

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

**[PERSONAL INFORMATION]
CASE ID #[PERSONAL INFORMATION]**

APPELLANT

AND:

**WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND**

RESPONDENT

AND:

[PERSONAL INFORMATION]

**RESPONDENT
EMPLOYER**

DECISION #258

| | |
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| Appellant | Nicole McKenna, Worker Advisor, representing the Worker |
| Respondent | Stephen Carpenter, Solicitor representing the Workers Compensation Board |
| Respondent Employer | Patricia McPhail, Employer Advisor, representing the Employer |
| Place and Date of Hearing | June 27, 2017 Rodd Royalty Charlottetown 14 Capital Drive Charlottetown, Prince Edward Island |
| Date of Decision | November 10, 2017 |

1. This is an appeal of the decision of the Internal Reconsideration Officer (“IRO”) IR #[PERSONAL INFORMATION] dated October 15, 2015 which denied the Appellant's request that her claim be reopened as of June 2, 2015.

Facts

2. At the time of the accident on May 11, 2014 the Appellant was a permanent part time [PERSONAL INFORMATION] at [PERSONAL INFORMATION] in Charlottetown. In her Form 6, she described bending down in the [PERSONAL INFORMATION] to pick ice cubes off the floor and hitting her head on a low part of the ceiling. The Appellant also worked at [PERSONAL INFORMATION]. [Appeal Record Tab 6]
3. A Physician's Report dated May 17, 2014 from Dr. P. Corney indicated a diagnosis of concussion. Dr. Corney stated that the Appellant should remain off work for at least another week. [Appeal Record Tab 3]
4. A Physician's Report dated May 27, 2014 from Dr. David MacKenzie also provided a diagnosis of concussion. Dr. MacKenzie advised that the Appellant was unable to perform any kind of work for the next week. [Appeal Record Tab 5]
5. Further reports from Dr. MacKenzie of June 3 and June 12, 2014 advised that the Appellant was unable to perform any type of work. A June 20, 2014 report recommended the Appellant commence an ease back program which had her working half days doing computer work. A June 27, 2014 report recommended ease back and suggested the Appellant start back with kitchen work at four to five hours per day. [Appeal Record Tab 5]
6. A report dated July 9, 2014, from Dr. MacKenzie stated that the Appellant had been in a motor vehicle accident on July 1, 2014. She was diagnosed with a

concussion. Dr. MacKenzie indicated that the accident had set her back by a week but she would be ready for an ease back program as of July 14, 2014. [Appeal Record Tab 8]

7. On July 30, 2014, a second report from Dr. MacKenzie stated the Appellant was unable to perform any type of work. [Appeal Record Tab 8]
8. By letter dated August 5, 2014 the Appellant was advised that her claim was accepted effective May 12, 2014. As well as medical aid benefits, temporary wage loss (TWL) benefits were provided for intermittent periods between May 14, 2014 and July 29, 2014. TWL benefits were not provided for the days in which medical advice indicated the Appellant could engage in an ease back, due to the fact that the Appellant had not done so. [Appeal Record Tab 10]
9. The Appellant participated in physiotherapy and work conditioning in the summer and fall of 2014, but was found unable to return to work. [Appeal Record Tabs 12, 15-21, 23]
10. The Appellant also participated in chiropractic treatments which were reported to have produced some improvement but not enough for the Appellant to return to work. [Appeal Record Tabs 25, 31]
11. An Occupational Therapy Performance Profile of the Appellant dated December 20, 2014 showed the Appellant having significant difficulty in many areas, including concentration, headaches, low energy, communication and emotional function. [Appeal Record Tab 30]
12. In a June 2, 2015 letter, the Appellant was advised that her claim for both TWL and medical aid benefits was closed effective June 2, 2015. The letter noted that the Appellant had been cleared for an ease back on several occasions since the initial injury and had not commenced the ease back program.

13. The letter also noted that the Appellant's continuing symptoms were more reasonably related to other factors, including the July 1, 2014 motor vehicle accident, than to the compensable injury of May 11, 2014. [Appeal Record Tab 40]
14. A Request for Internal Reconsideration was filed June 1, 2015 by the Worker Advisor on the Appellant's behalf. The Request provided reasons why the Appellant's continuing symptoms were more reasonably attributable to the initial compensable injury of May 11, 2014 than to the later motor vehicle accident or any other factors. [Appeal Record Tab 42]
15. In a letter of October 15, 2015 the IRO denied the Appellant's request and upheld the June 2, 2015 decision of the Case Coordinator. [Appeal Record Tab 1]

Issue

16. Was the October 15, 2015 decision of the IRO to close the Appellant's claim for both temporary wage loss and medical aid benefits appropriate?

Appellant's Argument

17. The Appellant submitted that the IRO erred in finding that her continuing concussion symptoms were more reasonably related to the July 1, 2014 motor vehicle accident and other factors than to the initial compensable workplace injury of May 11, 2014.
18. The Appellant argued that the motor vehicle accident was only a minor accident in which the car carrying the Appellant, who was in the back seat, was rear ended. There was no vehicle damage and the Appellant did not need

to seek medical treatment. The July 30, 2014 report of Dr. MacKenzie stated that the motor vehicle accident was " . . . very minimal trauma but probably showed that she had not recovered from post-concussion symptoms." The Appellant submitted that it was for this reason that she was unable to return to work on an ease back basis prior to the motor vehicle accident.

19. On July 29, 2014, her physiotherapist, Tom Crowell, stated the following:

She reports that her symptoms had been slowly improving over the initial 1 month to 6 wk period follow[ing] her initial injury when she was involved in a minor relatively low impact car accident. She had no physical injuries other than the abrupt jolt that seemed to exacerbate her symptoms over a period of approximately a week. Those exacerbated symptoms have returned to baseline.

20. The Appellant submitted that the temporary effects on her condition of the July 1, 2014 accident had cleared soon after. Her persistent symptoms since that time were related to the original workplace injury of May 11, 2014, not the motor vehicle accident.

21. The Appellant argued that even if her recovery was extended because of the effects of the motor vehicle accident, she was still entitled to continued compensation benefits.

22. The Appellant quoted Terrence Ison, author of *Workers' Compensation in Canada*:

5.4.2. Subsequent causal factors. *Where a compensable disability is aggravated by a subsequent event such as negligent medical treatment, the resulting disability is compensable. Similarly, where a compensable disability is aggravated by some event in the ordinary course of life, or by the worker's attempts at rehabilitation through exercise or recreation, and the duration of the disability is thereby extended, compensation remains payable for the duration of the disability.*

23. The Appellant took issue with the May 22, 2015 opinion of Dr. Steven O'Brien, Board Medical Advisor. The Applicant suggested that the initial injury was more significant than described by Dr. O'Brien as it occurred while she was bending down to the floor, not while straightening up, so that she struck her head straight on, on a low part of the ceiling.
24. The Appellant argued that the opinion of Dr. O'Brien was predicated on a guideline and that in a case such as this, the Appellant should have recovered in three months. The Appellant submitted that a guideline should not be applied in a rote manner, without careful consideration of each case's circumstances.
25. The Appellant provided an article published on the Brain Injury Association of America website which discussed the recovery time frame guidelines in the following excerpt:

The recovery from a mild injury is not always quick. For mild brain injury, the issues are the same as moderate to severe brain injury. While there are general guidelines for recovery, there can be wide individual variations in the timeframe for recovery. It can take several weeks, or several months for symptoms to fully resolve.

26. The Appellant stated that she continued to experience the effects of the original concussion suffered at work on May 11, 2014. The medical reporting from her treating physiotherapist and occupational therapist showed that she had been making progress and was nearing a return to work, but the treatments ended when her compensation claim was closed.

Respondent Board's Argument

27. The Respondent Board did not dispute that the Appellant suffered a concussion while at work — a compensable workplace injury — on May 11, 2014.
28. The Respondent Board argued that Dr. MacKenzie believed that the Appellant was recovering from her workplace injury. It appeared that the Appellant was not following medical advice, as she did not attempt to return to work on any of the recommendations made by Dr. MacKenzie.
29. The Respondent Board submitted that the medical evidence confirmed that the Appellant's workplace injury symptoms were improving and that a return to work should have been commenced as the Appellant was medically cleared.
30. The Respondent Board noted that the motor vehicle accident that the Appellant was involved in on July 1, 2014, had been described as minor. The injury was however not assessed at that time, as the Appellant did not seek medical attention. There was no evidence as to the severity of the brain injury sustained by the Appellant. The Appellant did not obtain medical attention until eight days post-accident (when she saw Dr. MacKenzie on July 9, 2014).
31. The Respondent Board submitted that the delay in seeking medical attention by the Appellant made an accurate diagnosis of the impact of the injury from the motor vehicle very difficult.
32. On July 3, 2014, the Appellant advised her employer that she did not know when she would be returning to work as she was involved in a motor vehicle accident on July 1, 2014. [Appeal Record Tab 36]

33. The Respondent Board submitted that while the Appellant took the position that the motor vehicle accident was minor and had virtually no effect on her, the Appellant felt differently following the accident.
34. On July 9, 2014, Dr. MacKenzie noted that the Appellant was unable to work as the July 1, 2014 motor vehicle accident showed that she was not recovered from her concussion symptoms. Dr. MacKenzie had the opinion that she would be ready for an ease back program starting the week of July 14, 2014; however, the Appellant did not attempt to return to work as recommended by Dr. MacKenzie. She returned to see him July 30, 2014, and he noted at that time that she was unable to work.
35. Dr. MacKenzie felt that the Appellant was ready to return to work on August 20, 2014, starting with a couple of hours and planning a return to work on ease back in early September.
36. However, at the visits of August 31, 2014 and September 18, 2014, Dr. MacKenzie noted that the Appellant was unable to perform any type of work.
37. The Appellant underwent chiropractic and physiotherapy treatments after September 2014. The Appellant's physiotherapist cleared the Appellant for ease back on May 7, 2015.
38. The Respondent Board argued that there was no other medical opinion on file that addressed the issue of the cause of the Appellant's ongoing symptoms.
39. The Respondent Board also disputed the fact that Dr. MacKenzie only made mention of the impact of the motor vehicle accident in two of his initial Physician's reports, shortly after the motor vehicle accident. He noted that it set back the Appellant's return to work by one week (July 9, 2014) and that the

motor vehicle accident showed that she had not yet recovered from the post-concussion.

40. The Respondent Board argued that the findings of Dr. MacKenzie following the initial treatments of the Appellant were that by June 9, 2014 — approximately one month following the workplace injury — the Appellant should be starting to return to work.
41. The Respondent Board submitted that in the circumstances, it was reasonable to look at outside factors to determine if there were other factors impacting the Appellant's ability to return to work. In this case, the Respondent argued it was evident from the medical evidence that the Appellant deteriorated significantly following the motor vehicle accident.
42. The Respondent Board argued that while the Appellant reported that the motor vehicle accident was low impact and had no effect on her recovery, the review of the notes of the doctors and the medical practitioners that dealt with the Appellant following the motor vehicle accident disagreed with that assessment.
43. The Respondent Board submitted that Dr. Steve O'Brien was unequivocal in his analysis on the matter that "her reason for being off work since June 27, 2014, would be the motor vehicle accident that occurred July 1, 2014". Dr. O'Brien also believed that the type of injury suffered by the Appellant should be resolved within three months – this was supported with medical literature and research.
44. The Respondent Board submitted that other factors were obviously responsible for the significant discrepancy in the medically anticipated recovery period (3 months) and the actual recovery period for the Appellant.

Therefore, it was clear that the intervening motor vehicle accident was responsible for the Appellant's continuing symptoms.

45. The Respondent Board provided the Tribunal with Board Policy POL-68, which states:

7. When making claim-related decisions, the Workers Compensation Board will consider the medical information provided by health care providers, as outlined in Workers Compensation Board policy, POL-64, "Health Care Providers".

The Workers Compensation Board will review the medical information presented by the health care providers and consider the following:

- *whether the medical information can reasonably relate the injury or symptoms to a workplace accident;*
- *whether the workplace accident is of sufficient degree and duration to result in the reported symptoms or injury;*
- *whether non-work related factors contributed to the injury or symptoms, and if so, whether they are the dominant cause of the injury or symptoms;*
- *whether a need for time off work, related to the injury, is documented;*
- *whether the medical information is evidence-based and consistent with relevant medical literature and/or disability guidelines; and*
- *whether there are other determinations necessary to be able to make a decision.*

46. The Respondent Board suggested that based on the factors set out in Policy POL-68, and the medical opinion of Dr. O'Brien, it was appropriate for the case worker to find that the Appellant no longer had a loss of earnings related to her compensable work injury.

47. The Respondent Board provided decisions which recognized that an intervening event (such as a motor vehicle accident) would break the chain of causation between the worker's workplace injury and their loss of earnings.

[Respondent's Factum – Decision No. 614113, CarswellOnt 9836 (ON W.S.I.A.T.), para. 28 – Tab 3]

[Respondent's Factum – Decision No. 1126/01, CarswellOnt 9930 (ON W.S.I.A.T.) para. 50 – Tab 4]

48. The Respondent Board also provided the Tribunal with Section 5.4.2 of Terrence Ison's Workers' Compensation in Canada:

5.4.2 Subsequent causal factors. Where a compensable disability is aggravated by a subsequent event such as negligent medical treatment, the resulting disability is compensable. Similarly, where a compensable disability is aggravated by some event in the ordinary course of life, or by the worker's attempts at rehabilitation through exercise or recreation, and the duration of the disability is thereby extended, compensation remains payable for the duration of the disability.

Where, however, a worker deliberately elects to engage in risky conduct that he knows is likely to aggravate the disability, and it is thereby aggravated, compensation is not payable in respect of any extended period of disablement caused by such an aggravation. Similarly, where a worker sustains a separate disability from independent causes, such as non-compensable disease, compensation benefits are terminable when the worker has recovered from the compensable disability, though the non-compensable disability may still preclude a return to work.

49. The Respondent Board submitted that the motor vehicle accident injury sustained by the Appellant was similar to a disability suffered from an independent cause. It was not related to the workplace injury and was therefore not compensable.

Respondent Employer's Argument

50. The Respondent Employer supported the October 15, 2015 decision issued by the IRO.
51. The Respondent Employer submitted that the evidence before the motor vehicle accident ought to be given greater weight regarding the impact of the workplace accident on the Appellant's loss of earning capacity as compared to the impact of the motor vehicle accident on the Appellant's loss of earning capacity.
52. The Respondent Employer advised that prior to the motor vehicle accident, the Appellant had been cleared to return to work several times, both by her own family physician and by a doctor in Moncton.
53. The Respondent Employer also advised that the Appellant provided a note from Dr. MacKenzie of June 27, 2014 which indicated that she was cleared to return to work part time on 4-5 hour shifts.
54. The Respondent Employer argued that the evidence indicated that the Appellant was making good progress in her recovery and was on track to return to work before the motor vehicle accident on July 1, 2014.
55. The Respondent Employer also pointed out that the Physician's Report dated July 9, 2014, from Dr. MacKenzie's office indicated that, "Recheck concussion. July 1 suffered WAD from MVA which set her back a lot with headaches over last 2-3 days...".
56. Dr. MacKenzie also provided the opinion that the motor vehicle accident set the Appellant back a week. However, the Respondent Employer argued that this opinion was inconsistent with the above-notation where it indicated the

motor vehicle accident set the Appellant back with headaches over the last 2-3 days, which were occurring more than a week after the motor vehicle accident.

57. The Respondent Employer argued that the opinion that the motor vehicle accident only set the Appellant back a week ought to be given little weight as it was contradicted by other comments from the same visit.
58. The Respondent Employer stated that when the Appellant attended the workplace on July 3, 2014, she verbally indicated that, due to the car accident, she would be unable to return to work for an unknown period of time. A written and signed statement was then obtained.
59. Given that the Appellant had been progressing to the point of a recommended ease-back prior to the motor vehicle accident, and after the motor vehicle accident had a significant increase in symptoms, the Respondent Employer argued that the weight of evidence demonstrated that it was no longer the workplace injury which was the cause of the Appellant's loss of earning capacity.
60. The Respondent Employer stated that Dr. O'Brien's medical opinion supported this conclusion. In his opinion of May 22, 2015, Dr. O'Brien provided the opinion that, "...it is well-known that repeated head injuries are often more significant than the initial head injury, which in this case would be viewed as mild." Dr. O'Brien also referenced the ODG Treatment stating, "There is some evidence for greater vulnerability in individuals with multiple concussions."
61. Dr. O'Brien concluded his opinion by finding that the Appellant's symptoms would be related to factors other than the workplace injury that initiated this claim.

62. The Respondent Employer believed the opinion of Dr. O'Brien ought to be given greater weight. Section 7 of POL-68, "Weighing of Evidence" provides:

7. When making claim-related decisions, the Workers Compensation Board will consider the medical information provided by health care providers, as outlined in Workers Compensation board policy, POL-64, "Health Care Providers". The Workers Compensation Board will review the medical information presented by the health care providers and consider the following:

- whether the medical information can reasonably relate the injury or symptoms to a workplace accident;*
- whether the workplace accident is of sufficient degree and duration to result in the reported symptoms or injury;*
- whether non-work related factors contributed to the injury or symptoms and if so, whether they are the dominant cause of the injury or symptoms;*
- whether a need for time off work, related to the injury, is documented;*
- whether the medical information is evidence-based and consistent with relevant medical literature and/or disability guidelines; and*
- whether there are other determinations necessary to be able to make a decision.*

63. The Respondent Employer advised that Dr. O'Brien gave clear consideration to the non-work related factor (intervening motor vehicle accident) and cited evidence-based medical literature regarding vulnerability of patients with multiple concussions. As such, his findings ought to be given significant weight in determining whether the Appellant was still suffering a personal injury from the workplace accident.

64. The Respondent Employer argued that the effect of a second head injury during the period, for which she was still recovering from the workplace injury, though unfortunate, did not entitle the Appellant to continue on benefits until she was completely recovered.

65. The Respondent Employer submitted that there is no obligation to carry on benefits until the Appellant is completely symptom free if the preponderance of evidence prior to the motor vehicle accident indicated that the Appellant was improving and was cleared to start back to work.
66. The Respondent Employer argued that the motor vehicle accident was clearly a non-compensable intervening variable which was a significant cause of the Appellant's impairing condition.

Decision

67. The Board did not dispute that the Appellant suffered a concussion while at work on May 11, 2014. It was indicated that she should remain off work until late June 2014 at which time an ease back program was recommended.
68. It appears from the medical evidence that Dr. MacKenzie felt that the Appellant was recovering well from her injury which was stated in his reports from June 20 and 27, 2014, in which he recommended an ease back program.
69. The Appellant was cleared to work but did not go back to work and then on July 1, 2014, the Appellant was involved in a motor vehicle accident.
70. The evidence on the file indicated that the motor vehicle accident was not serious. The Appellant did not seek medical attention at that time.
71. On July 3, 2014, the Appellant advised her employer she did not know when she would be returning to work because she had been involved in a motor vehicle accident on July 1, 2014. The reason she gave for not returning to work was the motor vehicle accident. However, at the time, she had not been seen by Dr. MacKenzie because of any symptoms she had from the motor vehicle accident.

72. On review of the evidence, some of the medical evidence that supports the Appellant is as follows:

- Dr. MacKenzie stating in his July 30, 2014, report that the motor vehicle accident was, "...very minimal trauma but probably showed that she had not recovered from post-concussion symptoms."
- Physician's report Form 9 dated July 9, 2014, Dr. MacKenzie's office indicated that "Recheck concussion. July 1 suffered WAD from MVA which set her back a lot with headaches over last 2-3 days..."
- On July 9, July 30, August 31 and September 18, 2014, Dr. MacKenzie noted that the Appellant was unable to perform any type of work.
- The Appellant underwent chiropractic and physiotherapy treatments and neither of those medical practitioners felt that she was able to return to work.

73. On review of the evidence, some of the medical evidence that supports the Respondent is as follows:

- Dr. MacKenzie stated in his reports of June 20 and 27, 2014, that the Appellant was ready to start an ease back program at work.
- On July 9, 2014, Dr. MacKenzie still believed that the Appellant would be ready for an ease back program starting the week of July 14, 2014. Dr. MacKenzie also felt that the Appellant was ready to return to work on August 20, 2014 with an ease back.
- The Appellant herself stated on July 3, 2014 that the reason she was unable to work was the motor vehicle accident.
- Dr. Steve O'Brien's position was that the Appellant's reason for being off work since June 27, 2014, was the motor vehicle accident that occurred on July 1, 2014. He relied on medical research and literature regarding the three month time period in terms of the resolution of the injury.

74. In this instance, there is some conflicting medical evidence and the Tribunal must weigh the medical evidence as well as review Board Policy POL-68 "Weighing of Evidence". Section 7 of POL-68 states:

7. When making claim-related decisions, the Workers Compensation Board will consider the medical information provided by health care providers, as outlined in Workers Compensation Board policy, POL-64, "Health Care Providers".

The Workers Compensation Board will review the medical information presented by the health care providers and consider the following:

- whether the medical information can reasonably relate the injury or symptoms to a workplace accident;*
- whether the workplace accident is of sufficient degree and duration to result in the reported symptoms or injury;*
- whether non-work related factors contributed to the injury or symptoms, and if so, whether they are the dominant cause of the injury or symptoms;*
- whether a need for time off work, related to the injury, is documented;*
- whether the medical information is evidence-based and consistent with relevant medical literature and/or disability guidelines; and*
- whether there are other determinations necessary to be able to make a decision.*

75. Upon review of Section 7 of POL-68 "Weighing of Evidence", the Tribunal notes the following: The medical information of Dr. MacKenzie in his reports of June 20 and 27, 2014, indicated the Appellant could begin an ease back program at work. The Appellant indicated on July 3, 2014, that the reason she was not coming back to work was her motor vehicle accident.

76. The Appellant did not go see Dr. MacKenzie until about a week after her motor vehicle accident. The Appellant had been cleared for ease back before the motor vehicle accident.
77. The Appellant was approximately 13 months post-injury which is 10 months past the three month guideline for recovery of a concussion. The Appellant delayed seeking medical attention after the motor vehicle accident. The Appellant seemed to deteriorate after the motor vehicle accident.
78. Dr. O'Brien stated that the Appellant's reason for being off work since June 27th was the motor vehicle accident that occurred on July 1, 2014.
79. It appears to the Tribunal that the non-work related factors – the motor vehicle accident – contributed to the injury or symptoms and the Tribunal finds that the non-work related factors are the dominant cause of the injury or symptoms.
80. The Tribunal also reviewed 5.4.2 of Ison, and would agree that the motor vehicle accident sustained by the Appellant would be similar to a disability suffered from an independent cause. It would not be related to the workplace injury and, therefore, would not be compensable.
81. The Tribunal would also agree that the motor vehicle accident could not equate to an ordinary activity that could aggravate an injury and it would be a significant intervening factor and would break the chain of causation between the workplace injury and the loss of earnings.
82. The Tribunal suggests that based on the factors set out in POL-68 "Weighing of Evidence" and the medical opinion of Dr. O'Brien, it was appropriate for the case worker to find that the Appellant no longer had a loss of earnings related to her compensable work injury.

83. For all the reasons we have listed and applying POL-68 “Weighing of Evidence” and on the balance of probabilities, the Tribunal denies the appeal and finds that the October 15, 2015 decision of the IRO to close the Appellant's claim for both temporary wage loss and medical aid benefits was appropriate.

84. This Tribunal would like to thank the parties for their submissions.

Dated this 10th day of November, 2017.

P. Alanna Taylor, Chair
Workers Compensation Appeal Tribunal

Concurred:

Eugene (Stu) Lavers, Employer Representative

Gordon Huestis, Worker Representative