

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

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

APPELLANT

AND:

**WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND**

RESPONDENT

DECISION #329

Appellant	Maureen Peters, Worker Advisor
Respondent	Stephen Carpenter, Solicitor representing the Workers Compensation Board
Place and Date of Hearing Date	March 6, 2018 Rodd Royalty Charlottetown 14 Capital Drive Charlottetown, Prince Edward Island
Date of Decision	May 30, 2018

1. This appeal was heard on March 6, 2018 before the Workers Compensation Appeal Tribunal (“Tribunal”).
2. The worker brings this appeal from the decision of the Internal Reconsideration Officer (“IRO”) being IR #[PERSONAL INFORMATION] dated October 23, 2017, which denied the worker’s request for internal reconsideration. [Appeal Record, Tab 1]

FACTS

3. The Appellant, an employee at the [PERSONAL INFORMATION], suffered a workplace injury on March 7, 2016, hurting his lower back while lifting a resident out of a chair. [Appeal Record, Tab 5]
4. On March 14, 2016, the Appellant sought medical attention at the emergency room of the Queen Elizabeth Hospital. Dr. John Sampson diagnosed the Appellant with lumbar sprain. [Appeal Record, Tab 4]
5. On March 15, 2016, the Appellant submitted his Form 6 (Worker’s Report) to the Workers Compensation Board (the “Board”). [Appeal Record, Tab 5]
6. On March 16, 2016, the Board approved the Appellant’s claim for benefits. The accepted diagnosis was right lumbar strain. [Appeal Record, Tab 10]
7. On May 2, 2016, the Appellant commenced an ease back program. [Appeal Record, Tabs 15-16]
8. Between March 16, 2016 and May 18, 2016, the Appellant was seen by a physiotherapist, Tom Crowell. Mr. Crowell completed reports dated March 17, April 1, 15, May 4, 18 and 20, 2016. In his report of May 20, 2016, Mr. Crowell described the goal as being “*full RTW*” with the recommended work status being “*Ease Back*”. In his report of May 18, 2016, the physiotherapist had set out “*2-3 weeks and return to full duties at present rate of progress*” with the recommended work status being “*Ease Back*”. Prior to that, on April 15, 2016

and May 4, 2016, the Physiotherapist had also described a return to work time frame of 2-3 weeks. [Appeal Record, Tab 12]

9. On May 24, 2016, the Board informed the Appellant that his claim for benefits would close effective June 10, 2016. [Appeal Record, Tab 19]
10. On June 4, 2016, the Appellant's wife suffered a heart attack. Due to his wife's heart attack the Appellant was put on compassionate leave by his personal physician, Dr. Randy MacKinnon, until October 3, 2016. Because of this, the Appellant ended his ease back on June 6, 2016, a few days short of the scheduled termination date of June 10. [Appeal Record, Tab 26]
11. On June 14, 2016, the Board's Occupational Therapist completed an Ease Back Discharge Summary, stating that the Appellant had "*an increase in symptoms*" as his hours increased but "*good functional abilities*". [Appeal Record, Tab 20]
12. On July 7, 2016, the Appellant began attending chiropractic sessions with Dr. Vincent Adams. In a Report to the Board, dated July 7, 2016, Dr. Adams checked the box for "*Full Duties*", and noted the following: "*Decrease range of motion of sacroiliac, Localized swelling, Spasm in right quadratus lumborum*". [Appeal Record, Tab 21]
13. On September 6, 2016, Dr. Adams informed the Board that the Appellant should remain off work for an additional two weeks and then commence an Ease Back. [Appeal Record, Tab 22]
14. On October 20, 2016, the Appellant submitted to the Board new information in the form of an October 4, 2016 report from Dr. Adams and an October 6, 2016 note from Dr. Randy MacKinnon, both indicating that the Appellant remained unable to work. [Appeal Record, Tab 23]
15. On October 28, 2016, the Board informed the Appellant that its decision was unchanged. The Board rejected the October 4, 2016 report of Dr. Adams as

reiterating information already on file, while Dr. MacKinnon's October 6, 2016 report was determined to lack a "*new objective medical rationale for the time off besides for the work related back injury which is information already on file*" and, therefore, did not change the Board's prior decision to close the claim. [Appeal Record, Tab 24].

16. On November 13, 2016, Dr. MacKinnon wrote a letter to the Board indicating that the Appellant's injury had persisted following his ease back and that the Appellant had been seen by Dr. MacKinnon, as a result of his low back symptoms, on July 18, August 01, October 06, October 27 and November 08. Dr. MacKinnon also attached an October 27, 2016 lumbar x-ray that found no significant bone or joint abnormality. [Appeal Record, Tab 26]
17. On December 2, 2016, the Appellant submitted the first request for internal reconsideration. The Appellant attached a November 29, 2016 letter from Dr. Adams as new evidence. [Appeal Record, Tab 27]
18. On January 23, 2017, the Internal Reconsideration Officer (IRO) accepted the November 13, 2016 letter of Dr. MacKinnon and the accompanying lumbar x-ray as new evidence, but rejected the November 29, 2016 letter from Dr. Adams on the basis that it summarized information already on file. The case was returned to Workplace Services for reassessment. [Appeal Record, Tab 28]
19. On June 7, 2017, the Board informed the Appellant that the new evidence did not cause the Board to change its previous decision. [Appeal Record, Tab 29]
20. On August 31, 2017, the Appellant submitted his second request for reconsideration. [Appeal Record, Tab 30]
21. On October 23, 2017, the Board rejected the Appellant's second request for reconsideration. The IRO stated that the Appellant's claim was closed on June 10, 2016 after a successful discharge from physiotherapy and subsequent ease back. She states that the Appellant was "*put off work for personal reasons*" and

that “*the medical information submitted following his return to work clearance does not provide any objective medical findings to support his continued need to be off work is related to his compensable injury*”. She, therefore, determined that it was appropriate to close the Appellant's claim effective June 10, 2016. [Appeal Record, Tab 1]

22. The Appellant has appealed the October 23, 2017 decision of the IRO to this Tribunal by way of Notice of Appeal dated November 3, 2017. [Appeal Record, Tab 2].

ISSUE

23. Was the decision to close the Appellant's claim effective June 10, 2016 correct?

APPELLANT'S ARGUMENT

24. The Appellant has argued that the IRO's decision to close the Appellant's claim was not correct, since the medical evidence on file supports that the Appellant remains unable to work as a result of his initial workplace injury. [Appellant's Factum, paragraph 29]

25. The Appellant submits that, in her decision, the IRO gave preference to “*outdated evidence that did not reflect subsequent developments in the Worker's condition*” and that she pitted the evidence of the physiotherapist and the July 7th report of the chiropractor against the chiropractor's later report and that of the Appellant's personal physician, Dr. Randy MacKinnon. [Appellant's Factum, paragraphs 35-48]

26. The Appellant argues, as well, that that the medical evidence, here, favours his position or, at the very least, is of equal weight to the medical evidence advanced by the Board and that the Appellant is entitled to the statutory benefit of the doubt, under s. 17 of the Act. [Appellant's Factum, paragraphs 49 and 50]

RESPONDENT'S ARGUMENT

27. The Respondent submits that the decision to close the Appellant's claim, as of June 10, 2016, was correct and that the medical evidence received subsequently does not contain objective medical findings to support that the Appellant's continued need to be off work is related to his compensable injury. The Respondent claims that the Appellant's continued symptoms and inability to work are, in fact, more reasonably related to non-injury factors, including his age and his own subjective feelings, expectations and beliefs. [Respondent's Factum, paragraphs 11 and 34-37]
28. The Respondent submits that the Appellant's claim was closed "after a successful discharge from physiotherapy and subsequent ease back" and states that the physiotherapist determined that the Appellant "could return to full duties". [Respondent's Factum, paragraph 10]
29. The Respondent argues, as well, that medical information received, here, from the Appellant's physiotherapist and occupational therapist should be weighted more heavily than the medical evidence of the Appellant's physician, Dr. Randy MacKinnon, on the basis that a physiotherapist and occupational therapist have greater specialization than a physician in considering the impact of symptoms on functional employment requirements. [Respondent's Factum, paragraphs 30-33]

DECISION

30. In her decision, the IRO finds that it was appropriate for the Case Worker to close the Appellant's claim, effective June 10, 2016, since his "*symptoms were decreasing*" and "*the physiotherapist stated he could return to full duties*". [Appeal Record, Tab 1]
31. The Tribunal finds, however, that the physiotherapist did not clear the Appellant to return to full duties. The case worker's decision to close the claim, effective June 10, 2016 was made on May 24, 2016. The final physiotherapy

report, dated May 20, 2016, stated that the “goal” was a “return to work” and that the client was returning to work on an “5-6 hr ease back” with “*minor LBP [lower back pain] but progressing as per ease back schedule*”. The box checked for recommended work status was “Ease Back” not “Full Duties”. On the previous physiotherapy report, dated May 18, 2016, it had indicated that the Appellant was “*back to work on ease back mging well at 5 hrs some minor discomfort R lumbar region but quite manageable increasing tasks this week to more strenuous activity*”. On that report, the Physiotherapist indicated, under Time Frames, “*2-3 weeks and return to full duties at present rate of progress*”. The same prospective time frame had been stated, however, on the preceding two physiotherapy reports (April 25, 2016 and May 4, 2016) and were, evidently, not intended to be other than the physiotherapist's projection, based on the level of progress being made at that time. [Appeal Record, Tab 12]

32. Furthermore, in a Physician's Report (Form 8) completed by Dr. Randy MacKinnon on May 24, 2016 (the day the case worker made her decision to close the claim on June 10th), it was reported that the Appellant had suffered a “*flu-like illness over the wknd with flare of R lower back pain*”. While Dr. MacKinnon indicated that the Appellant could continue with the ease back, he did not check the box for “*able to remain at work at full duties*” and, in fact, reported that the Appellant's compensable condition had “*deteriorated*”. [Appeal Record, Tab 6]

33. In an Ease Back Progress Report, dated May 24, 2016, from the Appellant's Occupational Therapist, Cathy Callaghan, it is stated that the Appellant had “*increased to five hours last week and was doing more cares with light residents, pushing some people in wheelchairs as well*”. Her report states that the Appellant had reported to her that “*his low back was sore*”. On May 27, 2016, following contact with the Appellant on May 26, 2016, the Occupational Therapist states that the Appellant had been doing 6 hours that week but that he “*still has not done any heavier transfers but will be adding this in over the next two weeks*”. On June 2, 2016, the Occupational Therapist's report states

that the Appellant had indicated his “*low back is very sore*”, that he “*has not gotten into any work with the heavier residents*” and that he “*is concerned with the level of low back discomfort remaining and plans to have a follow up with family physician next week*”. On June 7, 2016, the Appellant saw Dr. MacKinnon, who reported that the Appellant had suffered a “*flare of LPB during ease back shift June 2*”. Dr. MacKinnon recommended chiropractic treatment and that the Appellant continue with the ease back but notes his condition had “*deteriorated*”. On the Form, Dr. MacKinnon leaves blank the box for “*able to remain at work at full duties*”, checking, instead, that the Appellant was “*ready for an easeback program*”. It is, thus, the Tribunal’s finding that the case worker’s decision to close the Appellant’s claim, effective June 10, 2016, was premature. The Appellant had not, as of May 24th, when the decision was made, or even as of June 10th, its effective date, been cleared to return to full work duties. [Appeal Record, Tabs 6 and 16]

34. Further, the Tribunal finds that the IRO erred in determining that the Appellant’s continued inability to work was not due to his workplace injury. In her decision, the IRO considers the medical evidence received by the Board subsequent to June 10, 2016 and at page 4, she states:

“In a chiropractor’s report dated July 7, 2016, DR. V. Adams noted some objective findings (decreased range of motion and decreased spasms) but stated the worker was able to work full duties.

On September 6, 2016 and October 25, 2016, a letter was received from Dr. Adams. He stated the worker was unable to work but did not provide any objective findings to support his statement.

In a conversation with the case worker on November 8, 2016, the worker stated he did not re-injure his back but that his back was still sore from his original injury. Dr. MacKinnon stated in his letter dated November 13, 2016 and Dr. Adams stated in his November 29, 2016 letter that the worker still had low back pain. While this may be true, he had been cleared for full duties by his physiotherapist and chiropractor”.

35. As set out previously herein, however, the physiotherapist did not clear the Appellant for full duties. Furthermore, while Dr. Adams’ report of July 7, 2016

did contain “objective findings”, those objective findings support that the Appellant was still experiencing symptoms. In Dr. Adams’ report of July 7th, he checks the “*Full Duties*” box but notes the following:

*“Decrease range of motion of sacroiliac
Localized swelling
Spasm in right quadratus lumborum”* [Appeal Record, Tab 21]

36. Moreover, Dr. Adams subsequently notified the Board that the Appellant’s condition had worsened. In a letter to the Board, dated November 29, 2016 (to which the IRO refers in her decision, although she had previously declined to admit it as new evidence), Dr. Adams writes:

“...I have previously sent two separate letters to Workers Compensation Board on [the Appellant’s] behalf, the first one on July 7, 2016, stating he could return to work on full duties. At that time, I decreased his treatments to every second week. Upon his next visit for treatment, however, [the Appellant] showed signs of much discomfort and excruciating pain in his lower-right back, which was restricting him from performing functional abilities, such as squatting, bending and twisting at the waist. After a number of treatments with no improvement, I sent a second letter on October 4, 2016 stating that these restricted abilities would very much interfere in his job as a Resident Care Worker and that due to these restrictions, I felt [the Appellant] would not be able to return to work at that time. The Appellant continues to experience severe back pain which prevents him from carrying out his duties at work. He needs to continue his treatments with me. I certainly feel he should be covered by Workers Compensation Board as his pain is an on-going problem directly caused by the initial work place injury from March 7, 2016”. [Appeal Record, Tab 27]

37. A further medical report was received from Dr. Randy MacKinnon, dated November 13, 2016. In it, Dr. MacKinnon states that, while the Appellant had to stop the ease back program on June 6, due to his wife’s heart attack and was placed on compassionate leave until October 03, this did not mean that his low back pain had “*resolved by the time he finished the ease back program June 06*”.

In fact, states Dr. MacKinnon, "*the right-sided low back pain has persisted since the compassionate leave began*". He indicates that the Appellant was followed in his office on "*July 18, Aug 01, October 06, October 27 and most recently Nov 08, 2016*" and that he "*continues to suffer from right low back pain*" which is "*directly related to the work place injury he sustained March 07*". [Appeal Record, Tab 26]

38. In the Tribunal's view, it was selective for the IRO to rely on Dr. Adams' July 7th report, while discounting his subsequent opinion, and that of Dr. MacKinnon, both of which indicated that the Appellant's symptoms were ongoing. There is no evidence, here, other than Dr. Adams' report of July 7, 2016, that indicates that the Appellant is able to return to work on full duties and even that report makes it clear that, on July 7th, the Appellant was still experiencing symptoms. By the time the IRO's decision was made, Dr. Adams had provided the Board with his opinion that the circumstances were no longer as he had stated on July 7th, and that, in fact, the situation had changed, as of the Appellant's very next appointment with him after July 7th, where the Appellant had shown signs of being in "*excruciating pain in his lower right back*". The IRO acknowledges, in her decision, that "*it may be true*" that the Appellant "*still had low back pain*". Nevertheless, she continues to rely on the earlier (July 7th) report of Dr. Adams, notwithstanding that there was evidence his opinion had changed, and on the physiotherapist's report, which, as discussed, had not cleared the Appellant to return to full work duties. The Tribunal agrees with the Appellant that, in doing so, the IRO "*gave preference to outdated evidence that did not reflect subsequent developments in the worker's condition*" and locked the Board into a "*static position*" regarding the Appellant's claim. [Appellant's Factum, paragraphs 40 and 47]

39. The Respondent has argued, here, as well, that medical information received from the physiotherapist and occupational therapist should be weighted heavier than the evidence of the Appellant's physician, Dr. MacKinnon. However, this is not a case of conflicting medical evidence but, rather, a case where the various

professionals, who treated or assessed the Appellant, provided their opinions in relation to the Appellant's condition at different times and for somewhat differing purposes. As was argued by the Appellant, "*even if Physiotherapist, Mr. Crowell, was correct in assessing the [Appellant's] improved status on May 20, 2016, this cannot negate the medical evidence that the [Appellant's] condition declined later*". Here, the Physiotherapist's final report is dated May 20, 2016 and the Occupational Therapist's final report, being an Ease Back Discharge Summary, is dated June 14, 2016. As previously discussed, the Physiotherapist does not clear the Appellant to return to work at full duties. Similarly, the Occupational Therapist comments that the Appellant had "*good functional abilities*" but also an "*increase in symptoms*" as his hours increased. She does not provide any details as to the nature of his increased symptoms, nor does she indicate what "*good functional abilities*" means in the context of a worker whose regular duties include the lifting of residents. Accordingly, we do not feel that either report is determinative, as to the Appellant's ability to return to work at full duties. Furthermore, they were both written at an earlier point in time from the subsequent (November 13, 2016) opinion of Dr. MacKinnon who unequivocally states that the Appellant's low back pain has persisted and is directly related to his March 7, 2016 workplace injury. Dr. MacKinnon's November 13, 2016 letter is also consistent with Dr. Adams' November 29, 2016 letter, where he gives a detailed explanation for why his assessment of the Appellant's condition and his opinion, as to the Appellant's ability to work, has changed from the earlier (July 7th) opinion he had provided to the Board. [Appellant's Factum, paragraph 47; Appeal Record, Tabs 12, 20, 26 and 27]

40. As to the Respondent's argument that the Appellant's continued symptoms and inability to work are more reasonably related to causes other than his workplace injury, the Tribunal finds that this is not supported by the evidence. The Respondent cites the following as potential causes of the Appellant's continued symptoms: a back injury "*many years ago*" mentioned in the report of Dr. J. Sampson, who saw the Appellant at the OEH on March 14, 2016; an

Occupational Therapy report on April 12, 2016 where the worker mentioned neck and shoulder pain being most problematic; stress caused by his wife's heart attack; the Appellant's age; and his subjective feelings, values and beliefs. As stated, however, there is no evidence supporting that any of these are causing the Appellant's ongoing symptoms. In the Tribunal's view, it is more probable that the Appellant's symptoms are due to the March 7, 2016 workplace injury, as has clearly been stated to be the case by both his physician, Dr. Randy MacKinnon and his chiropractor, Dr. Vincent Adams.

41. The Tribunal is, therefore, of the view that the evidence, here, supports the Appellant's position. At the very least, we find it to be of equal weight to that advanced by the Board, thereby entitling the Appellant to the statutory benefit of the doubt pursuant to s. 17 of the *Act*.
42. For the reasons given, the Tribunal finds that the decision to close the Appellant's claim, effective June 10, 2016, was not correct. The Appellant's appeal from the IRO's decision of October 23, 2017 is, therefore, allowed.
43. We thank counsel for their materials and submissions.

Dated this 30th day of May, 2018.

A handwritten signature in black ink that reads "Maureen Gregory". The signature is written in a cursive style with a large initial 'M'.

Maureen M. Gregory, O.C., Vice-Chairperson
Workers Compensation Appeal Tribunal

Concurred:

A handwritten signature in blue ink that reads "Don Cudmore". The signature is written in a cursive style with a large initial 'D'.

Don Cudmore, Employer Representative

A handwritten signature in blue ink that reads "Marlene Hunt". The signature is written in a cursive style with a large initial 'M'.

Marlene Hunt, Worker Representative