

**WORKERS' COMPENSATION BOARD
APPEAL TRIBUNAL**

BETWEEN:

**[personal information]
CASE I.D. #[personal information]**

PLAINTIFF

AND:

**WORKERS' COMPENSATION BOARD
OF PRINCE EDWARD ISLAND**

DEFENDANT

DECISION #41

[Personal information]

Plaintiff

John K. Mitchell

**Solicitor representing the
Workers' Compensation Board**

Place and Date of Hearing

**Best Western - MacLauchlans
Charlottetown, Prince Edward Island
October 17, 2005**

Date of Decision

February 7, 2006

FACTS

1. This is an appeal of Internal Reconsideration Decision IR-04-101, dated February 4, 2005, which upheld the entitlement officer's decisions dated September 20, 2004 and October 13, 2004, denying the Appellant's claim for a recurrence.
2. By way of background, the Appellant was injured on [personal information], 2003, while employed as [personal information] with [personal information]. The Appellant was working [personal information] when he slipped and fell [personal information] and injuring his ribs on his left side. The Appellant's claim for compensation benefits was accepted effective [personal information], 2003, as a result of his multiple left rib fracture injury.
3. The Appellant suffered from a prior chronic back problem which was noted in his family physician, Dr. M. McNeill's, progress report dated [personal information], 2003. It was also noted in correspondence dated [personal information], 2003, from Dr. Profitt who stated that the Appellant has suffered chronic spinal pain [personal information].
4. On [personal information], 2003, the worker saw Dr. McNeill, and then following the appointment, called the Entitlement Manager to advise he could not return to work due to a back injury. At this time, it was confirmed with the worker that the claim was approved for a left rib fracture and that the medical information on file did not indicate anything in regard to a back injury occurring on [personal information], 2003.
5. The Entitlement Officer contacted Dr. McNeill who confirmed that with regard to the worker's left rib fracture, he was able to return to work at this time. Dr. McNeill further advised that the worker did mention he had outstanding back problems for several years and he had hurt his back at work

a year ago but had not reported it. Dr. McNeill confirmed during this conversation that she did not have any record of back injury occurring for the worker and, specifically, not for back related injury related to the work place accident on [personal information], 2003. Dr. McNeill also noted in a consultation report to Dr. Profitt dated [personal information], 2003, “a lot of injuries to back over years. Recent rib fracture – fell [personal information] at work – fractured rib. Back hurt before and still hurts, wonders what can be done.”

6. The Appellant saw Dr. Profitt, orthopedic surgeon on [personal information], 2003. Dr. Profitt described the Appellant’s accident as having “slipped and fell [personal information]”. The Appellant was diagnosed with a fractured rib after a workplace accident on [personal information], 2003. He further stated “He has had chronic spinal pain [personal information]. When he was younger it seemed to be more in his low back but at this point in time it is more in his thoracic spine. X-rays show a spondylolysis, grade 1 spondylolisthesis at the L5-S1 level. The thoracic spine shows some mild scoliosis but no other abnormalities.”
7. A medical progress report from Dr. McNeill dated [personal information], 2004, approximately one year since the worker’s last visit noted under subjective complaints, “chronic pain in thoracic spine area ever since his fall [personal information] ’03 hurting back [personal information], had 3 fractured ribs”.
8. A Prince County Hospital Emergency Department report dated [personal information], 2004, stated that the Appellant was seen for pain under his right shoulder blade. The Appellant informed the doctor that the pain was due to his [personal information], 2003, injury and that since that time he had been having intermittent pain under his right shoulder blade. In a medical progress report dated [personal information], 2004, the Appellant again complained of back pain. The Appellant had returned to work on [personal information], 2003. The Emergency Department chart dated [personal information], 2004, stated the Appellant was seen for his “posterior lower scapula radiating around to anterior ribs”.
9. The Appellant filed for recurrence of the [personal information], 2003, injury on [personal information], 2004. The Appellant had confirmed on [personal information], 2004, that there was no new accident. The Appellant submitted

a Workers' Report of Injury (Form 6) stating back pain as relating to the original injury of [personal information], 2003.

10. A medical progress report from Dr. McNeill dated [personal information], 2004, stated subjective complaints were "pain in back and all over body, chest and neck, pain in arms and legs." Dr. McNeill advised that the client was working but finding it very hard to work.
11. The Entitlement Officer summarized the key components which weighed into her decision including:
 - i. Lack of continuity of care – one year no medical attention sought;
 - ii. Original injury was for a fracture to the left [personal information] rib;
 - iii. The Appellant's submission for recurrence of injuries was for the opposite side and different body part than originally approved;
 - iv. Memorandum to file regarding conversation with Dr. McNeill on [personal information], 2003, identifies that the Appellant's back injury was from prior work related injury that was never reported or treated;
 - v. X-ray demonstrates a fracture to the left [personal information] rib only; and
 - vi. Inconsistencies identified regarding anatomical area of the injury.
12. In correspondence dated November 16, 2004, [personal information] of [personal information], indicated that the Appellant has never notified her with respect to an incident in 2004.
13. In correspondence dated September 20, 2004, the Entitlement Officer informed the Appellant that this claim for recurrence of his [personal information] 2003 injury had been denied. The basis for that decision was the following:
 - i. The Appellant's original injury on [personal information], 2003, was for a fracture of the left [personal information] rib while his application for recurrence was for injury to the right scapular area, an entirely different anatomical area.
 - ii. Dr. McNeill's report for a visit dated [personal information], 2003, stated that the Appellant had pain in his back on the left side near his spine; however, the Appellant had a history of

back problems prior to the [personal information] 2003 injury;
and

iii. Dr. McNeill confirmed that the Appellant was able to return to work with respect to his left rib fracture and that the Appellant has had outstanding back problems for several years. Dr. McNeill had no record of the Appellant suffering a back injury a year ago or as a result of the [personal information], 2003, accident.

14. On November 5, 2004, the Appellant filed a Notice of Request for Internal Reconsideration based on submitting Dr. McNeill's clinical notes from [personal information], 2002, to [personal information] 2004. These notes identified medications taken by the Appellant as well as injury to his [personal information] rib and ongoing back pain. By correspondence dated October 13, 2004, the Entitlement Officer concluded that this new evidence did not change the September 2004 decision to deny his claim for recurrence.
15. The Appellant then sought additional evidence from his physiotherapist, Dr. McNeill and Dr. Profitt, his orthopedic specialist.
16. In correspondence from the Appellant's physiotherapist dated December 14, 2004, the physiotherapist noted as follows:

On [personal information], 2003, [personal information] had fell [personal information]. He has reported discomfort in his rib area on the right since that time. This past summer after [personal information] his discomfort increased. [Personal information] reports bilateral shoulder blade and lower back discomfort greater on the right with occasional right leg pain and occasional numbness in both arms.

17. In response to the Appellant's request that his physician write a more detailed letter regarding his back injury, Dr. McNeill sent correspondence to the Workers' Compensation Board dated December 29, 2004, stating as follows:

The first time he was in to see me with his back was [personal information], 2003, and he was having a lot of pain with his back and it seemed to have been going on for quite a while so I decided to send him for an opinion from the orthopedic surgeon about his back and to send him to physiotherapy. He saw Dr. Allen Profitt [personal information], 2003. At that time, he mentioned that there had been some chronic spinal pain [personal information], Dr. Profitt says. When he was younger it seemed to be in his lower

back but at this time it was more in his thoracic spine. Dr. Profitt decided to do a bone scan and booked a bone scan. The bone scan showed intense isotope activity over the left [personal information] ribs consistent with a simple fracture and a further spot more posterolaterally on the left [personal information] rib also quite suggestive of a fracture. So, the bone scans showed three fractured ribs, [personal information], although the x-ray only showed one at the [personal information]. This is not unusual. Bone scans will tend to pick up fractured ribs better than x-rays will.

18. Dr. McNeill indicated that the Appellant attended physiotherapy for his fractured rib as well as lumbar dysfunction. He had two sessions with the physiotherapist and one with the chiropractor. He returned to work at first gradually and then within a few months, he had to stop work again because of the back pain.
19. Dr. McNeill saw the Appellant for his back pain on [personal information], 2003; [personal information], 2004; and not again until [personal information], 2004. During this last visit, he indicated that he felt pain “all over his back” and that he could hardly walk. Dr. McNeill notes that at the time he was complaining of pain mainly on the right side of his back and under his shoulder blade. On [personal information], 2004, she noted that the Appellant had an obvious muscle spasm in his back. She also saw him again on [personal information], 2004, and he was doing somewhat better with fewer spasms.
20. A report from Dr. Profitt dated [personal information], 2004, stated the worker has chronic pain in his right thoracic spine area just inferior to the tip of the right scapula.

Clinically he appears healthy and fit. He has local tenderness in the rhomboids paraspinal musculature on the right side of the thoracic spine at about the T6-T7 level. Bone scan in the past essentially showed rib fractures on the left side.

[Personal information] has chronic soft tissue or myofascial pain after his fall at work. This is an unfortunate situation as he is fast approaching two years and we know these soft tissue injuries once two years is reached symptoms are static and do not improve or deteriorate with the further passage of time.

21. In correspondence dated December 31, 2004, the Manager of Intake and Entitlement reviewed the new material received on the Appellant’s claim

since the time of the Entitlements Officer's decision letter of September 20, 2004. The Manager of Intake and Entitlement upheld the September 2004 decision on the following basis:

No one factor is the deciding one in this decision, yet in weighing all the evidence on this claim, I have determined based on the difference in anatomical area from the original injury and current symptoms and based on the lengthy history of chronic pain in the spine, the decision letter of September 20, 2004 for recurrence continues to be the final entitlement decision on this claim.

As well, the information on your file does not support your chronic pain as resulting from the compensable injury under which this claim was accepted.

22. In a medical comment to file dated [personal information], 2005, medical advisor Dr. O'Brien reviewed the Appellant's file as well as the most recent documents and determined there was no new objective medical information contained in the letter from Dr. McNeill or from Dr. Profitt that had not already been considered in the decision letter dated September 20, 2004.
23. The Appellant filed a Notice of Appeal of the decisions dated September 20, 2004, and December 31, 2004, with the Workers' Compensation Appeal Tribunal. The hearing was held on October 17, 2005.

ISSUE

24. The issue in this appeal is whether or not the Appellant's back injury has arisen out of or in the course of employment.

THE LAW

25. The Workers Compensation Act ("the Act") clearly provides in section 32(2) that the question of whether an injury has arisen out of or in the course of employment is one of fact. When an appeal is based on a factual finding the appropriate standard of review involves determining whether there has been a palpable or overriding error made in determining of the facts. This is supported by the Supreme Court of Canada decision, *Stein v. "Kathy K." (The) ("Storm Point" (The))* (1976), 62 D.L.R. (3d) (S.C.C.) and has been adopted in other appeal tribunal decisions including [personal information],

Decision #6, PEIWCAT, August 23, 2000, where a tribunal stated, in referencing Board decisions:

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

26. The Policy POL 04-08 for recurrence provides that “a recurrence must be medically compatible with the previous work injury and decisions to accept or deny recurrences must rely on medical evidence supporting this relationship”.
27. The Appeal Tribunal by virtue of s. 56(17) is bound by this policy.
28. Section 17 of the Act also provides that the Worker is entitled to “the benefit of the doubt”. It 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.

ANALYSIS AND DECISION

29. In reviewing the medical evidence filed with the appeal, it is clear that the worker suffered injuries to his left ribs when he fell [personal information]. The issue before the Appeal Tribunal is whether the Appellant suffered back pain as well from this injury. It is not disputed by the Appellant that he has suffered with chronic back pain [personal information]; however, it must be noted that this chronic back pain was described as a lower back pain and not thoracic area type back pain. In review of the decisions being appealed from, it would appear that the difference in back pain was not specifically addressed by the Board although it is noted in reports from Dr. McNeill, Dr. Profitt and Emergency Department records. The Appellant confirmed that he did not suffer a new injury. The Tribunal finds that the Board should have further investigated the specifics of the back injury and that the Board erred by not

comparing the Appellant's pre-existing condition and the back injury sustained by the [personal information], 2003, accident.

30. In conclusion, after reviewing all of the evidence and listening to the arguments advanced at the hearing, the Tribunal determines that in considering section 17 of the *Workers Compensation Act*, and the details surrounding the accident itself, that the worker's appeal should be allowed and that there was enough inconsistent evidence as between the original injury and subsequent pain that the worker should have been afforded the benefit of the doubt in determining the "thoracic pain" was a recurrence from the [personal information] 2003 injury and not related to his chronic lower back pain. The Tribunal further finds that the back injury complained of from the accident is medically compatible with the previous work injury in adherence to POL 04-08.

Dated this 7th day of February, 2006.

Pamela J. Williams
Vice Chair of Workers Compensation Appeal Tribunal

Don Cudmore,
Employer Representative

Nancy Fitzgerald, Employee Representative

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