states ‘working on a ceiling...came on gradually, 2 weeks with pain mid-back radiating into the left shoulder.’ Although the doctor immediately sent us a report, the worker completed and submitted his report many months later – December 16, 1992. It stated that drywall slipped and fell onto his head and right shoulder...” This report also sets out in the “Analysis” section the following history of neck/shoulder problems:
- “*July 1982*, left shoulder, BC – compensable
  - *April 1989*, right shoulder, YT – compensable
  - *July 1990*, left shoulder, YT (no reports received)
  - *May 1992*, left shoulder, YT (medical report received)
  - + right shoulder, YT (worker reports seven months later)
  - *November 1992*, right shoulder, YT (at home chopping wood)

- *March 1993*, right shoulder, YT (flare-up of November 1992 incident)
  - *August 1993*, right shoulder, YT (pain onset at work)”
- (59) The worker requests a permanent partial assessment in January 1995 and is referred to the board medical consultant.
- (60) A medical consultant’s report dated February 1, 1995 states:  
 . . . request to determine the worker’s level of permanent impairment . . .  
 Impression: . . . nerve root impingement probably at C7 level on right . . .  
 4% to 6% of total permanent partial impairment of function, assuming that moderate to severe degenerative changes then are noted on cervical spine x-rays . . . if no or minimal degenerative changes then his impairment level would be 4% of total . . . I do believe that his condition is permanent and that it is unlikely that any further medical treatment can be offered. [Emphasis added.]
- (61) A medical consultant report dated February 16, 1995 says with respect to whether or not the worker’s condition may be related to his accident in the Yukon in 1989 or may be due to previous injury in BC, “. . . may be helpful to have an independent medical practitioner review the x-rays and possibly the worker himself to try to determine underlying causation . . . would suggest that the medical report and x-rays be sent to an orthopaedic consultant or a neurosurgeon . . . try to determine whether the worker’s condition may be related to an underlying kyphosis or other such cause . . . the consultant would also need the background medical report and x-rays for detailed review.”
- (62) On March 6, 1995 the worker requests an IRC hearing.
- (63) On March 9, 1995 the board refers the worker for an IMO [independent medical opinion] with Dr.VZ. in Alberta.
- (64) The medical consultant is asked again to comment on the cause of the worker’s disability. “. . .the initial injury in 1982 is the primary underlying cause of this worker’s problems . . . second major factor is the ageing process . . . it is possible for degenerative disc disease to be asymptomatic. My impression is that the worker’s current condition is predominantly caused from a combination of the original injury in 1982 along with the normal ageing process . . . recovery from the soft tissue injury in 1989 may have been delayed because of an underlying condition.”
- (65) Dr. C.’s progress report dated April 3, 1995 states, “. . . I suggested to him that he request a different impartial opinion than . . . since I professionally am not impressed with Dr. VZ.’s opinions.” [Dr.VZ. in Alberta]

- (66) A memo to file from the medical consultant dated April 4, 1995 mentions for the first time that there may be problems in both arms in the future.
- (67) On June 5, 1995 the adjudicator writes the worker to notify him of decisions regarding his entitlement as follows:
- . . . reviewing the 1989 claim , we are satisfied that you returned to your pre-accident employment. . . no evidence that the 1989 injury negatively impacted your ability to drywall . . . the claim is considered to be at finality . . . because the 1989 claim ended with your ability to carry on in your occupation, the 1993 problem must be considered a new claim . . . as with 1989 claim the 1993 claim is for an aggravation of a pre-existing condition and you have been compensated from August 30, 1993 to date . . . next issue is whether you are entitled to vocational rehabilitation . . . entitlement will exist if you are required to change occupations as a result of your compensable injuries. Obviously you were able to continue drywalling after 1989. You are not able to do so presently and thus we looked at whether your restrictions are a result of the 1993 claim . . . thus we cannot support entitlement to vocational rehabilitation.
- (68) A memorandum to file dated July 6, 1995 states in addendum, “. . . referral to an outside specialist . . . cancelled . . . we concluded that a referral would not be helpful . . . would confirm disability but could add nothing to the issue . . . .”
- (69) On June 8, 1995, the worker’s lawyer contacts WCB to request a review of the adjudicator’s decisions to terminate wage replacement benefits and to not provide vocational rehabilitation.
- (70) The next medical report is dated June 22, 1995. It is from Dr. VanR. [different from Dr. VZ.], a physiatrist [specialising in physical medicine and rehabilitation]. The worker sees this doctor in preparation for the IRC hearing, on the advice of his lawyer. Dr. VanR. reports:
- . . . slight loss on circumference of the right upper arm compared to the left when viewed and palpated . . . persistent decreased sensation to touch and to pain at the tip of his right index finger . . . if there were changes observed [on x-rays] in 1993 and not in 1989, this suggests they occurred during the period between 1989 and 1993, and were likely related to some degree of disc protrusion and/or narrowing of the root outlet area to the vertebrae which occurred during that time. . . . Since 1989 he has had ongoing neck and shoulder symptoms with periodic exacerbations usually related to neck and/or arm positioning. . . . In my opinion, he likely has a reported dysfunction (disability) associated with certain activities depending on

the arm and neck position assumed, the intensity of the activity, and how prolonged the work might be. At this stage, given his work history, it seems unlikely that his complaints will abate significantly in the future." [Emphasis added.]

- (71) In a subsequent September 11, 1995 report by the same specialist, Dr. Van R., which is based on further x-ray reports not available for the doctor's previous June 1995 report, he states that the 1982 injury x-ray of an avulsion fracture "could be sufficient that it would have resulted in some damages to the disc between C6-7 vertebrae, but if there was disc injury, by history, it did not involve any of the nerve roots going into the arm." He also states that the 1989 x-ray reports show "disc spaces and joints were well maintained." He then says of the November 23, 1992 x-ray report that it shows "a narrowing of the C6-7 disc space with the same bony changes." Lastly, he says the August 15, 1991 [typo: should read August 15, 1995 as is clear from later reference in report to 1995 x-rays] report shows "ongoing narrowing of the C6-7 disc space with bony overgrowth around the opening of the nerve roots, especially on the left side." In conclusion, he says "these problems (loss in disc height) occurred in the three years between the two x-rays" [that is, between 1989 and the end of 1992, emphasis added].
- (72) In February 7, 1996, Dr. H. (another physiatrist who did an independent medical exam of the worker at the Board's request), reports that the worker told him with respect to his drywalling work: "there were at least twelve incidents when the ceiling weighing up to 108 lbs. came down striking [the worker's] head, during the period 1986 to 1989". He comments on the 1989 X-ray showing "height of C6 vertebral vertebra was reduced. Disc height appeared to be slightly diminished at the C6-7 level, the exit foramina [we note these are the openings where the nerve roots come out of the vertebrae] looked unremarkable". He also says the 1989 report shows "progression of the disc space narrows at the C6 level as well as anterior osteophyte formation ... not significantly narrowing the exit foramina." Next, he states that the 1995 X-rays show "further disc space narrowing at the C5-6 level and more prominent osteophyte formation anteriorly as well as posteriorly, exit foramina narrowing was apparent at the C6-7 level, primarily on the left side. He also reports, "I think that [the worker's] residual neck and upper back painful symptoms as well as recurrent pain affecting his right upper extremity are due to the development of degenerative disc disease of the cervical spine at the C6-7 level. I furthermore suspect he has recurrent irritation of the right C7 nerve root superimposed on the background of a residual mild C7 nerve root impairment". With respect to the 1982 injury he says the worker "made a full symptomatic and functional recovery. While this incident may have predisposed him to develop problems later on in life, I believe the several incidents of forceful axial loading of the cervical spine precipitated by the ceiling

falling onto his head, as well as the work-related injury in 1989, were more significant factors in the development of his persistent neck/upper back problems clinically documented C7 radiculopathy." [Emphasis added.]

- (73) [In 1982 the worker is 25 years old; in 1989 he is 32 years old; in 1995 he is 38 years old.]
- (74) The adjudicator awards to the worker a \$4,800 lump sum for permanent impairment on June 13, 1996.
- (75) In March 1997, a Voc-Aid consultant hired by the board meets with the worker, reviews files #89-0465 and #95-0593 and concludes that the November 1992 wood chopping incident was a recurrence of the 1989 injury and therefore should be compensable. She recommends that the files be amalgamated and all benefits be calculated using the 1987 Act. [If the wood chopping incident were not a recurrence it would not otherwise have been compensable as it did not occur in the course of employment; however, a recurrence of the 1989 disability would arise out of employment.]
- (76) As a result of the VocAid consultant's recommendations, the worker's benefits are recalculated and the worker is placed in a position of repayment to the board. Benefits payable for the November 1992 to June 1993 period are also calculated at this time.
- (77) In a letter to the worker dated March 27, 1997 the senior adjudicator sets out the recalculations based on 1986 *Act* rather than the 1992 *Act*. As a result the worker is awarded \$20,218.74 for the November 18, 1992 to July 21, 1993 time period, reduced to offset an overpayment due to the benefits he had already received following August 30, 1993 under the 1992 *Act* and due to a reduction of the permanent partial impairment award (again because of the difference between the 1986 *Act* and the 1992 *Act*). The worker receives a cheque in the amount of \$2,777.60.
- (78) We note that this result must have been regarded by the worker as one step forward, then two steps back. He had sought compensation for the 1992 wood chopping incident and got it but the basis on which he received it led to a recalculation of benefits to date and into the future at a lower rate under the 1986 *Act* than he had previously been receiving under the 1992 *Act*. He also has other issues with respect to how the recalculation occurred - - that is, whether the review by the VocAid consultant was "independent" and whether she addressed matters broader than agreed to, etc. - - but we cannot deal with these issues here. We are confined by the *Act* to a review of the 1997 IRC decision.

**Issue #1:** Did the IRC err in deciding that the worker's 1992 and 1993 disabilities were recurrences of the 1989 disablement?

### Analysis on Issue #1

(79) It is clear that the IRC confirms the adjudicator's decision of March 1997, which in turn finds that both the 1992 and the 1993 disabilities are recurrences of the 1989 disability. The IRC also explains the distinction between a "recurrence" and "new injury" in this way:

A recurrence results when a worker has returned to work following a compensable injury and later suffers a temporary or permanent disability as a result of the same injury. A recurrence is not a new injury and does not result in a new claim. When a recurrence occurs, the legislation in effect at the time of the original disablement occurs applies.

[Emphasis added.]

(80) The IRC provides no reference to or interpretation of the *Act's* provisions for this statement of the law. However, we agree with the IRC's definition of recurrence and its statement of which legislation should be applied to determine entitlement if a recurrence is found.

(81) In *Workers' Compensation in Canada*, (2<sup>nd</sup> ed.), Terence Ison defines "recurrence" at paragraph 5.5.1 in this way:

The word 'recurrence' usually refers to a situation where a worker returns to work following a compensable injury or disease and subsequently suffers a temporary or permanent disablement as a result of the same injury or disease. During the intervening period of work, the worker may have been receiving benefits for partial disability or may have made a total recovery from the initial disability. Usually a recurrence involves a renewal or aggravation of physical impairment. . . .

A recurrence may be an event within or outside the course of employment. If the event is within the course of employment, it may sometimes be debatable whether it is a recurrence of the previous injury *or* a new injury that warrants an opening of a new claim.

(82) Our review of the record shows that initially the 1992 wood chopping injury was not regarded as a "recurrence" because it occurred outside the course of employment. Similarly, the August 1993 injury was initially not regarded as a recurrence but rather as a new injury. However, as the worker pursued compensation for the 1992 wood chopping incident, the medical information was

re-evaluated and new information was obtained from the worker (see his March 10, 1997 letter) which indicated continuity of symptoms during periods for which there were not doctor reports. The board eventually decides that both the 1992 and 1993 incidents were recurrences.

- (83) The record also shows that the 1989 Yukon workplace incident was also initially questioned and investigated as a recurrence of the B.C. 1982 workplace injury. However, after the BC board determined the 1989 injury was not due to the 1982 injury, the Yukon board regarded the 1989 injury as a fresh injury.
- (84) [Although the IRC does not deal with the 1982 injury, we note that the 1982 injury involves higher levels of the cervical vertebrae than the 1989 injury and also involves symptoms on the left side of the worker's body rather than the right side as was the reported case in the 1989, some of the 1992 and all of the 1993 incidents.]
- (85) We find that the IRC was addressing the right question - - are the 1992 and 1993 incidents recurrences of the 1989 injury or instead new injuries not caused by the 1989 injury?
- (86) There is no policy of the board (that we are aware of) in the Yukon that provides either guidelines or criteria for making a determination on whether or not a disability is a recurrence of an earlier disability or a new injury. Some other jurisdictions do have guidelines in the form of adjudication or operational manuals. These manuals are useful because workers' compensation statutes only provide the skeleton for the worker's compensation system. Therefore, detailed rules are needed to flesh out the statute by way of policy and/or adjudicative or operational guidelines or manuals. In the Yukon, the board has produced "policies" but only on a limited number of matters. A comprehensive adjudicative manual or operational guidelines would help the tribunal understand the positions of the board. It would be a useful working document to provide a common vocabulary and common approach for both the tribunal and the board and to bringing the bare bones of the statute to life, when adjudicating at all levels from first instance to final level of appeal.
- (87) In the absence of any guidelines and operational policy, we have considered what tribunals in other jurisdictions have had to say about how to determine if a subsequent accident/injury is a recurrence or a new injury.
- (88) In Decision No. 303/95, the Ontario Workers' Compensation Appeal Tribunal considered the case of a worker disabled first under one statute that then was replaced with another statute in force at the time the worker was disabled again. As in our case, there were significant statutory differences in the worker's

entitlement to benefits depending on whether the subsequent injury resulted from the earlier one or not.

- (89) In the Ontario case, the Ontario Tribunal sets out the Ontario board's operational Policy Document #02-04-02, "Recurrence Versus New Claim" as follows:

*Medical Compatibility*

Decision-makers compare the worker's medical compatibility and condition following the initial accident to the most recent problems. Similar medical conditions suggest that the subsequent problems may be a result of the original injury . . . To assess the similarity of medical conditions, decision-makers look to the nature and degree to which the two conditions affect the same body parts or functions.

*Continuity*

"Continuity" inquiries are used to establish a recurrence when compatibility is not a reliable indicator of the relationship between the original conditions and the subsequent problems. Decision-makers determine whether there have been ongoing complaints...[and] symptoms.

*Work Restrictions/modifications*

Work restrictions/modifications can determine a connection between the original condition and the subsequent problems.

*New Accidents*

If the worker had another accident . . . full details are obtained...Decision-makers evaluate the significance of the new accident...If the worker's latest problems result entirely from the new accident, a new claim is created. But if both medical compatibility and continuity are established and the effect of the new accident is insignificant, further entitlement to benefits as a recurrence is in order. [Emphasis added.]

- (90) The Ontario Tribunal also considers previous decisions which dealt with the question of whether the onset of a worker's disability is a recurrence of an old injury or a new injury as follows:

The question . . . arises: when is the onset of a disability a recurrence of an old injury and when is it a new injury? . . . The answer to that question should be: there is a new injury when the worker has recovered from the previous injury. . . .

Whether . . . [the] sudden onset of a similar disability . . . is a recurrence or a new injury will depend on such factors as:

- the nature of the subsequent occurrence;
- the evidence of continuity between the injuries; and,
- any changes in the worker's job or lifestyle . . . [that is, modifications or restrictions].

The focus of . . . inquiry will be to examine each of the worker's onsets of disability, in chronological order, to determine which was the most probable cause of . . . those injuries . . . can it be said that, from a medical point of view, the worker substantially recovered.

- (91) The factor of "recovery" (as indicated by capacity to perform pre-accident work after an earlier accident/disability) or, alternatively, "lack of recovery" (as indicated by subsequent and ongoing problems performing pre-accident work after the first disability, perhaps with modifications or lighter duties required) was also identified as relevant in the legal advice we obtained.
- (92) In other words, if the worker was capable of doing the relevant work before the 1993 accident/disability and incapable afterward, this could indicate a new disability rather than a recurrence of the 1989 disability. Put another way, is there evidence of the health and capacity of the work - - from the worker, the employer, or medical reports - - prior to 1993 such that it is reasonable to infer that the 1993 incidents caused the permanent impairment rather than the 1989 injury.
- (93) In the Ontario case, the tribunal also found it useful to apply the concept of "intervening cause" when looking at earlier and subsequent incidents. An "intervening cause" is one that is so "dominant" that it "breaks the chain of causation" between the earlier compensable disability and the subsequent disability. Usually this comes into play where there is a non-compensable accident or injury (that is, where one of the injuries is not work-related) complicating the picture which includes other compensable injuries and then there is a resulting disability. However, the Ontario tribunal in No. 303/95 found that using the concept of intervening cause was also useful when there are two compensable (work-related) injuries in order to determine whether subsequent disability flowed from the old and first injury or from the second and subsequent injury. The tribunal said the major test is whether the worker had substantially recovered from the old injury prior to the new injury.
- (94) The Ontario Tribunal also says the worker's evidence with respect to his or her condition is important and should be considered along with all the other evidence, in particular the medical evidence. Lastly, the tribunal says it must look at the matter from a "common sense perspective".

- (95) We find the Ontario Tribunal's analysis and guidelines sound and useful in the case before us.
- (96) Therefore, we will freshly review all the medical evidence before us, as well as the worker's evidence and use our common sense to interpret and analyze it. We will focus on any elements of continuity, medical compatibility, work modifications or restrictions, recovery and intervening cause in our review of the medical evidence, as well as what the worker has said about his condition.

### ***The Medical Evidence***

#### a) Medical Compatibility

- (97) Analysing this factor involves reviewing the evidence to determine if the medical condition in 1992 and in 1993 are similar to the condition diagnosed in 1989. If they are similar, this can suggest that the subsequent problems in 1993 are the result of the original injury in 1989. In assessing this factor, we must look to the nature of and the degree to which the 1992 and 1993 medical conditions affect the same body parts or functions as does the 1989 medical condition.
- (98) In this case, the worker's 1989 injury affects his neck and right shoulder (trapezuis muscle) with numbness and decreased strength in his right arm. At first, the treating physician speculates that the worker has a C6 nerve root impingement. However, after a referral to a neurologist (specialist in diagnosing conditions involving the nerves of the body), the worker's condition is identified as C7 root syndrome and this has been confirmed by subsequent opinions.
- (99) The November 1992 incident led to an outpatient hospital admission. The hospital report describes the worker's condition as "right middle back and arm hurts, pinched nerve [that is, nerve impingement] – previous episodes three years ago . . . numbness, weakness in right arm . . . decreased range of motion". (We will deal with the worker's account of the November incident shortly.)
- (100) We note that this description of the 1992 medical condition is compatible with that of 1989. We also note the hospital report indicates that there was a "previous episode" three years before - - that is, in 1989. In addition, the record indicates the worker within several months receives physiotherapy (as before in 1989) and in April 1993 a doctor reports that the worker was "initially improving from C7 impingement [we take this as a reference to the November 1992 incident] but now has increased pain and numbness in the right arm". (We will deal with

the worker's account of the March 1993 incident shortly.) The record shows that the worker is not employed in November 1992 through to July 1993.

- (101) Then in April 1993, the worker sees the neurologist again who diagnoses him as having degenerative disc disease in his cervical spine.
- (102) Then, when he is back at work in August 1993 (on modified duties) the worker again experiences pain which he describes in his report to the B.C. board as located in his neck and right arm. A doctor's report of early September 1993 describes tenderness in the trapezius muscles and between the shoulder blades. The doctor describes it as "re-injury of his old injury". Later in September 1993, another medical report describes symptoms of numbness in both the left and right arms (slightly on the right).
- (103) Based on our analysis of the evidence, we find that there is medical compatibility between the worker's conditions in 1989, 1992 and 1993.

b) Continuity of Complaints/Symptoms

- (104) Our review of the extensive medical evidence in the record indicates that there is continuity of symptoms from 1989 through to 1992 and 1993, in particular with respect to right-sided arm pain, weakness and numbness as well as neck and back pain. In coming to this conclusion and finding of fact here, we also rely on the detailed account provided by the worker of his ongoing symptoms which we review at (e) below.

c) Recovery versus Work Modifications/Restrictions

- (105) As we stated earlier (see para. 91 and 92), another factor which is helpful in determining whether the 1992 and 1993 incidents are recurrences or a new injury is whether or not the worker had any ongoing problems in performing his drywalling job duties subsequent to the 1989 injury.
- (106) We find that there is not full recovery after the 1989 injury. In part, our finding is based on the worker's account of his condition from 1989 to 1993, set out at (e). He requires light duties in 1989 (doing styrofoam cutting). The worker also says that after April 1989 he "always" has a problem wearing a hard hat because it makes his neck and upper shoulder sore. As a modification to deal with this problem, the worker switches to a "bump hat". He also avoids ceiling drywall work and does lighter drywall work and steel stud work whenever possible after the 1989 injury. The worker also reports that when he does heavy drywall work in May 1992 he again experiences neck and upper back pain. He reports that he then does modified work (supervisory) and also stops wearing his tools for about

a week. After the November 1992 incident, he is off work until July 1993 when he begins work screwing in stucco wire which is described by the B.C. board adjudicator as “modified light duties”. In other words, he is not doing heavy drywall work – the work he was capable of prior to the 1989 injury – when he reports renewed symptoms of neck and right arm pain in August 1993.

- (107) We find that the evidence shows that after 1989 and more importantly, at the time of the August 1993 injury the worker is not capable of doing the heavy drywall work he could do prior to the 1989 injury. In other words, we find that the worker did not recover after his 1989 injury but instead required work modifications and experienced restrictions in his capacity to do pre- (1989) accident work.

d) Intervening Cause

- (108) This factor involves analysing the evidence to determine if the 1993 incident(s) [August 1993 or March and August 1993] were of such significance or so “dominant” that it breaks the chain of causation from the prior 1989 disability. This test for causation is also sometimes described as the “but for” test. In other words, would the worker have sustained the permanent impairment/disability but for the 1993 incident(s)?
- (109) Based in part on our analysis of (a)(b), and (c) above, we find that even without the 1993 incidents, it is more likely than not that this worker would have the permanent impairment/disability that he has today. Stated another way, we do not find that the 1993 incidents were a significant cause of the worker’s permanent impairment/disability. Our finding is also based on medical evidence in the record. The worker’s doctor describes the August 1993 injury as a “re-injury of his old injury”. He states that the worker “cannot do this type of work . . . he already has a permanent disability”. [Emphasis added.] In our view, this report shows that the doctor, who has treated the worker since 1989, sees the worker as already being permanently disabled prior to the August 1993 incident. In other words, this doctor does not characterize the August 1993 incident as a significant cause of the worker’s permanent disability. We note that within five months of this report, the medical consultant essentially concurs that the worker has a permanent disability in the form of a C7 nerve root syndrome (see para.51). This C7 nerve has been identified as a source of the worker’s disability since 1989 (see para.26).
- (110) We find that Dr. VanR.’s two reports (see para.70 and 71) also confirm ongoing degenerative changes of the root outlet area at the C6 and C7 spinal vertebrae level. Dr. VanR. notes the worker’s “ongoing neck and shoulder symptoms with periodic exacerbation usually related to neck and arm positioning” which he says began in 1989. Lastly, he also says the worker’s problems (loss in disc height)

occurred in the three years between two different sets of x-rays - - that is, between 1989 and the end of 1992 [November 23, 1992]. In other words, the “problems” or disability are in place before the 1993 incidents.

- (111) We also find that Dr. H.’s independent medical exam of the worker (see para. 72) also indicates that the work-related injury in 1989 (as well as incidents from 1986-9 while drywalling when ceiling drywall sheets fell on his head [up to 108 pounds]) are the “significant factors in the development of his persistent neck/upper back problems [which are] clinically documented [as] C7 radiculopathy.”

e) The Worker’s Statements About His Condition

- (112) We attach considerable weight to the worker’s detailed accounts of his ongoing symptoms and the incidents giving rise to severe and less severe symptoms in 1989, 1990, 1991, 1992 and 1993. Following is our summary:
1. In April 1989 the worker is injured doing steel stud work with his hands outstretched at head height and pulling toward his body. He is off work until June 1989 when he returns to light duties. Throughout the summer he continues to have problems with his neck and is examined in September and diagnosed with a pinched nerve. The worker points out that he still has symptoms five months after the April injury. Since that time to the present he cannot wear a hard hat without getting sore shoulders and neck. Since 1989 he tries to stay away from heavier drywall work.
  2. In June 1990, as in 1989, he has the same (but less severe) symptoms when he slips on a ramp at work.
  3. From October 1990 to March 1991 he is off work and without problems in his neck. During this time he works on building his own house.
  4. In July 1991 (after returning to work in March) he again has problems with his neck.
  5. In February 1992 he starts with another employer and does lighter steel and drywall work for two months (March, April). Once he begins heavier drywall work in May, he develops the neck and upper back symptoms again within 2 to 3 weeks. With the employer’s consent, he modifies his work (rather than taking time off) by doing supervisory work (“made sure the job was getting done”) and by taking a break from wearing his tools for a week or more.

6. In May 1992 he has mid-back and shoulder (left) pain that increases over two weeks while he is drywalling a ceiling and in June 1992 he takes time off work because his neck and upper back are bothering him more and more repeatedly.
7. After splitting wood at home for an hour and a half during the day in November 1992 he has weakness and numbness in his right arm by evening. The next morning he has severe pain in his upper back, neck and right arm which he describes as “the exact pain symptoms as the April 1989 accident”.
8. In March 1993 he is shovelling snow at home and around this time he is also receiving physiotherapy. Both the worker and the neurologist he sees in April 1993 refer to his pain and other symptoms as “recurrences”.
9. The worker clearly relates successive injuries to his 1989 disability shown in this quote from his March 10, 1997 letter:

I have had problems with my neck ever since the April 1989 incident that started with minor incidents such as July 1990, July-August 1991, May 1992, turning severe enough to stop me from further working in my trade. . . . I believe there is more than enough medical and other evidence that these injuries are related to the 1989 accident . . . .

Now if you look at the symptoms of my 1992 wood chopping incident, March 1993 shovelling snow incident and August 1993 incident, all my medical symptoms are the same as the April 1989 incident . . . .

I believe the above information in this report gives enough evidence to prove my injuries are directly related to the April 1989 incident . . .

I believe I should be paid wage loss benefits from November 15, 1992 to July 18, 1993 while I was suffering recurrences of the April 1989 injury.  
[Emphasis added.]

### **Conclusion/Finding of Fact on Issue #1**

- (113) Taken as a whole, our review and analysis of the medical evidence with respect to (1) medical compatibility; (2) continuity of complaint and symptoms; (3) recovery versus work modifications/restrictions; (4) lack of intervening cause; and our review of the worker’s account of his injuries, ongoing symptoms, work modifications, etc. lead us to conclude and find that the worker’s 1992 and 1993 disablements are recurrences, not new injuries. We further find that the events of

1993 were not of any particular causative significance in producing the permanent impairment or disability. The disability experienced in 1993 is a recurrence of the 1989 disability, not the result of a new injury. We find that the 1989 disability is the cause of the worker's permanent disability. We also find that even without the incidents in 1993 this worker would still have had his permanent disability.

- (114) Therefore, we confirm the IRC's finding of recurrence. We conclude the IRC did not err when it made this finding.

**Issue #2:** What legislation should be used to determine entitlement to a permanent impairment award for this worker?

### **Analysis of Issue #2**

- (115) It is in relation to this issue that the Board directed a stay and rehearing of the appeal.
- (116) The board says that in our earlier decision [#21] the tribunal found that when permanent impairment develops over time, it is the date consistent with the most recent changes in impairment that should be used to determine entitlement to compensation, as opposed to when the accident occurs. The board says we improperly used the reference to "causation" in the transition provision of the current *Act* to create entitlement to benefits and in particular used "caused" in the sense of the final rather than the beginning step in producing disability. The board says "You cannot separate the concept of the accident and the permanent disability."
- (117) In essence, we understand the board to mean by this that for the purpose of deciding on the applicable law, no distinction should be made between the date of injury and the date of permanent disability caused by that injury. We agree. A worker may become eligible for a permanent disability award (when he is at maximum medical improvement) but the date his disability is assessed or the date his award is paid out does not determine the question of which statute applies.
- (118) As a general rule, the law applicable throughout the lifetime of a claim is the law as it stood at the date of injury. In all prior decisions, the tribunal has interpreted the entitlement subsections of section 90 (the "transition provision") in this way and we do so here. We also agree with the board's reasoning that the date of permanent disability should not be separated from the date of the injury that

caused it, when applying section 90 of the current *Act* in order to determine which legislation governs entitlement in a particular case.

- (119) Given that we have decided the 1992 and 1993 disabilities are recurrences of the 1989 disability, it follows that section 90.(1) (b) of the current *Act* applies. It states:

**Transitional**

**90.(1)** Where a worker is entitled to compensation as a result of a disability caused in

- (b) 1992 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before January 1, 1993

- (120) This means that the worker's entitlement to compensation - - in this case a permanent "disability payment" - - is as set out in 1986 *Act*, as amended to April 17, 1989, the date of the worker's injury. Section 42 of that *Act* provides for a "disability payment".

## Conclusions

The worker's appeal is denied. The decision of the IRC is confirmed as follows:

1. The worker's 1992 and 1993 disabilities are recurrences of his 1989 disability, and not the result of a new accident or injury. The 1989 disability is the cause of this worker's permanent disability.
2. The worker's entitlement to a permanent disability award must be determined according to the legislation in force as of April, 1989.
3. Board Order 1987/003 and Policy No. 24 do apply.

Dated this **21st day of December, 2001** in the City of Whitehorse, in the Yukon Territory.

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Karen Waroway, Member

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Heather MacFadgen, Presiding Officer

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Jan Stick, Member