

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

[PERSONAL INFORMATION]
CASE ID #[PERSONAL INFORMATION]

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND

RESPONDENT

DECISION #233

Appellant	Worker, as represented by Maureen Peters, Worker Advisor
Respondent	Stephen Carpenter, Solicitor representing the Workers Compensation Board
Employer	Employer, as represented by Patricia McPhail, Employer Advisor
Place and Date of Hearing	August 16, 2016 Loyalist Lakeview Resort 195 Heather Moyse Drive, Summerside, Prince Edward Island
Date of Decision	February 9, 2017

1. This is an appeal arising from a decision of the Internal Reconsideration Officer (the "IRO") of the Workers Compensation Board (the "Board"), IR# [PERSONAL INFORMATION], dated April 20, 2015, which denied the Worker's reconsideration request that his claim for both temporary wage loss benefits and medical aid benefits be reopened effective October 6, 2013.

EVIDENCE

2. The Worker was employed as a [PERSONAL INFORMATION] with his Employer when on or about April 12, 2012, he felt a twinge in his low back and a sudden pulling sensation in his right groin as he was [PERSONAL information].
3. The Worker subsequently attended the Emergency Department of Prince County Hospital on April 16, 2012, reporting, in part, a sore lower back with radiating pain in the bilateral buttock. The Worker was advised that he should be off work for five days and to follow-up with his family doctor as needed.
4. On or about April 17, 2012, the Worker attended at his family physician, Dr. Julie Johnston, who first put the Worker off work until May 1, 2012, but which she subsequently extended to June 1, 2012.
5. The Worker filed a claim with the Board, which was accepted by the Board for temporary wage loss and medical aid benefits on April 24, 2012.
6. On May 4, 2012, the Worker attended physiotherapy, at which time the physiotherapist noted that the Worker had decreased range of motion in his lumbar spine, was tender on palpation of the bilateral lumbar spine muscles, had mild sciatic nerve irritation, and exhibited decreased core strength.
7. An x-ray of the Worker's lower spine was conducted on May 15, 2012, with Dr. Kimberley Hender, a radiologist, opining that the Worker's spine alignment and curvature were normal, but there appeared to be mild narrowing of the L3-4 and L4-5 discs as a result of degenerative disc disease. Dr. Hender opined that the remaining discs were normally maintained and that the Worker's facet joints were grossly normal given the Worker's age.
8. On May 15, 2012, Dr. Johnston opined that there had been no changes to the Worker and that the Worker was still unable to perform any type of work.

9. On May 15, 2012, the Worker again attended at physiotherapy, where it was again noted that the Worker displayed decreased range of motion in his lumbar spine and was tender on palpation.
10. On June 7, 2012, Dr. Johnston opined that the Worker could return to work on July 1, 2012, but that the Worker should lift no more than 20 pounds and there should be no repetitive bending.
11. On June 11, 2012, the Worker attended physiotherapy, where it was noted that the Worker displayed a full range of motion in his lumbar spine but that he was still tender to palpation and experienced pain with movement.
12. After the June 11, 2012 physiotherapy session, the Worker was assigned to a new physiotherapist for work conditioning and was initially assessed by the new physiotherapist on June 26, 2012, who opined that the Worker had decreased range of motion in his lumbar spine and decreased positional tolerance, core control, strength and endurance in his lumbar spine.
13. On September 17, 2012, the Worker was assessed by Dr. Johnston who opined that the Worker could safely perform some of his pre-injury job duties except that he should not lift more than 20 kilograms and there should be no repetitive bending.
14. The Worker commenced an ease-back work program with his Employer during the Fall of 2012. On September 25, 2012, Alida Love, an Occupational Therapist, opined that the Worker had not made any progress in his lifting abilities during the easeback, noting that the Worker, who was working as an extra employee on a [PERSONAL INFORMATION], had expressed fear about lifting anything too heavy.
15. The Worker underwent a Functional Capacity Evaluation with Valerie Handren, a physiotherapist, on October 23-24, 2016. Ms. Handren noted that the Worker reported that he had worked for his Employer for the last 13 years but had experienced back problems for approximately 20 years. The Worker described his job with his Employer as [PERSONAL INFORMATION]. Ms. Handren observed that the Worker displayed general stiffness in terms of movement and positional changes and that the Worker demonstrated restrictions through his thoracic spine for extension, side flexion, and rotation bilaterally. Ms. Handren recommended that the Worker's lifting capacity should be restricted to weights that could be safely handled with good body

mechanics. A Summary Report prepared by Ms. Handren indicates that Ms. Handren believed that the Worker had, as a maximum capability, the capability to tolerate “*medium*” weights as the Worker was able to achieve a maximum of 25 lbs floor to waist lifts, 25 lbs in waist to overhead lifts, and horizontal lift and carry of between 30 lbs and 35 lbs.

16. During the Functional Capacity Evaluation, the Worker was noted to have shortness of breath and fluctuating blood pressure and Ms. Handren suggested that the Worker receive medical assessment for same. The Worker was subsequently diagnosed with an irregular heart beat and his ease-back return to work ended in November of 2012.
17. At the Board’s request, the Worker was assessed on May 21, 2013 by Dr. Edwin Koshi, a physician specializing in physical medicine and rehabilitation, who prepared a Consultation Report.

Dr. Koshi first reviewed the Worker’s history, noting that the Worker worked at [PERSONAL INFORMATION] which the Worker believed was very hard on his back. The Worker indicated that approximately 3 years prior to the assessment, the Worker had “*pulled some muscles*” in his back, and was off work for approximately four months.

Dr. Koshi opined that the Worker was vague in identifying where he experienced back pain, with the Worker indicating that his pain changes daily, with pain in his upper back some days and in his lower back on other days, that the Worker described his pain as throbbing and evenly spread and that the Worker indicated he suffered pain flair-ups approximately 20 to 30 times per day. Dr. Koshi noted that the Worker indicated that he did not feel that he was able to return to his prior job, as the Worker believed he could not do the lifting required for the job.

After completing a physical examination of the Worker, Dr. Koshi opined that the Worker likely suffers from mechanical low back pain (likely muscular tendinous ligamentous) but that Dr. Koshi could not determine any anatomical diagnosis for same. Dr. Koshi opined that given the Worker’s prior history, the workplace incident of April of 2012 exacerbated (i.e temporarily worsened) a pre-existing condition. Dr. Koshi opined that the Worker had distorted beliefs about his condition, that the Worker was likely to experience pain flare-ups regardless as to whether he was working or not and that the majority of individuals with this pain return to their pre-injury jobs. Dr. Koshi opined that there were no medical restrictions for a return to work or for any amount of

lifting and that Dr. Koshi could see no reason why the Worker could not return to his job at this point in time.

Dr. Koshi opined that the Worker was not a candidate for spinal injections or surgery and that if he had any flare ups, the Worker should take Tylenol for short periods of time.

18. A representative of the Employer contacted the Board on June 17, 2013, to advise that the Employer had determined that it was not in a position to accommodate the Worker's lifting restriction of not more than 30 pounds and that the Worker's position had subsequently been back filled.
19. Dr. Steve O'Brien, the Board's Medical Advisor, subsequently reviewed Dr. Koshi's above-referenced report, summarizing that it appeared that the Worker had not sustained a permanent medical impairment as a result of the workplace injury and that the Worker could be considered as having returned to the baseline level that he was at pre-injury.
20. On September 3, 2013, a Board representative met with the Worker, advising that the Worker was medically cleared to go back to work and since there was no job for the Worker to return to, the Board was providing the Worker with four weeks of job search assistance with the Board's return-to-work coordinator.
21. On October 6, 2013, the Board terminated the Worker's temporary wage loss benefits after the four week period of job search assistance ended.
22. By letter to the Worker dated November 21, 2013, a Board representative explained that the Board had placed significant weight on Dr. Koshi's opinion that there were no medical restrictions on the Worker's return to work or capability to lift objects and that since it had been determined that the Worker had no work to return to, the Worker was provided with four additional weeks of temporary wage loss benefits in lieu of an ease-back to work as provided for under Board Policy 93.
23. The Worker subsequently requested that the Board reconsider its decision, submitting in part that the Functional Capacity Evaluation of October of 2012 had determined that the Worker had functional restrictions preventing his return to work, and that the results of the Functional Capacity Evaluation should be given greater weight than the report of Dr. Koshi as Dr. Koshi had not tested the Worker's lifting tolerances.

24. The Board IRO denied the Worker's request for reconsideration by IRO decision #[PERSONAL INFORMATION] dated May 21, 2014. The IRO opined that it was reasonable to conclude that the Worker's function had improved between the Functional Capacity Evaluation of October 2012 and Dr. Koshi's assessment of May of 2013 and that the IRO felt that the evidence established that the Worker had only sustained a temporary worsening of his pre-existing back injury such that the Worker had not suffered a permanent medical impairment. The IRO opined that since the Worker had no job to return to and did not have a permanent medical impairment, it was appropriate to provide the Worker with four weeks of wage loss benefits in lieu of an ease-back to work pursuant to Board Policy POL-93.
25. The Board subsequently provided its medical advisor with the results of an x-ray of the Worker taken December 16, 2013 and asked the medical advisor to compare same with the previous x-ray results of May 15, 2012. By Memorandum dated July 24, 2014, the Board's medical advisor, Dr. Steven O'Brien noted that the x-ray results of December 16, 2013 indicated a minor intervertebral disc spacing narrowing at L2-L3 and L5-S1 discs and that this was indicative of a little worsening of the Worker's degenerative disc disease, which Dr. O'Brien opined was not an uncommon change given the Worker's age and the 18 month span between the two x-rays.
26. Upon receipt of the Board's medical advisor's above-noted opinion, the Board reviewed same and indicated that it did not constitute new evidence and was merely a reformatting and reiteration of evidence in the Worker's file.
27. The Board subsequently received a letter from the Worker's Advisor dated October 8, 2014, enclosing an opinion letter of Dr. Allen Profitt, an orthopaedic surgeon. Dr. Profitt noted that he had assessed the Worker on January 15, 2014 and that the Worker exhibited some moderate mechanical findings, with poor movement of the lumbar sacral spine and restricted movement of the flexion, extension and lateral rotation as well as restricted side bending. Dr. Profitt noted that the x-rays indicated degenerative changes within the lumbar sacral spine and that a subsequent MRI of the Worker's lumbar sacral spine requested by Dr. Profitt showed no unusual abnormalities. Dr. Profitt opined that the Worker had chronic lumbar pain syndrome resulting from lower back strain at work. Dr. Profitt did not feel that the Worker would be able to return to any type of work that required prolonged sitting, standing or lifting and that he did not feel that the Worker would be able to return to the workforce, including his prior occupation of [PERSONAL INFORMATION], unless there

were significant improvements to the Worker's overall symptoms and an increase in the Worker's level of education.

28. The Board subsequently forwarded Dr. Profitt's October 8, 2014 letter to its medical advisor for comment. By letter dated November 14, 2014, Dr. O'Brien noted that there was a variance between Dr. Koshi's May 21, 2013 opinion letter and Dr. Profitt's October 8, 2014 letter, particularly with respect to the range of motion observed in the Worker's spine. Dr. O'Brien opined that this decrease in range of spinal motion would not be work related, as the Worker had not been in the workplace post-examination by Dr. Koshi and the examinations of Drs. Koshi and Profitt had occurred 12 months and 18 months post-injury.

Dr. O'Brien noted that the 2nd Edition of the American Medical Association's Guide to the Evaluation of Work Ability and Return to Work, indicated that for the vast majority of patients with back pain, there was no known pathology or change in anatomy to explain the pain, that most patients with these types of problems are capable of remaining or eventually returning to their work, that there was no science to support the need for activity restrictions and there was concern that limitations may in fact impede a patient's return to work and foster disability unnecessarily.

29. By letter dated December 18, 2014, the Board indicated that it did not believe that Dr. Profitt's October 8, 2014 letter constituted new evidence and did not change the Board's decision to close the Worker's claim for temporary wage loss benefits. The Worker subsequently requested that the Board reconsider its decision.
30. By IR decision # [PERSONAL INFORMATION], the IRO found that Dr. Profitt's October 8, 2014 letter constituted new evidence, but that this new evidence did not change the Board's decision to close the Worker's claim for temporary wage loss benefits. The IRO noted that while there was variance in that no movement restrictions were noted by Dr. Koshi one-year after the injury, there was movement restriction noted 18-month post injury by Dr. Profitt. There was no structural injury to the Worker's spine that would result in the progression of the Worker's injury, specifically noting that there were no significant changes noted in the MRI of the Worker performed at Dr. Profitt's request.

ISSUE

31. The issue in this appeal is whether the IRO was correct in deciding that the Worker was not eligible for a continuation of temporary wage loss benefits.

LAW, ANALYSIS AND DECISION

32. WCAT reviews the IRO's decision on a standard of correctness, and in doing so, is bound by the provisions of both the *Workers' Compensation Act* (hereinafter referred to as the "Act") and Board Policy. In applying the standard of correctness, WCAT undertakes its own analysis of the issue and then determines whether the IRO decided the issue correctly.
33. The Worker submits that he has functional restrictions resulting from his workplace injury, and that these restrictions are correctly noted in the Functional Capacity Evaluation of October 23-24, 2012, and Dr. Profitt's report of July 30, 2014. The Worker submits that these findings outweigh the May 21, 2013 opinion of Dr. Koshi. In the alternative, the Worker submits that the evidence equally supports that his continuing loss of earning capacity is due to the April 2012 workplace injury, and that WCAT should resolve the issue by applying Section 17 of the *Workers' Compensation Act*.
34. The Board submits that the evidence should be weighed using Board Policy POL-68, and that greater weight must be given to objective evidence and the evidence of specialists. The Board submits that only Dr. Profitt had related the Worker's condition post-October 6, 2013 to the original injury of April of 2012 and that the majority of the specialists who have provided opinions in this matter agree that the Worker is able to be employed. The Board submits that when properly weighed, the medical evidence supports a conclusion that the Worker's condition post-October 6, 2013 was not reasonably related to the workplace injury of April of 2012 and that the Worker is capable of being gainfully employed.
35. The Employer submitted that the Worker's condition post-October 6, 2013, was not a "*personal injury*" within the meaning of Board Policy POL-71. The Employer suggests that there is conflicting medical information in the Appeal Record and that Board Policy POL-68 should be applied by WCAT, suggesting that Dr. Koshi's area of expertise as a Physical Medicine and Rehabilitation Specialist would make him a more appropriate specialist for assessing the activity level of the Worker as compared to Dr. Profitt, and that Dr. Profitt's medical opinion does not contain any information about the Worker's back

pain history pre-April of 2012 which suggests that Dr. Koshi relied on more accurate information when providing his opinion.

36. There is some degree of variance between the Functional Capacity Evaluation and accompanying Summary Report prepared by Valerie Handren, the Consultation Report of Dr. Koshi, and the opinion letter of Dr. Profitt.

Valerie Handren noted, most clearly in her Summary Report to the Functional Capacity Evaluation, that in October of 2012, the Worker had “medium” weight lifting capability, setting out the Worker’s maximum weight capacity for various types of body movements. Ms. Handren opined that if the Worker’s job description was “heavy”, a safe job match would not exist.

Dr. Koshi opined that there were no medical restrictions based on risk for return to work at any level or for any amount of lifting.

Dr. Profitt opined that the Worker suffered from chronic lumbar pain syndrome and felt that the Worker would be unable to return to any type of work that required him to do prolonged sitting, standing or lifting.

37. The IRO decision of May 21, 2014 resolved the variance between the reports of Ms. Handren and Dr. Koshi by finding that since the report of Dr. Koshi was prepared seven months after the report of Ms. Handren, it was reasonable to conclude that the Worker’s function had improved after the assessment of Ms. Handren. Respectfully, WCAT does not draw the same conclusion, particularly in light of Dr. Profitt’s subsequent letter, and rather, believes the variance should be resolved by the application of Board Policy POL-68.
38. Board Policy POL-68 provides in part as follows:

“Where there is conflicting medical information on a claim, the Workers Compensation Board will analyze the information objectively, using the following criteria:

- *the expertise or degree of specialization of the health care provider giving the opinion;*
- *the relevance of the clinical expertise of the health care provided giving the opinion to the medical question being addressed;*
- *the accuracy of the information relied upon by the health care provider;*
- *objective versus subjective medical information;*
- *the relevance of any research referenced by the health care provider; and*

- *any issues of bias or objectivity.*"

39. In applying Board Policy POL-68, WCAT accepts Valerie Handren's finding that the Worker had up to "medium" weight lifting capability in October of 2012 over Dr. Koshi's opinion that the Worker has no medical restrictions to a return to work. While Ms. Handren may not have the same level of expertise or degree of specialization as either of Drs. Koshi and Profitt, WCAT believes that Ms. Handren relied upon more accurate information about the Worker than Dr. Koshi.
40. Ms. Handren bases her conclusion on detailed testing of the Worker's physical capabilities over two days, with Ms. Handren believing that the Worker provided maximum, consistent effort throughout the testing. While Dr. Koshi indicates in his Consultation Report that he performed various physical tests of the Worker, the Consultation Report does not indicate that the Worker's lifting capacity was tested by Dr. Koshi. Rather, Dr. Koshi's opinion that the Worker had no medical restrictions to a return to work appears to largely be based on his assessment that while the Worker suffered subjective mechanical low back pain, Dr. Koshi could not determine an anatomical diagnosis for same and the medical literature which Dr. Koshi had reviewed did not support the view that individuals with mechanical back pain will harm themselves if they return to work at any level.
41. Although WCAT believes that the Worker had only "medium" weight lifting capability in October of 2012, this fact is not determinative of entitlement to compensation, as it must also be shown that a loss of earning capacity was caused by a workplace accident.
42. The x-rays of the Worker's spine on May 15, 2012 and December 16, 2013, indicated mild narrowing of the Workers' L3-4 and L4-5 discs, such that Dr. Hender, a radiologist, opined that the Worker suffered from degenerative disc disease.
43. Regarding the causes of degenerative disc disease, the Board's medical advisor, Dr. Steven O'Brien, summarized the following in his July 24, 2014 letter:

"In Current Medical Diagnosis & Treatment, 2013, page 810, under Osteoarthritis (which is another name for degenerative disc disease), it states:

Osteoarthritis, the most common form of joint disease, is chiefly a disease of aging. Ninety percent of all people have radiographic features of osteoarthritis in weight-bearing joints by age 40. Symptomatic disease also increases with age ... This arthropathy is characterized by degeneration of cartilage and by hypertrophy of bone at the articular margins."

44. There is no evidence before the Board that the Worker suffered degenerative disc disease as a result of the workplace injury of April 12, 2012, and based on both the foregoing quote indicating that degenerative disc disease is chiefly a disease of aging, together with various statements in the Appeal Record that the Worker had suffered from back issues prior to the injury of April 12, 2012, WCAT finds on a balance of probabilities that the Worker suffered from degenerative disc disease prior to the April 12, 2012 injury; in other words, degenerative disc disease was a physical condition of the Worker which pre-existed the April 12, 2012 injury.
45. Subsection 6(9) of the *Workers' Compensation Act* provides as follows:

"6(9) 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."
46. WCAT finds that by at least the early Fall of 2013, if not months sooner, the Worker had reached a plateau in his medical recovery for the injury of April 12, 2012 and that the Worker's medium maximum weight lifting capacity was as a result of the Worker's degenerative disc disease and not as a result of injury. In particular, WCAT notes that the x-ray testing of the Worker does not disclose a physical injury resulting from the April 12, 2012 workplace incident, rather only degenerative disc disease, which as noted above, WCAT believes was a pre-existing condition.
47. Accordingly, for the foregoing reasons, the Tribunal finds that the IRO correctly determined that the Worker was not eligible for a continuation of temporary wage loss benefits post-October of 2013 and therefore this Tribunal dismisses the Worker's appeal.

48. We thank counsel for their materials and submissions.

Dated this 9th day of February, 2017.

John L. Ramsay, Q.C., Vice-Chair
Workers Compensation Appeal Tribunal

Concurred:

Fairely Yeo, Employer Representative

Gordon Huestis, Worker Representative