WORKERS' COMPENSATION
APPEAL TRIBUNAL

CASE ID # [personal information]

BETWEEN:

WORKER

APPELLANT

AND:

WORKERS' COMPENSATION BOARD
OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION #29

Appellant	Represented by John R. Diamond Diamond & Associates
Respondent	Represented by John K. Mitchell, Q.C. Stewart McKelvey Stirling Scales
Place and Date of Hearing	**Best Western Charlottetown - MacLauchlans** **238 Grafton Street** **Charlottetown, P.E.I.** March 10, 2004
Date of Decision	May 19, 2004

STATEMENT OF FACTS

1. The Worker has had, going back as far as 1986, some back problems for which he has received compensation, based for the most part, on soft tissue injury and/or low back pain resulting from sprain or strain to his back.

2. The Worker on **[personal information]**, 1998, was employed as a **[personal information]** in a full time work position.

3. The Worker's Report of Injury, Form No. 6, signed on **[personal information]** 1998 by the Worker, identified the time and date of his injury as 11:00 a.m. on **[personal information]**, 1998. He described what happened to cause the injury as *"bent down to put* **[personal information]***"*, and stated this apparently caused an injury to the anatomical area of the *"lower back"*. Initially he did not require time off from work for this incident.

4. He reported that he had previously hurt his lower back at work on **[personal information]**, 1997 and he was off work due to this accident from **[personal information]** 1997 through **[personal information]**, 1997 at which time he returned to work with his pre-injury employer.

5. The Physician's Initial Report, Form No. 8, by Dr. R. Belyea, Chiropractor for initial date of treatment **[personal information]**, 1998 provided a diagnosis of lumbosacral joint subluxation syndrome. The report stated: *"[The Worker's] low back has been quite good since his last episode, recommended his physical abilities were consistent with continue to work".*

6. **[personal information]**, 1998 - Report by Dr. Belyea: clinical impression: *"[The Worker's] improvement to date is slow and entirely typical. There's nothing unusual in this and no reason for concern with physical abilities consistent with continue to work."*

7. From **[personal information]** 1998 up to **[personal information]** 2001 the Record indicates

that there were in excess of Fifty (50) reports from various medical personnel, including a CT Scan, filed in this matter.

8. The initial decision of the Case Manager was to deny the Worker's claim for compensation on the basis that there was *"no objective medical evidence to support entitlement to compensation or medical aid (including a mechanical bed) benefits for ongoing low back problems and that [the Worker] has recovered from the soft tissue strains, has returned to his symptomatic pre-existing condition, and his ongoing problems are a natural progression of his underlying degenerative disc condition"*.

9. On October 24, 2001, the Internal Reconsideration Officer conducted a hearing and in his decision dated January 7, 2002, he upheld the decision of the Case Manager.

10. The Worker appealed the Internal Reconsideration Officer's decision. The grounds of Appeal are as follows:

GROUNDS OF APPEAL

i. That the Internal Reconsideration Officer erred in the determination that the Appellant's present disability is not related to the work related injuries. The disability and symptoms which arise from degenerative disc disease which is supported by Dr. Barry Ling, Dr. Andrew Clark and Dr. Frank Burke and had its onset as a result of cumulative damage from the work related injuries.

ii. That the Internal Reconsideration Officer erred in the determination that the Appellant has reached a medical plateau therefore he can return to work. This position is not supported by the current medical opinion on file as relating to his present disabled state.

iii. That the Internal Reconsideration Officer erred in the determination that there were no inconsistencies from Functional Capacity Evaluation and suggested job matching and

disregarding significant limitations.

iv The Internal Reconsideration Officer erred in the determination that the matter is not one which should be adjudicated pursuant to the old legislation as the claim has its origin in 1985.

11. At the initial hearing in this matter on June 3, 2003, the Worker was represented by his counsel who made his oral submissions to the Tribunal during the course of which he presented a MRI conducted by Dr. Louis C. Gaudet at the Moncton Hospital on **[personal information]**, 2001.

12. That MRI was printed on **[personal information]**, 2001 six (6) days after the IRO hearing.

13. The MRI Report states:

MRI Examination of the Lumbosacral Region (5870):
Sagittal T1 and T2 Weighted sequences were obtained as well as similar Axial Sequences at the L2-L3, L3-L4, L4-L5 and L5-S1 Levels. The L2-L3 and L3-L4 Discs are essentially unremarkable. There is some narrowing and mild diffuse bulging of the L4-L5 Disc.

There is also some narrowing of the L5-S1 Disc and there is a medium-sized central bulge or herniation of the L5-S1 Disc causing mild compression of the thecal sac.

Impression:

There is a small to medium size central bulge or herniation of the L5-S1 Disc as described.

14. As there was no evidence that the Internal Reconsideration Officer was aware of this MRI before he wrote his decision on January 7, 2002, this panel held that this MRI constituted

new evidence. ON June 23, 2003 in accordance with Section 56(23) of the *Act,* the matter was referred back to te Board for further consideration.

15. On June 17, 2003, the Case Manager in her decision wrote:

DECISION:

Medical evidence does not support the medium sized central bulge or herniation of the L5-S1 noted on your MRI of **[personal information]**, *2001 as resulting from your work incident of* **[personal information]**, *1998. This MRI does not change my decision of March 22, 2001.*

16. In her claim summary she stated:

Under Claim **[personal information]** *(case* **[personal information]***), you had a work incident of* **[personal information]**, *1988 which Dr. Belyea described as an injury to the lumbosacral joint, apparently subluxation of L5. His report makes note of a previous physical defect of L5 disc degeneration.*

On **[personal information]**, *1997 a new claim was filed under case #***[personal information]**. *This was described as "was lifting* **[personal information]**, *plate not working right, would not flip out". Dr. Belyea described this as an acute low back strain with a possible herniated disc.*

You saw Dr. Ling and had a CT Scan which showed L4-5 disc narrowing, but no bulge or herniation. The diagnosis was osteoarthritis.

This latest claim (Case ID **[personal information]***) was for an incident* **[personal information]**, *1998 described as, "Bent down to put* **[personal information]**.*" You continued to work until* **[personal information]**, *1998 when you filed for time loss. Dr. Belyea again notes lumbosacral joint subluxation syndrom with L4-5 disc*

degeneration.

X-rays taken in 1999 showed significant degenerative disc disease at L4-5, also L5-S1 with significant disc space narrowing. There also appeared to be osteoarthritic changes involving the right sided L4-5 and L5-S1 facet joints.

You had a CT Scan on **[personal information]***, 2000 from L1 to S1 level. This showed no evidence of disc herniation or spinal stenosis . . . there was diffused degenerative disc bulge noted with no focal herniation.*

You were examined by Dr. David Alexander, Professor or Orthopedic Surgery, on **[personal information]***, 2000. His report indicates straight leg raising was 80 -90 degrees. He could not detect any neurological dysfunction in the lower extremities. He reviewed the myelogram and CT Scan and indicated there certainly was no evidence of a compressive neuropathy. He did note the degenerative disc disease at L4-5, L5-S1 on the x-rays. . . . You were encouraged to return to work.*

Your claim was closed for benefits **[personal information]***, 2001 as it was determined you had reasonably recovered from your work injury of* **[personal information]***, 1998 (low back strain).*

My decision letter of March 22, 2001 indicated there was no ongoing entitlement to benefits or medidcal aid under your various claims as the work incidents that were filed with the Workers Compensation Boar were for strin injuries which aggravated your ***underlying degenerative disc disease*** *for a period of time. There was no objective medical evidence to support any ongoing impairment in relation to your work incidents.*

The MRI report of **[personal information]***, 2001 . . . shows the L2-3, L3-4 discs are essentially unremarkable. There is some narrowing and mild diffused bulging of the*

L4–5 disc. There was also some narrowing of the L5-S1 disc and there is a medium sized central bulge or herniation of the L5-S1 disc causing mild compression of the thecal sac.

Your MRI report was reviewed by the Board Medical Director. His report points out the time frames at work on your claim. He notes your latest work accident as **[personal information]**, *1998. He also notes the CT scan of* **[personal information]***, 2000, which showed no disc herniation,* ***predated*** *the MRI of* **[personal information]***, 2001 which shows a small to medium size central bulge or herniation of the L5-S1 disc. Dr. Carruthers also notes there appears to be no clinical correlation with the imaging study and the clinical findings and the clinical history on file.*

Rational For Decision:

X-Rays taken ***shortly after your accident*** *already showed degenerative disc disease at L4-5 and L5-S1. There was also noted to be osteoarthritic changes involving the right sided L4-5 and L5-S1 facet joints.*

A CT Scan of **[personal information]***, 2000 showed . . . There was no evidence of disc herniation or spinal stenosis at L5-S1.*

Dr. Alexander's assessment of **[personal information]***, 2000 showed no neurological dysfunction and* ***no evidence*** *of* ***compressive neuropathy****.*

You were on claim with the Workers Compensation Board at the time of the CT Scan in **[personal information]** *2000 and until your claim closed* **[personal information]***, 2001. The MRI of* **[personal information]***, 2001 was taken* ***four months after your claim closed.*** *It would therefore be reasonable to conclude that the herniation showing on this MRI report (which was not showing on your CT scan of* **[personal**

information], *2000) would relate to a more recent incident and not the work accident of 1998.*

17. Not satisfied with the decision of the Case Manager, the Worker appealed to the Internal Reconsideration Officer, who conducted a paper file review on July 7, 2003 and who decided:

Decision:

Medical evidence does not support the medium sized central bulge or herniation of the L5-S1 noted on your MRI of **[personal information]**, *2001 as resulting from your work incident of* **[personal information]**, *1998. The MRI does not change my decision of March 22, 2001.*

18. The Worker subsequently requested that this Tribunal proceed with the Appeal on the same Grounds of Appeal as initially filed; but, in any event, also considering the most recent MRI as being evidence supportive of his entitlement to compensation.

19. Dr. Barry Carruthers, Medical Examiner, attended at the hearing on behalf of the Board, the purpose of which was to explain some of the medical terminology used with respect to medical conditions of the spine and/or discs (i.e. disc bulge or herniation, spinal stenosis and focal herniation).

20. He indicated that he did not personally examine the Worker; but, that he was familiar with the Worker's file as he had reviewed it several times. He also indicated that, as the Staff Medical Advisor to the Board, it is his function to review medical reports and advise the Board on his finding, and in so doing, offers his professional opinion.

21. He confirmed that he reviewed the medical reports of Dr. Ling and Dr. Clark - who both referred to the Worker's disability. Dr. Carruthers did point out that disability, in his

opinion, is not a medical determination.

22. His evidence indicates that a "focal" herniation is usually the result of a specific incident or body injury (i.e. an accident).

23. In his report, "Medical Comment" to file, dated **[personal information]**, 2003, Dr. Carruthers concluded:

The key in understanding this claim is the time frame involved and connecting these time frames with the clinical findings . . . The MRI is dated **[personal information]** *and shows a pathology at the L5-S1 level; however, there is also a CT myelogram dated* **[personal information]** *2000 showing some diffuse degenerative bulges at the L4-5 level with no focal herniation and at the L5-S1 level, no evidence of disc herniation or spinal stenosis. Obviously, the CT results of* **[personal information]** *2000 precedes the MRI results of* **[personal information]** *2001. A reasonable conclusion would be that a herniation therefore post dates the CT date and thus relates to an interim event remote from the date of initiation of the claim . . . . . there appears to be no clinical correlation with the imaging study and the clinical findings and the clinical history.*

24. In an earlier Comment to The File on **[personal information]**, 2001, Dr. Carruthers, in reviewing the report of Dr. Alexander, dated **[personal information]**, 2000 stated:

I would then ascribe a date of **[personal information]**, *1999, when the Worker was seen by Dr. Ling as having reasonably recovered to his pre-injury symptomatic self . . . . .*

However, if one does not accept the **[personal information]** *1999 date as being a reasonable recovery date, then most certainly by* **[personal information]** *2000, when seen by Dr. Alexander, could be the date under which it can be reasonably concluded that this worker had returned to his pre-injury state, given Dr. Alexander's*

examination and his comments at that time.

Dr. Alexander, on **[personal information]**, *2000, is unable to appreciate any neurological involvement and commented further that the investigative procedures do not support a compromise of the nerve roots as well. He did comment the worker had degenerative disc disease, but more importantly, encouraged the worker to return to work again. This, in my mind, gives good and clear evidence of this worker having reasonably recovered and can no longer be considered disabled from that date forward secondary to injuries sustained under this claim. Once again, it does not mean this worker does not have back pain, nor does he have difficulty performing his work duties. I am simply indicating this worker has reasonably recovered from the injuries and his present difficulty does not relate to the injury, but relates to the underlying degenerative condition. As previously commented, the degenerative changes cannot be reasonably associate with the work events which have initiated any or all of these claims.*

25. As a central issue in establishing entitlement to compensation involves the question of causation, as is the case here; the question that the Board had to address is whether or not there is any connection between the **[personal information]**, 1998 injury and ongoing back problems that the Worker was suffering from at the date of the second Internal Reconsideration Officer's decision being July 8, 2003.

26. The Worker's position is that "the injuries that he had over the years are causing him to have an ongoing disability". Counsel for the Worker at the hearing put it this way: *"his present disability is on the basis of an aggravation of his pre-existing condition(s)"*.

27. A review of the Worker' previous history by Dr. Carruthers going back to at least 1986 indicates; as appears in his **[personal information]**, 2001 Medical Comment to the file:

I discussed with the case manager in detail this worker's claim and all other claims

associated with his back shoulder and neck.

Prior to the initiation of any of these claims, the first one being dated 1986, this worker had chronic low back and shoulder problems - reference Dr. Belyea's clinical report of **[personal information]**, *1986. The 1986 injury involved the cervical spine, the right shoulder and the right low back. A review of the '86 claim revealed that by* **[personal information]** *1987, he had recovered well from the low back stain and after that the right shoulder. The worker was seen with respect to the cervical spine in* **[personal information]** *1987 and in this report, there is good indication of this worker having incurred a previous fracture to the cervical spine. There is no evidence this fracture is work-related under this claim or other claims under the Workers Compensation Board of Prince Edward Island. By* **[personal information]**, *1987, the comment is that this worker was having only significant symptoms after extended activities - referenced Dr. Ling. To me, this gives good and clear indication of this worker having recovered well from injuries sustained under this claim and the worker had returned to his symptomatic pre-injury self.*

Under a **[personal information]** *1988 claim, the work injury is compatible with a mild stain to the low back or a temporary aggravation of a pre-existing degenerative condition involving the lumbar spine. There is no medical information of needing to seek ongoing medical attention with reference to this anatomical area of the low back from* **[personal information]** *1989 for a full year until* **[personal information]** *1990. I would therefore conclude from this that this worker, once again, had reasonably recovered from injuries accepted under the* **[personal information]** *1988 claim with no evidence of any ongoing impairment from this claim or, indeed, the 1986 claim.*

In my opinion, the need to seek medical attention in **[personal information]** *1990 onwards cannot medically be reasonably related to the 1986 claim or the* **[personal information]** *1988 claim. In fact, the clear and overwhelming medical evidence is*

that this worker had recovered well from both of those injuries.

The comment that this worker experienced paid in his neck and back . . . does not translate to *<u>this worker being injured</u>* *"as a result of the work activity.*

There is an additional claim dated 1997 . . . The worker underwent extensive investigation with consultations by an orthopedic surgeon, as well as CT examinations. Again, as a result of this medical attention, it was determined that the worker was having ongoing degenerative changes and no evidence of any disc herniation. It would be my opinion that this worker had reasonably recovered from this 1997 injury by **[personal information]** *1997 - reference Dr. Ling's consultation that the worker was back at full activities by* **[personal information]** *1997.*

There is a **[personal information]** *1998 claim, the claim for which the worker continues to remain off work.*

The work activity described in **[personal information]** *1998 is compatible with both a mild tissue strain involving the low back and is equally compatible with simply* *<u>causing the worker to notice symptoms of his underlying symptomatic condition.</u>* *I find it intriguing that when the worker was first seen on the day following, there was a comment from the chiropractor that the worker "always has a modicum of discomfort. This is a re-injury of a chronically dysfunction low back".*

Please recall *<u>this worker was symptomatic prior to the initiation of this injury and, in my opinion, his symptoms at this point are such that they can be considered as part and parcel of his pre-existing condition</u>*, *that is, pre-existing the date of injury under this claim. Also please note at this point* *<u>this worker has had an additional 10 years of ongoing progression of degenerative changes in his back since the original back claim of 1986.</u>*

There is an x-ray of the lumbar spine dated **[personal information]** *1999, which shows significant degenerative changes . . .* ***The degenerative changes, as commented above, cannot be reasonably associated with the soft tissue injuries accepted under this claim.***

The worker was assessed by Dr. Alexander in **[personal information]** *2000 and like Dr. Ling, Dr. Alexander was unable to appreciate any nerve root tension signs in his examination. He confirmed also the primary diagnosis of degenerative disc disease as the cause of this worker's ongoing symptoms.*

In summary, this worker numerous claims have involved soft tissue trauma only. ***There is absolutely no evidence he incurred a disc herniation as a result of any of the injuries nor is there any evidence that any initiating event is compatible with anything more than a temporary aggravation of a symptomatic pre-existing condition.***

In my opinion, this worker has recovered well from all of the injuries sustained under all of the claims and his present difficulty more relates to the natural progression of his underlying degenerative condition.

The above opinions are not meant, in any way, to apply that this worker doesn't have significant ongoing problems with respect to pain and abilities. However, there is absolutely no good medical evidence that the difficulty the worker presently has in any way relates to soft tissue injuries sustained under the 1998 claim or any previous claim.

The balance of probabilities greatly favor the worker's difficulties being secondary to the natural progression of an underlying chronic degenerative condition.

28. In an earlier comment to the file, on **[personal information]**, 2000 Dr. Carruthers noted the

results of Dr. Alexander's examination in **[personal information]** 1999, who noted normal neurological examination but queried nerve root entrapment. Dr. Carruthers concluded:

the worker had a CT scan which was considered nondiagnostic. Once again, the X-

rays showed diffuse degenerative changes. Investigations with myelogran and CT scan did not support any nerve root compression.

In the present medical information, the primary diagnosis at this point is degenerative arthritis of the lumbar spine. My medical opinion is this worker did not incur a disc herniation as a result of the injury which initiated this claim and his present symptomatology more reasonably represents the natural progression of a degenerative condition.

The July 8, 2003 Internal Reconsideration Officer Decision

29. The decision of the Internal Reconsideration Officer indicates that he concurred with the Case Manager's decision to the effect that the **[personal information]**, 2003 MRI was new evidence. Following his paper-file review of all of the material in the file from **[personal information]**, 2001 to **[personal information]**, 2003 (the date of the Case Manager's decision to deny the Worker's claim), the Internal Reconsideration Officer decided that the **[personal information]**, 2003 MRI did not cause him to change his initial decision of March 22, 2001. In reaching this decision, the IRO, set out his rationale which states:

a. X-rays taken shortly after your accident already showed degenerative disc disease at L4-5 and L5-S1. There was also noted to be osteoarthritic changes involving the right sided L4-5 and L5-S1 facet joints.

b. A CT scan of **[personal information]**, *2000 showed diffused*

degenerative disc bulge at L4-5 with no focal herniation. There was no evidence of disc herniation or spinal stenosis at L5-S1.

c. *Dr. Alexander's assessment of* **[personal information]***, 2000 showed no neurological dysfunction and no evidence of compressive neuropathy.*

d. *You were on claim with the Workers Compensation Board at the time of the CT scan in* **[personal information]** *2000 and until your claim closed* **[personal information]** *2001. The MRI of* **[personal information]***, **2001** was taken four months **after** your claim closed. It would therefore be reasonable to conclude that the herniation showing on this MRI report (which was not showing on your CT scan of* **[personal information]***, 2000) would relate to a more recent incident and not the work accident of 1998.*

30. Having reviewed the multitude of medical reports in the file from numerous experts whose opinions formed the basis of his decision, the Internal Reconsideration Officer saw no reason to depart from his October 24, 2001 decision to deny the Worker's claim. In so doing however, the uncontradicted medical opinion of Dr. Carruthers in his **[personal information]**, 2003 (Medical Comment to File) would tend to cause the Internal Reconsideration Officer to be more certain about his October 2001 decision because that opinion indicates that earlier tests, the **[personal information]** 2001 MRI and the **[personal information]** 2000 CT Myelogram show some diffuse degenerative bulges at the L4-5 level, there was no evidence of disc herniation or spinal stenosis. There was no evidence of focal herniation. In that report, Dr. Carruthers states that:

. . . there appears to be no clincial correlation with the imaging study and the clinical findings and the clinical history.

31. In short, the **[personal information]** 2003 MRI constitutes some compelling evidence leading to the conclusion that the Worker's back pain does not relate back to any specific work related injury but to a natural progressive deteriorating degenerative change in his back.

32. It has not gone unnoticed that Dr. Carruthers' opinion is based on the independent medical opinion of Dr. Alexander, whose reports are in the file as well as upon the earlier MRI and CT scan.

ISSUES:

33. As the central issue in this case - (whether the Worker suffers from a work related injury, entitling him to compensation) is a question of fact; then, this Tribunal can only overturn or interfere with the decision of the Internal Reconsideration Officer if he made some palpable and/or some over-riding error.

34. As indicated in previous Workers Compensation Appeal Tribunal decisions, the test as set out in several decisions of the Supreme Court of this Province, in cases involving a question of fact, is one of "reasonableness". That being the case, this Tribunal finds, and it so holds that the decision of the Internal Reconsideration Officer not to change his initial decision was reasonable and in fact, was strongly supported by not only the evidence in the file prior to **[personal information]**, 2001 but also by the subsequently acquired MRI and the medical opinion of Dr. Carruthers on **[personal information]**, 2003.

35. Notwithstanding the foregoing, a review of the Legislation, the medical evidence in the file, and the January 7, 2002 decision of the Internal Reconsideration Officer, with each of the Worker's four Grounds of Appeal in mind is warranted.

36. This review will focus on the medical evidence available to the Internal Reconsideration Officer up to October 24, 2001.

37. The Respondent agrees that the issues in this case are Grounds 1 through 4 of the Worker's Grounds of Appeal.

THE LEGISLATION:

Section 1(a) states:

"accident" means a chance event occasioned by a physical or natural cause, and includes

i. a wilful and intentional act that is not the act of the worker,

ii. Any

1. event arising out of, and in the course of employment, or

(B) thing that is done and the doing of which arises out of, and in the course of, employment, and

iii. an occupational disease,

and as a result of which a worker is injured;

Section 1(1) (u) states:

______***"occupational disease" means a disease arising out of and in the course of employment and resulting from causes and conditions***

(a) peculiar to or characteristic of a particular trade or occupation, or

(b) Peculiar to the particular employment, but does not include

(c) an ordinary disease of life, and

(d) stress, other than an acute reaction to a traumatic event;

Section 6(1) states:

Where, in any industry within the scope of this Part, personal injury by accident

> ***arising out of and in the course of employment is caused to a worker, the <u>Board shall pay compensation</u> as provided by this Part out of the Accident Fund.***

Section 6(9) states:

> ***Where an accident caused personal injury to a worker and that injury is aggravated by some pre-existing physical condition inherent in the worker at the time of the accident, the worker shall be compensated for the full injurious result until such time as the worker, <u>in the opinion</u> of the Board, has <u>reached a plateau in medical recovery.</u>***

Section 17 states:

> ***Notwithstanding anything in this Act, on any application for compensation the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant.***

Section 18(1) states:

> ***The Board <u>may</u> provide any worker entitled to compensation under this Part <u>with medical aid,</u> . . .***

Section 18(3) states:

> ***<u>All questions as to the necessity</u>, character, and sufficiency <u>of any medical aid</u> furnished or any vocational or occupational rehabilitation <u>shall be determined by the Board.</u>***

Section 32(1) states:

> ***Subject to section 56, the Board has exclusive jurisdiction to examine into, hear, and determine, all matters and questions arising under this Act and as to any matter or thing in respect of which any power, authority, or discretion, is conferred upon the Board; and the action or decision of the Board thereon is final and conclusive and is not open to question or review in any court, and no proceedings by or before the Board shall be restrained by injunction.***

Section 32(2) states:

> ***Without limiting the generality of subsection (1) the decisions and findings of the Board upon all questions of law and fact are final and conclusive, and in particular, the following shall be deemed to be questions of fact:***
>
> ***(a) whether any injury or death in respect of which compensation is claimed was caused by an accident within the meaning of this Part;***
>
> ***(b) the question whether any injury has arisen out of or in the course of an employment within the scope of this Part;***
>
> ***(c) the existence and degree of disability by reason of any injury;***

______***(e) the existence and degree of an impairment and whether it is the result of an accident;***

______***(f) the amount of loss of earning capacity by reason of any injury;***

(g) the amount of average earnings;

Section 56(1, 2, 17, 20, 23) states:

(1) The Board may reconsider any matter that has been dealt with by it or rescind, alter, or amend any decision or order previously made, or make any further or supplementary order.

(2) The decisions of the Board shall always be given upon the real merits and justice of the case, and it is not bound to follow strict legal precedent.

(17) The Appeal Tribunal shall be bound by and shall fully implement the policies of the Board and the Appeal Tribunal, its chairperson and members are prohibited from enacting or attempting to enact or implement policies with respect to anything within the scope of this Part.

(20) Subject to subsection (26), the Appeal Tribunal has exclusive jurisdiction to hear and determine all matters and questions arising under this Part in respect of

(a) appeals under subsection (6);

(b) any matter referred to it by the Board.

(23) In hearing a matter under subsection (20), the Appeal Tribunal shall give the Board and all other parties who have a direct interest in the matter an opportunity to make representations, but shall not allow the presentation of new or additional evidence and it shall, pursuant to subsection (22), immediately refer a matter to the Board where there is new or additional evidence.

BOARD POLICY

38. Effective June 21, 2001, the Worker's Compensation Board adopted a policy to be used in

identifying claims as new and separate events. The Policy PoL04-08 states:

D. Recurrence Versus a New Accident

A claim will be classified as a recurrence when the return of disabling symptoms occurs relatively spontaneously as a predictable medical consequence of the original injury on the balance of probabilities.

A claim is accepted as a recurrence whenever the worker is receiving Temporary Earnings Loss benefits for the injury at the time of the recurrence, unless there is a significant intervening event.

A claim will be classified as a new and separate accident where the current disabling symptoms are caused by an intervening event(s), activity or exposure which, by itself, may have caused a new injury.

Definition:

1. "Recurrence" is a return of disabling conditions, supported by objective medical findings - which result in a current loss of earnings capacity - that can be reasonably related to an injury caused by a previous work-related accident. Recurrence of the condition must be medically compatible with the previous injury, and decisions to accept or deny recurrences must rely on medical evidence supporting this relationship.

39. **GROUNDS OF APPEAL:**

#1. That the Internal Reconsideration Officer erred in the determination that the Appellant's present disability is not related to the work related injuries. The disability and symptoms which arise from degenerative disc disease which is

supported by Dr. Barry Ling, Dr. Andrew Clark and Dr. Frank Burke and had its onset as a result of cumulative damage from the work related injuries.

40. This first ground goes directly to the question of determining whether the injury complained of:

(a) was caused by an accident; and,

(b) has arisen out of or in the course of an employment; and/or whether

(e) the existence and degree of an impairment is the result of an accident;

41. Pursuant to Section 32(2) of the ***Act***, each one of these separate determinations are deemed to be Questions of Fact; and, as set out in Section 32(1) under the heading "Jurisdiction", the Board has ***exclusive jurisdiction to: examine into, hear, determine all matters and questions arising under this Act . . . And the Decision thereon is final and conclusive and is not open to question or review.***

42. As the second Ground of Appeal also raises questions as to the: existence and degree of Disability 32(2)(c), the permanence of the Disability by reason of any injury 32(2)(d), the existence and degree of an impairment 32(2(e), and the amount of loss of earning capacity by reason of any injury this Ground of Appeal will be considered with the first Ground of Appeal insofar as these questions all fall within the Boards exclusive jurisdiction to rule upon as set out in Section 32(1).

43. **GROUND OF APPEAL**

#2. ***That the Internal Reconsideration Officer erred in the determination that the Appellant has reached a medical plateau therefore he can return to work. This***

> ***position is not supported by the current medical opinion on file as relating to his present disabled state.***

Section 6(9) states:

> ***Where an accident caused personal injury to a worker and that injury is aggravated by some pre-existing physical condition inherent in the worker at the time of the accident, the worker shall be compensated for the full injurious result until such time as the worker, in the opinion of the Board, has reached a plateau in medical recovery.***

44. At the outset, it is noted that the Worker claims that his "present disability is ... as a result of Cumulative Damage from work related injuries".

45. A review of the enabling provisions of the ***Act***, including the definition section, and Board Policy reveals that the *Act* does not speak in the same or similar terms as set out in this first Ground of Appeal. To the contrary, the *Act* stipulates that the Board shall pay compensation to a worker who suffers "personal injury by accident".

46. In other words, it appears that each work related accident is to be treated separately. Entitlement to compensation is to be assessed, and if awarded, paid to the Worker in such amounts and for such time as provided for in the ***Act***; but, taking into account the right of the Worker to make further claims, for example, should he suffer a new work-related injury or a recurrence of a previous work-related injury.

47. In addition, Section 6(9) speaks directly to a specific situation where a worker, with a predisposition to be affected to a more serious degree from the results of a work-related accident, to be compensated for his injuries notwithstanding his pre-existing condition inherent in the worker.

48. This Section provides for the termination of compensation for the "full injurious result" when, in the opinion of the Board, the Worker has reached a Plateau in "Medical Recovery".

49. The Board developed/and adopted a specific policy to assist it in the determination of whether a claim will be classified as a new and separate accident where "the current disabling symptoms are caused by an intervening event(s) activity or exposure which, by itself, may have caused a new injury. Or, where the passage of time points to the probability that a current condition cannot reasonably be considered the direct result of an old strain or sprain injury".

50. The *Act* is clear with respect to the extent to which the Appeal Tribunal is bound to follow and adhere to policies established by the Board.

Section 56(17) states:

> ***The Appeal Tribunal shall be bound by and shall fully implement the policies of the Board and the Appeal Tribunal, its chairperson and members are prohibited from enacting or attempting to enact or implement policies with respect to anything within the scope of this Part.***

51. Absent an error in law and/or any other error going to the jurisdiction of the Board, this Appeal Tribunal, in view of the full privative clause as set out in Section 32(1) of the *Act*, cannot intervene in the decision made by the Board on the questions raised in Grounds 1 and 2 in the Grounds of Appeal (i.e.: entitlement to compensation, whether the injury has arisen out of, or in the course of employment, the existence and degree of disability, or whether it is the result of an accident and whether the Worker has reached a plateau in medical recovery).

THE STANDARD OF REVIEW: QUESTIONS OF FACT

52. There is no disputing the fact that, at the crux of the case, the main issue of contention is the entitlement to compensation benefits.

53. This case involves the applicability of Section 32 (2)(a to e) of the *Act.* In particular this question involves a Question of Fact and the decision of the Board on a Question of Fact is final and conclusive and is not open to review in any Court.

54. This Appeal Tribunal has, on numerous occasions dealt with appeals from Workers Compensation Board decisions dealing with Questions of Fact. Drawing upon rulings from both the Supreme Court of Canada - ***Stein v. The Ship Kathy "K",*** (1976) 62 DLR 3rd 1 SCC, ***Johnston v. Murchison***, (1995), 127 Nfld & PEIR 1(PEISCAD) and ***Fraser v. WCB of PEI*** (AD) 0486, the Appeals Tribunal adopted and continues to follow the guiding principles in these cases. These are:

55. In ***Johnston v. Murchison*** *(1995), 127 Nfld. & P.E.I.R. 1 (P.E.I. S.C., A.D.)* at pages 8 and 9, the parameters of review on an Appeal are stated as follows:

I. That an appellate court should not interfere with the conclusions of fact reached by a trial judge except in the event of a clear error on the face of the reasons or conclusions of judgement;

II. The privileged position of the trial judge to assess evidence extends to the evidence of expert witnesses as well as ordinary witnesses and the appellate court should not reconsider the evidence of expert witnesses when the conclusions reached by the trial judge could reasonably be supported by the evidence of the expert witnesses;

III. The appellate court does not have jurisdiction to interfere with the trial judge's assessment of the evidence as a whole unless, again, in conducting the assessment of the evidence on a whole, the trial judge made an error clear on the face of the record or conclusions of the judgment appealed from;

IV. Where the credibility of witnesses is not in issue, the appellate court may review a trial judge's finding of fact to determine if the findings were based on a failure to consider relevant evidence or on a misapprehension of the evidence;

V. Findings of fact based on the credibility of witnesses are not to be disturbed unless it is shown the trial judge made some palpable and overriding error which affected his or her assessment of the facts;

VI. The trial judge's conclusion must be consistent with the evidence and that no evidence essential to the outcome of the case be overlooked or ignored;

VII. An appellate court should not interfere unless it is certain that its difference of opinion with the trial judge is as the result of an error. The appellate court must be able to clearly identify the error made by the trial judge or it should not interfere unless the trial judge's finding of fact is so unreasonable that nothing he or she could have gleaned from this privileged position could possibly lead to the conclusion reached.

56. These parameters, in fact, were a summation of the guidelines and/or principles set out by the Supreme Court of Canada in ***Lapointe* v. *Hopital Le Gardeur*** *(1992) 1 S.C.R. 351 (S.C.C.)*

57. In the ***Johnston*** case, the P.E.I. Appeals Division of the Supreme Court applied the law as stated by the Supreme Court of Canada in ***Toneguzzo-Novell v. Burnaby Hospital***, *(1994) 1 S.C.R. 114 (S.C.C.)* at page 121:

> ***It is now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it . . .*** *(Emphasis added)*

58. This panel therefore should not and cannot interfere with the decision of the Board on matters of fact unless there is evidence of palpable or overriding error on the part of the Board in its decision with respect to the issue(s) before it. In the absence of evidence that the Board made a manifest error, ignored conclusive or relevant evidence, mis-understood the evidence or has drawn erroneous conclusions from it, this panel can not either overturn the decision of the Board or substitute its view for that of the Board.

59. In the absence of an error going to the jurisdiction of the IRO, this panel has no authority to entertain the argument of the Worker on these Questions of Fact.

60. Having carefully reviewed the written decision of the IRO it is evident that he considered all of the documents in the file, the applicable provisions of the new *Act* in the context of the nature of the case; and; there is no doubt that he canvassed all of the issues necessary to form the basis of his decision to the effect that the Worker was not entitled to the compensation benefits he requested.

61. All of the above being questions of fact; and, upon there being no convincing evidence that the IRO committed any palpable or overriding error; and; in the absence of convincing evidence that the IRO had made a manifest error, ignored conclusive or relevant evidence or has misunderstood the evidence or drawn erroneous conclusions from it, this Tribunal cannot interfere with or reverse the decision in the absence of a palpable and/or an overriding error. In short, there is no evidence that his decision was unreasonable.

62. In addition, from the summary of the decision of the IRO, it is abundantly clear that he had ample evidence from which he could have reached the decision that he did.

63. In reaching his decision the IRO must, especially when the issue is one involving entitlement to compensation, keep in mind the simple question: Can the Worker's case reasonably be brought within the scope of the legislation?

64. Mr. Justice Mitchell, speaking for the Appeal's Division of the Supreme Court of this Province in ***MacLeod v. WCB*** 40 Nfld & PEI p. 138 PEICA at p. 143 held:

> ***Accordingly, the Workers' Compensation Act should be interpreted liberally so as to provide compensation for work-related injuries to as many as can reasonably be seen to fall within its purview. . . . A worker, such as the appellant, should therefore be given compensation benefits if his case can reasonably be brought within the scope of the legislation.***

65. The very instructive and helpful decision of the Appeals Court in this Province in 1994 in ***Fraser v. WCB of PEI*** A.D. 0486 states:

> ***The Appellant challenges the August 14, 1993 decision of the respondent denying him benefits under the Workers Compensation Act, RSPEI 1988, Cap. W-7 because it found that his capacity to earn had not been diminished by the injury he sustained.***

The appeal against this ruling must be dismissed because s. 32(1) (d) of the Workers' Compensation Act deems such a finding a question of fact, and that being the case, no right of appeal exists. Section 32 (2) provides for appeals respecting questions of law and jurisdiction, but not fact. According to subsection 32 (1), findings of fact are final and conclusive. No question of law or jurisdiction arises with respect to the finding in this case because the respondent had evidence before it from which it could reasonably have reached the conclusion it did. The fact that this Court might disagree with the Board's decision or that it might have reached a different one is really immaterial. The Legislature obviously wanted the Board to have the last word on such matters.

66. Having reviewed the materials and the Decision of the IRO there is no evidence of a palpable or overriding error because the IRO had evidence before him from which he could reasonably have reached the decision to uphold the Decision of the Case Worker, denying the Worker's request for a reassessment and/or adjustment to his benefit.

67. Accordingly, on the basis of the foregoing, the decision on the Question of Fact by the IRO is upheld; or to put it another way, cannot be overturned by this Tribunal which feels bound to apply the law as set out in the above noted cases.

THE IRO DECISION AND REVIEW OF MEDICAL EVIDENCE:

68. The summary of the case manager's decision, by the Internal Reconsideration Officer, states that the case manager dismissed the Worker's claim indicates because:

i. There was no objective medical evidence to support entitlement to compensation or medical aid (including a mechanical bed) for ongoing low back problems; and,
ii. That the Worker had recovered from soft tissue strains;

iii. That the Worker has returned to his symptomatic pre-existing condition; and,

iv. The Worker's ongoing problems are a natural progression of his underlying degenerative disc condition.

69. The Internal Reconsideration Officer identified the issues before him, as the Worker's dissatisfaction with the case manager's decision "to deny further wage loss and medical aid benefits", because the medical reports of the Worker's treating physician support his position that he is unable to work".

The Internal Reconsideration Officer next cited the following sections of the _Act_ dealing with:

- ***the statutory entitlement to compensation resulting from a work-related injury;***

- ***compensation to a Worker, whose injury is aggravated by a pre-existing condition inherent in the Worker, for the full injurious result of the accident until the Worker, _in the opinion of the Board_, has reached a _plateau_ in _medical recovery_***

- ***The Board's exclusive jurisdiction to determine all matters coming before it - with a broad privative clause (decision is final and conclusive and not open to question or review in any Court).***

- ***Questions as to whether: an injury was caused by an accident within the meaning of the _Act_, whether it was a work-related accident, the existence and the degree of disability and or its permanence, the existence and degree of an impairment and whether it resulted from a work-related accident and the amount of loss of earning capacity.***

70. At the Internal Reconsideration Officer hearing, counsel for the Worker introduced an **[personal information]** letter from Dr. Clark to Dr. Frank Burke as well as a letter from Dr. Barry Ling to the Worker's Solicitor. These had not been in the Worker's file; but, they were

accepted by the Internal Reconsideration Officer and now form part of the Worker's file.

71. The Worker, through his counsel, took issue with the decision of the case manager because, in his opinion, the decision "appeared to be based not on medical evidence contained in the file generally, but more specifically on the **[personal information]**, 2001 memorandum to the file by the Boards Medical Director, Dr. Barry Carruthers.

72. The Worker insisted that his "disability" has not resolved and that he has not yet reached a plateau in medical recovery. Support for this, argued the Worker, is found in the medical consult of Dr. Belyea, **[personal information]**, 2001 and Dr. Ling's of **[personal information]**, 2001.

73. The Worker questioned that, as these consults clearly showed that he had ongoing symptoms in both his lower back and neck which are aggravated by protracted sitting, bending, lifting, etc., how could the case manager conclude that the Worker had reached a plateau in his medical recovery.

74. The Worker claimed that his low back and neck problems were pre-existing conditions resulting from previous Workers Compensation Board claims in 1986, 1988, 1997 and 1988; all of which would have "contributed" to his present condition.

75. He added further, that he had ongoing treatment throughout these years on a continuous, consistent basis.

76. The Worker, through his counsel, submitted that his "disability" is the outcome of various strains throughout the years; and, recently he was being investigated for potential nerve entrapment.

77. The Worker, through his counsel, suggested that the degenerative disc disease was contributed to "by his workplace injuries", beginning in 1986 from which time Dr. Belyea

has had a continuing medical involvement in his care.

78. The Worker indicated that he gave a full and consistent effort with respect to the functional capacity evaluation/(FCE) and that he was dealing with his disability as best he could - and he indicated his desire to return to work he after he completes his medical and his disability has resolved. He also argued that there were inconsistencies in the FCE in that a job match as a "cashier" is not consistent with the evaluation.

79. The Worker noted the comments in Dr. J. DeMarsh's **[personal information]**, 1996 medical report that to the effect that the Worker "worked through his medical problems" that can be related back to his 1986 injury. He also noted that Dr. DeMarsh recognized and commented upon the Worker's determination to get back to work.

80. The Worker did confirm that he had suffered, in 1968 while in **[personal information]**, a cracked vertebrae in his neck area which would be a pre-existing condition; but, his problems with his neck started only after his 1986 workplace accident in this province.

81. The Worker stated that his other additional Workers Compensation Board claims typically relates to lifting.

82. The Worker also argued that the medical evidence in the file contradicted the case manager's decision that he had reached a medical plateau.

83. The Worker also claimed that he should be compensated for all medical related expenses, wage loss benefits and medical consult services for finding relief for his problem, including a hospital bed - as suggested by Dr. Ling.

84. Counsel for the Worker also stated that the Worker's issues are "broad based" but his "disability" is significant and ongoing and that he has not yet reached a plateau in medical recovery; and, if the file evidence is there, indicating that the Worker has reached a plateau,

then he would like to be directed to the specific evidence that states that fact.

85. The Worker also indicated that he was unclear as to the case manager's reasoning to the effect that his 1998 injury is a new Act case. He argued that since he has a pre-existing injury going back to 1986, his 1998 injury is an aggravation of the initial claim in 1986 and he should be reinstated as a recurrence under the Old Act.

86. The Worker stated that he wanted to return to work and that he would appreciate being treated fairly.

87. The employer's representative took the position that the Worker's ongoing neck and back problems were pre-existing conditions related to injuries with a former employer.

88. The Worker's 1986 Claim **[personal information]** it appears from his argument, is the injury to which his present low back pain directly relates. The other later injuries, he argues, all contribute to his present low back pain. The Internal Reconsideration Officer in addressing the Worker's arguments in his January 7, 2002 Decision states:

8.1 ***he feels the Workers Compensation Board should give consideration to having his claim with Case ID*** **[personal information]** ***considered as a recurrence of a prior claim*** **[personal information]** ***and his present condition is as a result of an accumulative effect of his work injuries,***

A brief history of the Worker's **[personal information]**, 1998 injury as summarized in the IRO's decision is as follows:

8.3 ***"He bent down to put*** **[personal information]*****" and stated this caused an injury to the anatomical area of "lower back" (The Worker) did not require time off from work for this incident initially.***

He had previously hurt his lower back at work with date of accident [personal information]***, 1997 and he was off work due to this accident from*** [personal information]***, 1997 through*** [personal information] ***1997 at which time he returned to work with his pre-injury employer.***

8.5 ***The Physician's Initial Report, Form No. 8, by Dr. R. Belyea, Chiropractor for initial date of treatment*** [personal information]***, 1998 provided a diagnosis of lumbosacral joint subluxation syndrome. The report stated: "The Worker's low back has been quite good since his last episode, recommended his physical abilities were consistent with continue to work". "The Worker's low back has been pretty well for him. He always has modicum of discomfort. This is a reinjury of a chronically dysfunctional low back." "Patient walks and moves normally - bilateral sacrospinal is hypertonicity - generalized tenderness at L5 - motion at L5 mildly restricted".***

8.6 [personal information] ***1998 - Dr. Belyea: "The Worker's improvement to date is slow and entirely typical. There's nothing unusual in this and no reason for concern with physical <u>abilities consistent with continue to work</u>."***

8.7 [personal information] ***1998 - Progress Report: "Generalized sensitivity of the sacrospinalis persist, but his pain is less." "Generalized soft tissue sensitivity to palpation." The Worker's pain is currently low to moderate grade intensity over both S-1 and the lumbosacral area generally with physical <u>abilities consistent with continue to work.</u>***

8.8 [personal information]***- Progress Report: "The Worker continues with low/moderate grade low back pain and right leg pain which waxes and wanes with his workload." Objective findings identified: "Generalized soft tissue sensitivity around L4-5 and right buttock" And clinical impression: "<u>The Worker is holding his own currently with continue to work."</u>***

8.9 [personal information]***, 1998 - A second Worker' Report of Accident, signed by the Worker who stated his condition developed over a period of time and that he was incurring a recurrence of an earlier work-related condition from a previous work accident dated*** [personal information]***, 1997 from which he injured his low back while lifting a*** [personal information]

8.11 [personal information] ***1998 - Dr. Frank Burke: provided certified medical leave from work for exacerbation of back pain.***

8.12 [personal information]***, 1998 - Progress Report by Dr. Belyea: The Worker has been required to work*** [personal information] ***t several times of late . . . The Worker cannot work in this condition. The Worker is into an acute exacerbation of his low back dysfunction . . . . .***

8.14 [personal information]***, 1999 - Board Medical Adviser Assessment by Dr. Scott Cameron: stated, "Review of the X-rays provided to him by Dr. Belyea suggested there is probably some significant degenerative disc disease at the L4-L5 level, as well as the L5-S1 level with significant disc space narrowing. As well, there appears to be osteoarthritic changes involving the right sided L4-L5 facet joints.***

8.15 [personal information]***, 1999 - Consult by Dr. B. Ling: who saw the Worker with respect to his low back problems. Dr. Ling identified he assessed him several years ago for a similar problem and on examination this date he could not appreciate any evidence of nerve root tension and there was no neurological deficit. Dr. Ling stated: "He previously had a CT Scan several years ago which showed degenerative changes at the two bottom levels of his lumbosacralspine. I would rather expect that this an extension of this condition."***

8.16 [personal information] ***1999 - Consult by Dr. B. Ling: "I assessed the Worker today once again with respect to his degenerative lumbosacral disc problems."***

8.17 [personal information]***, 1999 - Consult by Dr. B. Ling: "The Worker still gets increased back and sciatic discomfort with any sustained sitting. As he is a*** [personal information]***, this is going to be a problem."***

8.18 [personal information]***, 1999 - X-ray with: confirmed degenerative lumbosacral disc disease.***

8.19 [personal information]***, 1999 - Consult by Dr. B. Ling: assessed the Worker with respect to his low back symptoms and approved his return to work effective*** [personal information] ***1999 to his pre-injury employment position*** [personal information] ***and stated: "He does claim to have good days when he is relatively asymptomatic followed by days where this is not the case."***

8.20 [personal information]***, 1999 - Island Physiotherapy Discharge Report: The Worker had low tolerance for his extension work through the lumbar spine with restricted sitting tolerance suggested additional reconditioning followed by return to work through an easeback format as his attempt to return to work on*** [personal information]***, 1999 resulted in increased symptoms to the point of going off work again effective*** [personal information] ***1999.***

8.22 [personal information]***, 1999 - Consult by Dr. D. Alexander (Professor of Orthopaedic Surgery, Dalhousie University) who recommended a myelogram and CT scan to see if a localized area of nerve root entrapment can be diagnosed as his X-rays only show degenerative changes;***

8.23 [personal information]***, 1999 - Internal Medical Assessment by Board Medical Adviser, Dr. Scott Cameron: "The Worker has ongoing and persistent symptoms which have essentially unchanged since*** [personal information] ***1993."***

8.24 [personal information]***, 2000 - CT of Lumbar Spine Report: no evidence of disc***

herniation** or **spinal stenosis** . . . **with no focal herniation.

8.25 [personal information] ***2000 - Dr. B. Ling: provided to Dr. Ruth Tank for formal acupuncture treatment ... The Worker had attended acupuncture treatment on several occasions however had not received any benefit and was discharged.***

8.26 [personal information]***, 2000 - Consult by Dr. D. Alexander: who on physical examination could not detect any neurological dysfunction in the lower extremities and reviewed the myelogram and CT Scan and stated: "Certainly there was no evidence of a compressive neuropathy". "I told the Worker that I did not feel surgical intervention would likely help him, and therefor I recommended against it. There was some degenerative disc disease at L4-L5 on the plain film X-rays.***

8.27 [personal information]***, 2000 - Consult by Dr. R. Belyea: provides a diagnosis stating: "Right LS-S1 joint dysfunction with L4, L5 disc degeneration." Dr. Belyea provided ongoing maintenance chiropractic treatment to assist with his symptoms in attempting to enhance his functioning capability and increase quality of life stating the Worker is unable to return to work at that time.***

8.28 [personal information]***, 2000 - Dr. Belyea: who is suggesting the Worker now as neck problems and suggested these symptoms are affecting his low back.***

8.29 [personal information]***, 2000 - Memorandum to file by Board Medical Advisor, Dr. Richard Wedge: clearly identified the Worker's neck symptoms were not part of his direct WCB injury and any neck treatment by Dr. Belyea is not the responsibility of his low back claim with this Board.***

8.32 [personal information]***, 2000 - Dr. B. Ling: who reviewed, the Worker***

has been off work from his [personal information] ***job for approximately*** [personal information] ***and any sustained standing, bending or sitting aggravates his low back and right-sided sciatic symptoms.***

8.35 [personal information]***, 2000 - FCE Doctor's Authorization Form: completed by Dr. Frank Burke. Dr. Burke responded to the standard form questions;***

1. "Is your patient at a medical plateau?" - "Yes"

8.36 [personal information]***, 2000 - A second FCE Doctor's Authorization Form: completed by Dr. Frank Burke. Dr. Burke responded to the standard form question:***

2. Is your patient at a medical plateau?" - "Yes"

8.38 [personal information]***, 2000 - Consult by Dr. B. Ling: 'The question has arisen as to whether or not the Worker should have an FCE . I don't find any medical contra-indication to having this."***

8.39 [personal information]***, 2000 - FCE Doctor's Authorization Form: completed by Dr. Barry Ling***

a. "Is your patient at a medical plateau? - "Yes".

b. Are there objective medical reasons why a FCE would not be advisable? - "No"

8.41 [personal information]***, 2000 - Consult by Dr. Frank Burke: who identified the Worker was unable to do a FEC test because he had a ventral abdominal hernia and due to his exacerbation of low back pain.***

8.43 [personal information]***, 2000 - Medical Comment to file by Board Medical Director, Dr. Barry Carruthers: who reviewed the Worker's file record relating his description of injury to the medical evidence on file***

and provided his conclusion by stating: "In the present medical information, the primary diagnosis at this point is degenarative arthritis of the lumbar spine. My medical opinion is this worker did not incur a disc herniation as a result of the injury which initiated this claim and his present symptomatology more reasonably represents the natural progression of a degenerative condition. It is my further medical opinion that this worker has recovered well from injuries accepted under this claim. He require no further treatment or investigation and certainly does not require further orthopaedic consultation. It is clear surgery has absolutely nothing to offer this worker."

8.44 [personal information]***, 2000 - Consult by Dr. B. Ling: The Worker inquired today about a hospital type of bed and Dr. Ling identified this would be of benefit with respect to his ongoing low back . . .***

8.45 [personal information]***, 2000 - FCE Summary Report by Valerie Handren, L.P.T. with Island Physiotherapy Inc.: . . . "This Functional Capacity Evaluation highlights an individual with medium physical range capabilities and decreased positional tolerances. . . . The Parameters of this FCE should be utilized to identify a safe return to work situation." The report identified a diagnosis of degenerative L4-L5 disc and L5 facet joint degeneration.***

8.48 [personal information]***, 2001 - Consult of Dr. B. Ling: " I assessed the Worker today with respect to his ongoing low back and sciatic symptoms. It is felt that his symptoms are on the basis of degenerative lumbosacral disc at the L4-L5 level which is not felt to be surgical. His symptoms persist despite previous physio, chiropractic treatments, medications, etc."***

8.49 [personal information]***, 2001 - Memorandum to File, . . . The Worker confirmed he had a previous work related neck injury in*** [personal

information] ***in 1966. . . .***

8.50 [personal information]***, 2001 - Memorandum to File by Gloria Laybolt, Case Manager:***

Dr. Carruthers identified the medical reports on file <u>did not show any "bony injury" which would allow the Board to consider degenerative disc disease under this claim.</u> The Worker did have a number of soft tissue claims <u>however Dr. Carruthers stated soft tissue injuries do not cause</u> degenerative disc disease. . . .

8.51 [personal information]***, 2001 - Medical Comment to File by Board Medical Director, Dr. B. Carruthers: who had reviewed in detail*** [personal information] ***claim and his other claims associated with his back, shoulder and neck.***

Dr. Carruthers outlined the facts and medical evidence supporting his opinion with regard to claim status and in his summary stated:
"The Worker's numerous claims have involved soft tissue, only. There is absolutely no evidence he incurred a disc herniation as a result of any the injuries nor is there any evidence that any initiating event is compatible with anything more than a temporary aggravation of a symptomatic pre-existing condition."...
"This Worker has recovered well from all of the injuries sustained under all of the claims and his present difficulty more relates to the natural progression of his underlying degenerative condition."

8.52 [personal information]***, 2001 - Match Exploration Report from Island Physiotherapy Inc.: which identified the Worker's FCE matched with the five sample job positions with accommodations recommended for each.***

8.52 [personal information]***, 2001 - Consult from Dr. B. Ling:***
"I have felt that the Worker's symptoms are on the basis of an aggravation of degenerative lumbosacral disc problem. His investigations including CT Scans have not shown any surgery correctable lesion here. Nevertheless, his symptoms persist and are associated with a significant functional restriction."

8.54 [personal information]***, 2001 - "Frame of Reference Regarding Degenerative Changes" . . .***
Dr. Carruther provided a cover reference page regarding degenerative disc disease and degenerative joint diseases also known as osteoarthritis. Stated the supporting medical literature in general supports these conditions are considered <u>an ordinary disease of life</u>. "<u>Current medical literature does not support that a worker's particular occupation has influence</u> on lumbar degeneration, cervical disc prolaps or the development of osteoarthritis of the joints.

89. The Internal Reconsideration Officer then noted:

8.56 ***Dr. Carruthers provides comment in regard to the Worker's most recent workplace injury claim of*** [personal information]***, 1998 for which he would [have] received ongoing compensation benefits from*** [personal information]***, 1998 through*** [personal information]***, 2001.***

Dr. Carruthers identified the question remains at what point following [personal information] ***1998 the Worker reasonably recovered from his injury. He noted reference is made to the*** [personal information]***, 1999 consult report by Dr. B. Ling who identified the Worker was cleared for return to work effective*** [personal information] ***1999, Dr. Ling stated: "<u>He does claim to have good days when he is relatively asymptomatic followed by days where this is not the case.</u> . . .***

He stated if the [personal information] ***1999 date was not accepted as being a reasonable recovery date then most certainly by*** [personal information]***, 2000 when the Worker was seen by Dr. Alexander, who had stated he could not detect any neurological dysfunction in the lower extremities and a review of the myelogram and CT Scan confirmed there was no evidence of compressive neuropathy Dr. Alexander comments the worker had degenerative disc disease and encouraged {him} to return to work again. Dr. Carruthers, in his opinion, states this gives good and clear evidence of the Worker's having reasonably recovered and can no longer be considered disabled from the*** [personal information]***, 2000 date forward, secondary to injuries sustained under this claim.***

90. The Internal Reconsideration Officers pointed out that:

Dr. Carruthers once again stated, it does not mean that the Worker does not have back paid or does he have difficulties performing his work duties. Dr. Carruthers identified he is simply indicating the Worker has reasonably recovered from the injuries and his present difficulty does not relate to the injury but relates to the underling degenerative condition and the <u>degenerative changes cannot be reasonable associated</u> with the <u>work events which have initiated any or all of his soft tissue</u> injury claims.

91. The Internal Reconsideration Officer then noted that:

Mr. Murphy's identified formal vocational rehabilitation initiatives are not considered for the Worker as he had been notified his claim will close effective [personal information]***, 2001 with no ongoing wage loss or medical aid services benefits as communicated by Gloria Laybolt.***

92. It is noted that counsel wrote to Dr. Ling asking for his opinion on whether or not the 1986, 1987 1997 and 1998 injuries "contributed to the Worker's" present disability. It is noted that in Dr. Ling's response he states:

8.60 ***. . . "I <u>think</u> that any back injury in the past contributes to the development of degenerative osteoarthritis and consequently is "a factor" in his current physical state and symptomatic state."***

<u>**Claim Summary for #**[personal information] **(Total of 17 Time Loss Days for Claim)**</u>

93. The Internal Reconsideration Officer noted from some of the earlier claims starting in 1986:

8.63 [personal information]***, 1986 - The Workers Report of Accident Form #6 by the Worker: who identified the date and hour of accident was*** [personal information]***, 1986 at 4:00 a.m. and described fully how the accident occurred by stating: "Going out in yard to check*** [personal information]***, slipped on ice." He identified his injury involved his hip, shoulder and neck.*** [personal information] ***reported his injury to his employer at 8:00 a.m. the same morning and sought initial medical attention with Dr. Belyea, Chiropractor on*** [personal information]***, 1986.***

8.65 [personal information] ***1986 -Doctor's First Report Form #8 by Dr. J. Belyea: stated "The Workers injury was to his right lumbosacral, sacroiliac area, to Rt. Shoulder girdle and <u>cervical spine</u>, patient was too sore and stiff to examine intensively today, area of most pain is <u>low back</u>."***

______***Dr. Belyea responded to the form question:***
(a) "is there any other condition affecting injury? If so, specify" - he stated "Previous history of low back and shoulder girdle pain".

8.66 [personal information]*, 1986 . . .*

(a) ***"Is there any permanent disability or deformity resulting from the accident?" - he stated: "Not expected."***

8.67 [personal information]*, **1987 - Consult by Dr. Belyea: stated the Worker's progress toward recovery was satisfactory for his low back . .***

8.69 [personal information]*, **1987 - "Low back is reasonably recovered"***

8.73 [personal information] ***1987 - Dr. B. Ling who stated the X-rays of his shoulder show degenerative changes superiorly and recommended physiotherapy.***

8.74 [personal information]*, **1987 - Dr. B. Ling: now makes an initial reference to the Worker's having symptoms to his <u>right cervical spine and lower trapezius</u> and ordered a cervical spine X-ray.***

8.75 [personal information]*, **1987 - Consult report by Deborah Gee, P.T. . . .***

- ***has had previous fracture in this region and noted his neck pain was radiating from the C6/C7 area.***

8.76 [personal information]*, **1987 - Report by Island Physiotherapy***
We will be continuing with moist heat and ultrasound in the are of C7 with the <u>previous</u> fracture in the <u>cervical spine</u> it appears that this segment may be a bit overworked and definitely irritated."

<u>Claim Summary for #</u>[personal information]**<u> (Case ID #</u>**[personal information]**<u>)</u> (Total of 1 Time Loss Days for Claim)**

8.81 ***"Bent down to pick up box on floor or*** [personal information]***";***

8.83 [personal information]***, 1988 - The Surgeon's First Report by Dr. R. Belyea: . . . "To lumbosacral joint, apparently a subluxation of L-5, no sciatic nerve involvement at this time."***

Dr. Belyea disclosed the Worker had completed the medical form questions:

1. ***Had claimant any previous physical defect?: <u>"Yes, L-5 disc degeneration."</u>***
2. ***Is there any other condition affecting injury? If so, specify: stated; <u>"previous history"</u>.***

8.87 ***The Workers file record identified the next treatment request to Dr. Belyea from*** [personal information]***, 1989 was on*** [personal information]***, 1990, over one year duration: stated:***
"This patient came in with <u>an episode of low</u> back pain <u>"which is normal for him</u>.

8.88 [personal information]***, 1990 - Doctor's Account by Dr. Belyea: stated: "This patient has a long standing chronic neck problem. His problem is a recurrent low back problem which is <u>aggravated</u> by <u>activity associated with his work</u>*** [personal information]***."***

8.89 ***The file record identifies Dr. Belyea billing for maintenance chiropractic treatment for the period of*** [personal information] ***1990 through*** [personal information] ***1990. Treatments were again requested some eight months later in*** [personal information]***, 1991 and again for the period of*** [personal information] ***1991 through*** [personal information] ***1992. Throughout these treatment periods, the Worker required no time loss from work.***

8.90 [personal information]***, 1993 - Consult Report from Dr. Belyea stated:***

"Both these conditions are aggravations of ongoing problems and the Worker already has a chronic problem with previous physical defects and condition affecting injury is lumbosacral joint disease".

8.92 [personal information] ***1996 - Assessment Report by Board Medical Consultant, Dr. John DeMarsh, who noted: "The Worker had quite a bit of stiffness in his neck although his range of motion is normal but the facet joints were quite stiff with <u>degenerative change in his C-spine,</u> especially on the left side.***

<u>Claim Summary for Case ID #</u>[personal information] **(Total of 85 Time Loss Days for Claim) for a work incident on** [personal information]**.**

8.95 ***. . . The Worker was lifting*** [personal information], ***not working right,*** [personal information], ***. . . The Worker hurt his lower back with the pain going down into left leg.***

8.98 [personal information]***, 1997 - QEH Emergency Department Report by Dr. L. MacDonald: . . . The discharge diagnosis was Discogenic back pain.***

8.99 [personal information]***, 1997 - Dr. B. Brandon identified the Worker had acute low back sprain with possible herniated lumbar disk.***

8.100 [personal information]***, 1997 - Dr. Belyea's First Report stated: "Lumbosacral joint subluxation with left sacrospinatis strain and sprain, <u>consistent with L-5 disc degeneration</u>." Dr. Belyea identifies the Worker had previous physical defects of "L-5 disc degeneration".***

8.101 [personal information]***, 1997 - Physician's First Report by Dr. Randy***

MacKinnon - "Discogentive low back pain", "previous history of back pain".

8.102 **[personal information]*, 1997 - Report by Dr. Belyea stated:***
"This is a severe strain injury to the lumbosacral joint particularly the left facet, recovery will be protracted."

8.103 **[personal information]*, 1997 - Consult by Dr. B. Ling:***
"I would rather suspect clinically that he has a central L4-5 disc. I am going to order a CT Scan.

8.105 **[personal information]*, 1997 - Report by Dr. R. Belyea: in disagreement with Dr. Ling's recommendation the Worker could return to work soon and suggested he continue with further treatment.***

8.106 **[personal information]*, 1997 - Dr. R. Belyea stated:***
"Currently the Worker's pain is diminishing considerably. He now has bilateral leg pain consistent with non-radicular origins (i.e. facet joint and soft tissue injury rather than sciatica."

8.107 **[personal information]*, 1997 - Report by Dr. Belyea stated:***
"The Worker reports today that his CT Scan is negative for any disc injury and that it only shows pre-existing disc degeneration.

8.108 **[personal information]*, 1997 - Consult by Dr. B. Ling:***
"His recent CT Scan did not show any new discrete disc bulge. However, there are some osteophytes and degenerative changes that are apparent on his CT Scan.

8.111 **[personal information]*, 1997 - Consult by Dr. B. Ling stated:***

"The Worker has improved considerably. He is going to start back to work on the first of the week on a full time bases."

8.112 **[personal information]*, 1997 - Consult by Dr. B. Ling - The Worker continues*** **[personal information]** ***and is having low back and right leg symptoms. Dr. Ling recommended that the Worker continue at full activities and it would be beneficial for him to be reinstated with chiropractic treatment for awhile.***

94. The Internal Reconsideration Officer then noted:

8.114 ***In summary, this claim file record for the Worker identified he was approved for time loss benefits for the period of*** **[personal information], *1997 through*** **[personal information]*, 1997. His claim closed with his return to work with his pre-injury employer on*** **[personal information]** ***1997. His medical aid service benefit was inactive on this claim from*** **[personal information] *1997.***

95. After a methodical and meticulous review of apparently more than one hundred (100) reports, memos, X-rays, CT Scans, Myelograms, opinions from numerous medical specialists including several physiotherapists, the Worker's several attending physicians, Workers Compensation Board Medical Advisors; and, after reviewing the previous claims (all of which were closed - i.e. Worker had returned to work) dating back to 1986, the Internal Reconsideration Officer upheld the decision of the Case Manager in her decision to close the Worker's file and deny him any further compensation benefits and/or medical aid. In doing so, he addressed the Worker's assertion that he is "unable to work".

96. At part 9.1(c) of his decision the Internal Reconsideration Officer stated:

9.1(c) ***In review, the Worker's time off from work for his claim became effective*** [personal information]***, 1998, and he has not returned to work with his pre-injury employer or any other employer from that date up to his internal reconsideration hearing of October 27, 2001. Throughout the Worker's claim duration he participated in extensive medical investigation which consisted of and not limited to examination by Dr. Frank Burke, family physician; Dr. R. Belyea, Chiropractor; Dr. B. Ling, Orthopaedic Surgeon; Dr. D.I. Alexander, Professor of Orthopediac surgery at Dalhousie University, Nova Scotia; Dr. Scott Cameron, Board Medical Advisory; Dr. Richard Wedge, Board Medical Advisor; Dr. Barry Carruthers, Board Medical Director; Valerie Handren, L.P.T. of Island Physiotherapy Inc.; Dr. A. Clark, Orthopaedic Surgeon, Moncton, N.B.; Dr. Ruth Pang, acupuncturist; and had diagnostic testing through X-ray, CT Scan, Myelogram; and treated with chiropractic treatment, physiotherapy treatment, in home self-care treatment program, acupuncture treatment, and medications.***

97. The Internal Reconsideration Officer then went on to point out and/or conclude:

- ***The Worker has had the full benefit of exhaustive medical review over an almost 3 year period***

- ***Approximately six months following his*** [personal information]***, 1998 injury, the Worker on*** [personal information]***, 1998 began his time loss from work. Through the next six months he was involved in medical review and treatment. He had a consult with Dr. B. Ling on*** [personal information]***, 1999 with respect to his low back symptoms and was <u>medically approved for return to work</u> effective*** [personal information]***<u>, 1999,</u> to his employment with his pre-injury employer. . . . I find the medical evidence supports Dr. Ling's statements and this***

evidence identifies <u>the Worker is now dealing with his underlying degenerative disease condition and not his work place soft tissue injury</u>. Medically it was recommended he return to work.

- ***The Worker had a follow up consult with Dr. D. Alexander who stated on physical examination that he could not detect any neurological deficit in the lower extremities and reviewed the myelogram and CT scan for him. Dr. Alexander stated, "Certainly there is no evidence of a compressive neuropathy. I told the Worker that I did not feel surgical intervention would likely help him and therefore I recommended against it. There was some degenerative disc disease at L4, L5 and L5 S1 on the plain film X-rays" He encouraged the Worker to try to return to work again . . . The Worker was involved with a degenerative disease condition and his <u>soft tissue injury</u> for which this claim was initially approved <u>was resolved</u>. Further, <u>it was medically recommended he return to work</u>.***

- ***The Functional Capacity Evaluation (FCE) summary report . . . on*** [personal information] ***and*** [personal information]***, 2000, identified . . . . The Worker at this time from*** [personal information]***, 1998 was approximately*** [personal information] ***time lost from work. It was recommended he could return to work.***

- ***On*** [personal information]***, 2001, Dale Murphy, Board Vocational Counsellor, received the job match exploration report he requested from Island Physiotherapy Inc. This report identified the Worker's FCE matched with five sample return to work positions with accommodations recommended for each. I find this is evidence the Worker was able to return to work.***

- ***The*** [personal information]***, 2001, consult from Dr. B. Ling states: " I have felt that the Worker's symptoms are on the basis of an aggravation of degenerative lumbosacral disc problem. His investigations including CT scans have not***

shown any surgical correctable lesion here. Nevertheless, his symptoms persist and are associated with a significant functional restriction. "I find Dr. Ling has clearly represented the Worker's medical status. The Worker is clearly involved with degenerative disc disease and degenerative joint diseases also known as osteoarthritis. It is generally expected that the Worker would have functional restriction with this condition. This is clearly stated by Dr. Ling. . . . Dr. Ling does not state that the Worker is "totally disabled" due to his condition, he does state he has functional restrictions. . . . I find this evidence does not suggest the Worker is unable to return to work.

- ***In summary, I find the collective supporting points identified herein successfully challenge the Workers contention that the reports of his treating physician on file support a position that he is unable to work due to his compensable injury.***

- ***I do acknowledge and have given less weight in my decision to the medical opinion of Dr. Frank Burke, from the effective date of the Worker's time loss period of*** [personal information], ***1998 has consistently provided his subjective opinion stating, "He is unable to work"; however his opinion has limited objective evidence or reasoning associated to support this opinion.***

- ***I also note both Dr. F. Burke and Dr. R. Belyea were in agreement and supported the Worker as being totally disabled and not capable of participating in a Functional Capacity Evaluation (FCE) assessment test. Yet, at that same time period, the Worker was medically cleared to participate in the FCE test by Dr. B. Ling. Upon completion of the 2 day FCE test, it proved inconsequential to the Worker's condition and identified his physical functional capability profile was of an individual with medium physical range capabilities. Further this assessment established parameters which could be utilized by the Worker to identify a safe return to work situation.***

- ***Further, I acknowledge both Dr. F. Burke and Dr. R. Belyea had from the onset of this claim and throughout the duration of this claim supported that ongoing chiropractic treatment was the treatment of choice to the Worker's resolve. Yet <u>I find limited evidence in their medical reports to the claim file record that this treatment was the resolve for the Worker's degenerative condition.</u>***

- ***John R. Diamond, lawyer for the Worker, issued a letter on*** [personal information]***, 2001, to Dr. B. Ling, who responded on*** [personal information]***, 2001 by stating, "In your correspondence you state you are trying to establish that the injuries in 1986, 1988, 1997 and 1998 have contributed to the Worker's present disability. I <u>think</u> that any back injury in the past contributes to the development of degenerative osteoarthritis and consequently is <u>a factor</u> in his current physical state and syptomatic state. <u>The Worker submits this report supports his present disability and degenerative condition is a result of his four work injuries</u>.***

- ***I find Dr. Ling statements are clearly consistent with the current medical literature on lumbar degeneration, cervical disc prolapse, or the development of osteoarthritis of the joints. <u>These conditions represent the affect of aging</u> on the human skeleton. These degenerative changes may occur prematurely in some individuals <u>but in general are considered an ordinary disease of life.</u>***

98. After an apparent review of medical literature, the Internal Reconsideration Officer stated:

- ***These conditions can be commonly acquired from a variety of life situations. In review, often what happens is that disability results from this natural aging process. At times, this process of degeneration can be influenced by environmental circumstances and activity. Work activities, leisure activities, genetic factors, diet, medical care, personal hygiene, personal relations,***

psychological and physiological make-up are all factors that may influence the pace of many kinds of natural degeneration.

- ***Work may be one of the range of variables influencing pace of the degeneration. Evidence must be established that the work activity brought about a disability that would have probably not otherwise have occurred, or that the work activity significantly advanced the development of a disability that would otherwise probably not have occurred until later. The current medical literature states degenerative changes of the spine and degenerative changes involving the spine can be considered ordinary diseases of life.***

- ***Related to Workers Compensation, these diseases <u>cannot</u> be considered <u>to be ordinary diseases of life if</u> the risk of contracting the condition through employment <u>can be shown to be greater than the risk associated with ordinary living experience</u>. If there is a preponderance of scientific evidence to support a conclusion that the nature of the work process or environment significantly increases the likelihood of it causing a particular disease or condition in that situation, then the disease or condition can be described as peculiar to that particular trade, work process, or occupation.***

99. The Internal Reconsideration Officer then concluded:

- ***I do not find a preponderance of scientific evidence or specific evidence in his claim file records to support a conclusion that the nature of his work process and environment as a*** [personal information] ***significantly increases the likelihood of causing him to have degenerative disc disease and degenerative joint disease, also known as osteoarthritis. The current medical literature does not support that the Worker's particular occupation has influence on lumbar degeneration or the development of osteoarthritis of the joints.***

- ***Further, a review of the diagnosis for <u>each</u> of the Worker's four claim file records, reviewed herein, identify diagnosis of <u>soft tissue injury</u> which have involved the anatomical areas of right lumbosacral, sacroiliac area, right shoulder girdle, cervical and lumbar spine.***

- ***Dr. Ling in his*** [personal information]***, 2001 letter provided a generalized statement with, "I think that . . ." is not defined as a conclusive statement on the source for the Worker's development of his degenerative conditions. Dr. Ling suggests the Worker's back injury would be <u>a factor</u> in his current physical state and symptomatic state, however, does <u>not indicate the Worker to be totally</u> disabled <u>as a result of same</u>.***

- ***In summary, I find the collective supporting points identified herein successfully challenge the Workers contention that this report by Dr. Ling supports a position that he is unable to work due to the accumulative effect of his four soft tissue compensable injuries and these injuries as being the cause for his degenerative condition.***

<u>**Plateau in Medical Recovery**</u>

- ***The Worker questioned how the case manager could conclude he had reached a plateau in his medical recovery . . . The Worker has stated the medical consults by Dr. Belyea dated*** [personal information] ***and*** [personal information]***, 2001, and Dr. B. Ling's consults of*** [personal information] ***and*** [personal information]***, 2001, identify he has ongoing symptoms in both his low back and neck and these symptoms are aggravated by any protracted sitting, bending, lifting, etc. The Worker submits this file evidence supports that his present disability has not resolved and that he has not reached a plateau in his recovery.***

100. In countering that argument, the Internal Reconsideration Officer stated:

"I find from the evidence in the claim summaries listed, the fact that the doctors stated the Worker has ongoing symptoms clearly does not in itself suggest that the Worker may not be at a medical plateau.

101. He then referred to the medical evidence in the file:

A FCE Doctor's Authorization Form dated [personal information], ***2000, and completed by Dr. F. Burke, who responded to the standard form question:***
"Is your patient at a medical plateau?", who responded "Yes".

On [personal information] ***2000 a second FCE Doctor's Authorization Form was completed by Dr. R. Burke, who responded to the standard form question:***

"Is your patient at a medical plateau?" who responded "Yes".

On [personal information]***, 2000, a third FCE Doctor's Authorization Form was completed by Dr. B. Ling who responded to the standard form question:***
"Is your patient at a medical plateau?" who responded "Yes".

102. Dealing with the basis upon which the case manager closed the Worker's case the Internal Reconsideration Officer stated:

The Worker suggested that the March 22, 2001 decision letter by the case manager appeared to be based <u>not on the medical evidence contained</u> in the file generally, but more specifically to the [personal information], ***2001 <u>memorandum</u> to file by Board Medical Director, Dr. Barry Carruthers.***

103. The Internal Reconsideration Officer then concluded:

> ***I find, from my summary reviews presented herein of this claim file record and the claim records of the Worker's other claims related to his issue in dispute, the case manager in her decision used the evidence before her generally.***

104. As indicated, there were in excess of one hundred medical consults and/or reports in the file - many of which the case manager referred to in addition to that of Dr. Carruthers' memo.

105. The Internal Reconsideration Officer concluded:

> ***I find the case manager was expeditious in her file reviews and presented a detailed review and presentation of the facts and evidence generally from the claim file records, and not singularly based on the review and opinion of Dr. B. Carruthers.***

106. This conclusion is well supported by the facts. The Worker's allegation on this matter is without merit.

107. The Internal Reconsideration Officer next dealt with the suggestion/claim that the case manager erred in concluding that the Worker's back and neck problems were pre-existing conditions.

108. He held, and there was a preponderance of medical evidence in the file to justify his finding that:

> ***I find, having reviewed the claim file record for the Worker's initial claim with the . . . date*** **[personal information]*, 1986, clearly identify him as***

having a <u>previous history</u> of neck and back problems <u>prior</u> to this injury.

<u>The summary for claim #</u> [personal information] ***<u>herein,</u> has a*** [personal information] ***1986 Doctors Report by Dr. R. Belyea who responded to the standard form question;***

"Is there any other condition affecting injury? If so, specify" - who responded: "Previous history of low back and shoulder girdle pain"; <u>hence I find a pre-existing condition.</u>

I also note from the [personal information]***, 1986, Employer's Report of Accident, form #7, the Worker had been working with this employer for a relatively short period of time of approximately*** [personal information].

The [personal information] ***1987 consult by Dr. B. Ling, who reviewed the X-rays he had ordered . . . showed degenerative changes superiorly. I find the Worker was already diagnosed as being involved with degenerative changes and had only been working with this employer for*** [personal information]***, <u>hence a pre-existing condition.</u>***

I will note that [personal information]***, 2001, Memorandum to File . . . it was identified a discussion occurred pertaining to the Worker's prior neck fracture while working in*** [personal information]. . . . ***it does provide evidence that the Worker had incurred a bone injury to his neck previously with his disclosure of having had a previous fracture in his neck region, hence, I find a <u>pre-existing condition.</u>***

<u>The Summary for Claim #</u>[personal information]

______***The*** [personal information]***, 1988 Surgeon's First Report, Form #8, by***

Dr. R. Belyea stated: "injuries received to lumbosacral joint, apparently a subluxation of L-5, no sciatic nerve involvement at this time." Dr. Belyea responded to the standard form questions:

1. ***"Had claimant had any previous physical defects? and responded "Yes, L-5 disc degeneration".***
2. ***"Is there any other condition affecting injury? If so, specify, "and stated, "Previous history."; hence, I <u>find a pre-existing condition.</u>***

______***The*** [personal information]***, 1990 Doctor's Account Form, by Dr. R. Belyea stated: "This patient has long-standing chronic neck problem (for which this claim is not made)." <u>hence</u>, I find a pre-existing condition.***

The [personal information]***, 1993 Consult Report by Dr. Belyea stated: "Both these conditions are aggravated by ongoing problems and the Worker already has a chronic problem with previous physical defects and condition affecting injury is lumbosacral joint disease." hence, <u>I find a pre-existing condition.</u>***

<u>The Summary for Claim with Case ID #</u>[personal information]**<u>:</u>**

______***The*** [personal information]***, 1997 Initial Doctor's Report by Dr. Belyea stated, "Lumbosacral joint subluxation with left sacrospinatis strain and sprain consistent with L-5 disc degeneration." Dr. Belyea stated the Worker had previous physical defects of: "L-5 disc degeneration"; hence, I find a <u>pre-existing condition.</u>***

The [personal information]***, 1997 consult by Dr. B. Ling assessed the Worker with respect to his low back injury and for whom he requested a***

CT scan. Dr. Ling stated; " His recent CT scan did <u>not show any new discreet disc bulge.</u> However, there <u>are some osteophytes and degenerative changes</u> that are apparent on his CT scan."; hence, I find a <u>pre-existing condition</u>.

109. The ultimate conclusion of the Internal Reconsideration Officer therefore was:

I find the evidence of the Worker's claim file records support he was involved with conditions not as a result of his work injuries.

<u>Previous Soft Tissue Injuries</u>

110. The Internal Reconsideration Officer found, and there was ample medical evidence to support this:

From my review of the claim file record for the Worker's **[personal information] 1986** ***injury, I note he had a short duration of time loss of a total of fifteen days from work due to his <u>soft tissue injury</u>, and for his*** **[personal information]** ***1988 <u>soft tissue injury</u> he had only missed one day from work.***

When the Worker filed his **[personal information]** ***1997 claim, it was eventually diagnosed as a <u>sprain</u> and <u>strain</u> type of injury. His <u>initial medical investigation disclosed he was involved</u> with <u>pre-existing disc degeneration as identified from his recent CT Scan.</u> The objective finding confirmed some osteophytes and degenerative changes. Hence, this evidence is contrary to the Worker's contention that it was as a result of the accumulative effect of all his injuries for claims in*** **[personal information]** ***1986,*** **[personal information]** ***1988,*** **[personal information]** ***1997, and*** **[personal information]** ***1998 which resulted in his present***

condition and disability.

The Worker clearly had pre-existing conditions and his <u>only recorded bony injury</u> from a work injury in [personal information] ***<u>in 1966</u> and <u>predating</u> his*** [personal information] ***<u>1986 injury</u>. The Worker's injuries in 1986 and 1988 were soft tissue strain and sprain injury with very little time lost from work as a result. When*** [personal information] ***was examined soon after <u>his 1997</u> injury, it was disclosed he had <u>pre-existing low back</u> degenerative condition which <u>I find was already inherent in him as a worker and prior to the 1997 workplace injury.</u>***

111. The Internal Reconsideration Officer therefore concluded:

I find in review of this claim and the Worker's other three related claims identified herein, the evidence of these file records clearly identifies that the Worker had incurred injury and was referenced to having <u>pre-existing neck and low back problems prior to his 1986 workplace injury.</u> Further, the Worker's first two claims with the Worker's Compensation Board of PEI wase diagnosed as soft tissue sprain and strain type of injury . . .

When the Worker was reviewed medically immediately following his 1997 injury he was diagnosed as having low back degenerative disc disease. Hence, I find the evidence of the Worker's claim file records support the standards identified in the current medical literature, and do not support that the Worker in his occupation or the Worker through his initial two soft tissue injuries in 1986 and 1988 were the cause of his diagnosed degenerative disc disease immediately following his 1977 workplace injury.

I find the evidence of the Worker's four claim file records support his degenerative disc disease and degenerative joint disease (osteoarthritis) are more reasonably considered ordinary diseases of life and his present condition and symptoms and resulting restrictions are a result from his natural again process. . . .

Medical Aid (Hospital Bed):

112. The Internal Reconsideration Officer held, and the evidence before him, clearly supports his finding to the effect that:

The Worker's present condition is as a result of his underlying degenerative disease which is not the result of his soft tissue injuries for which his claims had been approved by this Board. Hence, the Board is not responsible for the provision of a hospital bed to assist in his pain relief from this osteoarthritic degenerative disc disease.

This is not in any way inconsistent with Section 18(1) and (3) of the Act:

18.(1) ***The Board may provide any worker entitled to compensation under this Part with medical aid.***

18.(3) ***All questions as to the necessity, character, and sufficiency of any medical aid furnished or any vocational or occupational rehabilitation shall be determined by the Board.***

113. Applying the test of reasonableness referred to in the cases hereinbefore recited, having reviewed the substantial medical evidence that was before the Internal Reconsideration Officer, having reviewed the sections of the Act earlier referred to, the broad Section 32 privative clause, Board Policy, the statement of the issues

by the Internal Reconsideration Officer and his thorough analysis of these issues, the several arguments advanced by the Worker on these first two Grounds of Appeal and the detailed reasons for the Internal Reconsideration Officer's decision, this Tribunal finds, and it so holds that especially in light of the overwhelming medical evidence in the file which does not support either of these two Grounds of Appeal, the decision of the Internal Reconsideration Officer (and that of the case manager as well) was not only reasonable; but, it was the only rational conclusions that could be reached, based on the very extensive array of medical evidence from nearly every conceivable medical perspective available with respect to the Worker's medical problems.

GROUND #3

That the Internal Reconsideration Officer erred in the determination that there were no inconsistencies from Functional Capacity Evaluation and suggested job matching and disregarding significant limitations.

114. It is clear that there were some inconsistencies with the FCE matter. Firstly, while Dr. Burke had indicated that the worker had reached a plateau in medical recovery, he confirmed on **[personal information]**, 2000 the Worker was unable to complete the FCE. Six weeks later, on **[personal information]**, 2000, Dr. Burke changed his mind on that matter.

115. On the other hand, Dr. Ling on **[personal information]**, 2000 indicated with respect to the suggested FCE.
"there is no contra - indication currently for the FCE."

116. With respect to the FCE summary report, there is evidence of how the Worker perceives his limitations and/or abilities on the other hand and the objectively verified overall physical capabilities on the other.

117. The first paragraph of the **[personal information]**, 2002 Report states:

> ***"The client's perceived abilities were <u>inconsistent</u> with those objectively evaluated in the Functional Capacity Evaluation. . . . he profiles himself with abilities that fall below the sedentary level. The Functional Capacity Evaluation, on the other hand, profiles this client with medium physical capabilities overall.***

118. The Report recommended:

> ***This Functional Capacity Evaluation <u>highlights an individual with medium physical range capabilities and decreased positional tolerances.</u> These are specifically consistently related to presentation in the right lumbar spine and sciatica presentation in the right leg. While the latter is transient and can be relieved by position and rest, it also translates into decreased power in the right leg when present for a short period of time.***
>
> ***On the basis of this Functional Capacity Evaluation, I would recommend that the services of Vocational Counsellor may be of assistance for this client in his employment endeavours. The parameters of this Functional Capacity Evaluation should be utilized to <u>identify a safe return to work situation.</u>***

<u>Job Match:</u>

119. The Job Match Exploration Report dated **[personal information]**, 2001 identified five different job matches with specific accommodations identified for each job.

120. Counsel for the worker indicated that "specifically the Worker was objecting to the FCE tester opinion which matched his abilities with the job position of cashier

which he submits is inconsistent with the FCE finding".

121. A Review of the Job Match exploration Report does not reveal any apparent inconsistency. In the absence of further development on that argument it is not clear what the perceived inconsistency is. In any event, that report identifies the five following job matches: dispatcher (Public Works), Optical Lab Technician, Video Sales Clerk, Cashier, Sales Clerk (Carlton Cards). There were special accommodations attached to each position.

122. This matter involved a determination as to the existence and/or extent of the Worker's disability and is one that is deemed to be a question of fact - Section 32(2).

123. The Internal Reconsideration Officer had evidence before him from which he could reasonably conclude that the Worker was able to work - on the basis of that report alone. However, as indicated earlier, several of the other medical professionals came to the same conclusion.

124. This Ground of Appeal has little or no merit; accordingly, it cannot be upheld - it is therefore dismissed.

GROUND OF APPEAL #4

The Internal Reconsideration Officer erred in the determination that the matter is not one which should be adjudicated pursuant to the old legislation as the claim has its origin in 1985.

125. As noted earlier, there were three specific and separate claims opened, managed, and closed, all dealing with soft tissue injuries and/or strains/sprains in the years 1986, 1988 and 1997.

126. In each case the Worker was cleared to, and did in fact return to work. In the 1986 injury claim while there was a reference to a "previous history" of low back pain the Worker missed 15 days at work.

127. In 1988 the Worker missed one day and immediately returned to work. The medical report also noted a previous history of a back problem (disc - degeneration).

128. In 1997, the Worker reported an injury and was diagnosed with a strain and/or soft tissue injury. He returned to work in **[personal information]** of 1997. The Medical Report (Dr. Belyea) confirmed again the existence of a pre-existing injury.

129. Then in **[personal information]**, 1998 through to **[personal information]**, the Medical Reports indicated that the Worker's physical abilities were consistent with his continuing to work. In fact, up until that time (**[personal information]** 1998) he had not missed any time as a result of that last injury.

130. While Dr. Belyea on **[personal information]**, 1998 gave his opinion that the Worker was unable to work, Dr. Ling later confirmed on **[personal information]**, 1999 the Worker's ability to return to work. In **[personal information]** 2000, Dr. Alexander encouraged him to return to work.

131. In short, each of the four claims were treated as new and separate claims. The medical evidence does not support the theory, possibility or likelihood that any one of the latter claims is a recurrence of an earlier claim.

132. The Board was obliged to apply its policy on this matter of deciding if there was a recurrence.

133. Recurrence is defined as:

> ***"Recurrence" is a return of disabling conditions, supported by objective medical findings - which result in a current loss of earnings capacity - that can be reasonably related to an injury caused by a previous work-related accident. Recurrence of the condition must be medically compatible with the previous injury, and decisions to accept or deny recurrences must rely on medical evidence supporting this relationship.***

134. When the New Act came into force in 1995, the Worker did not have an active/open claim with the Board. Any "accident" at work after that date is required to be processed pursuant to the existing legislation at the date of the accident.

135. Should there be any doubt about this; then, it has been resolved in the decision of the Appeals Division of the Supreme Court of this Province in ***Lambe v. PEI Worker's Compensation Board*** at paragraph 29.

> ***The Appellant's claim is not one of those claims that would survive the repeal of the old Act and the coming into force of the new Act on January 1, 1995 because on this date the appellant did not have an entitlement to workers compensation except for the 18% partial disability pension awarded by IRO. Her entitlement to compensation was not a right she acquired before the old Act was repealed. Despite the fact she had been involved in previous accidents and as a result suffered previous injuries fro which she received compensation, at the time of the coming into force of the new Act, she had returned to full employment and was not entitled to workers compensation benefits other than the 18% permanent partial disability pension. She did not become entitled to receive additional benefits until the workplace accident on January 5, 1996 which resulted***

in a new claim for compensation. At this time the new <u>Act</u> was in force and any benefits to which she would be entitled as the result this accident would be payable under the legislation.

It is immaterial to the resolution of the issue in this appeal whether the injury the appellant suffered as the result of the accident on January 5, 1996 is a recurrence of the injury she suffered as a result of the accident in 1989. <u>If the injury is not a recurrence</u>, <u>there is no question</u>, that the <u>appellant's right to compensation would derive from the new Act</u>. Similarly, however, if the injury which caused her to have a loss of earning in 1996 is considered a recurrence of the injury resulting from the 1989 accident, her claim would also derive from the new <u>Act</u> because at that time it was only applicable legislation.

136. Whether or not there was an accident or recurrence in this case is a Question of Fact; and in the absence of palpable or an overriding error on the part of the Internal Reconsideration Officer, this Panel cannot overturn his decision.

137. If the determination, as to whether or not the <u>Old</u> or <u>New</u> Act applies in this case, is a Question of Law; then, applying the test set out in the *<u>Supreme Court of Canada</u>* in *<u>Pasiechnyk v. Sask. WCB</u>* case, the question to be asked is: Was the decision of the Internal Reconsideration Officer, in all of the circumstances patently unreasonable? To answer that question, consideration must be given to the Standard of Review applicable in this case.

<u>STANDARD OF REVIEW: QUESTIONS OF LAW</u>

138. In 1996 the Court of Appeal in this Province in considering the ***<u>Irving Oil Ltd. v. IRAC</u>***, 143 Nfld & PEIR 169 (PEISCAD) stated at page 172:

The Pezim case and the Shaw Cable Systems case both enunciate several factors which are relevant for consideration by the courts in determining the proper standard of review in each case. These factors include the following:

1. the nature of the statute conferring jurisdiction on the administrative tribunal;

2. the tribunal's role or function;

3. the presence of a privative clause;

4. whether there is a statutory right of appeal;

5. the expertise of the tribunal;

6. whether the question goes to the jurisdiction of the tribunal;

7. the role the tribunal plays in policy development.

139. The new ***Act*** contain a very broad privative clause.

140. The Board consists of a group of individuals who, along with their predecessors, have been managing the affairs relating to injured workers for several decades and in so doing developed certain expertise recognized by the Court. Accordingly, Tribunals and/or Boards operating with broad privative clauses have been given considerable latitude.

141. Evidence of this is found in Section 56(2):

(2) The decisions of the Board shall always be given upon the real merits and justice of the case, and it is not bound to follow strict legal precedent.

142. The Supreme Court of Canada in the case ***Pasiechnyk v. Saskatchewan WCB*** (1997), 2 SCR 890 at paragraph 16 indicated that for the decision of a Tribunal to be reviewed, it had to be shown that its decision was patently unreasonable:

It is I think possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of errors:
(1) If the question of law at issue is within the tribunal's jurisdiction it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review.
(2) If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

143. Therefor it is within the Board's jurisdiction to err provided that the Board's and/or the IRO's decision was not patently unreasonable.

144. In the ***Moreau-Berube v. New Brunswick Judicial Council***, 2002-02-07 SCC 11 the Supreme Court of Canada

______***This Court's jurisprudence has evolved to endorse a pragmatic and functional approach to determining the proper standard of review, which focuses on a critical question best expressed by Sopinka J. in Pasiechnyk v. Saskatchewan (Workers' Compensation Board), 1997 2 S.C.R. 890, at para. 18: Was the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?***

145. In ***Lambe v. P.E.I. Workers' Compensation Board***, 2002 CarswellPEI25 at paragraph 20 (PEISCAD) the Appeals Division of the Prince Edward Island Supreme Court stated:

> ***Applying the pragmatic and functional approach to determining a standard of review to the discretionary decision of the IRO and in this respect, having regard to the Board's relative expertise in matters of workers compensation, its central role in administering the legislation, the full privative clause in s-s. 32(1) of the old Act with respect to questions of fact and the provision of a statutory right of appeal on questions of law or jurisdiction, I am of the view the decision of the IRO should be reviewed on the standard of reasonableness. That is, unless it is demonstrated the IRO made a palpable and overriding error in concluding the appellant should be compensated under the provisions of the new Act, this court should not intervene.*** *(Emphasis added)*

146. Looking then at the decision of the IRO; he found that the new Act applied.

147. It is the opinion of the Tribunal that the Decision of the IRO was not patently unreasonable.

148. Accordingly, this last Ground of Appeal cannot be upheld.

149. The Worker's Case is therefore dismissed.

______ **Dated** this 19th day of May, 2004.

____
Allen J. MacPhee, Q.C.
Chair of the Appeal Tribunal

____
Don Cudmore
Tribunal Member

____
Neil MacFadyen
Tribunal Member

WORKERS' COMPENSATION BOARD
APPEAL TRIBUNAL

BETWEEN:

WORKER

APPELLANT

AND:

WORKERS' COMPENSATION BOARD
OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION #29