WORKERS' COMPENSATION BOARD
APPEAL TRIBUNAL

CASE I.D. [personal information]

BETWEEN:

WORKER

APPELLANT

AND:

WORKERS' COMPENSATION BOARD
OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION #45

Shawn Shea	**Worker Advisor, representing the Worker**
John K. Mitchell	**Solicitor representing the Workers' Compensation Board**
Place and Date of Hearing	**Best Western Charlottetown, Prince Edward Island October 26, 2005**
Date of Decision	**June 12, 2006**

BACKGROUND

In 1991, the Worker was working as a [personal information] in [personal information], PEI. He worked with [personal information].

In [personal information] 1991 the Worker was hurt on the job, but did not file a claim with the Workers Compensation Board (WCB) because he was told at that time by his boss that he was not covered under compensation.

The Worker had a low back injury and was put off work from [personal information] 1991 through to his return to work [personal information] of 1992.

During the period, he was off work. The Worker had one low back surgery by Dr. Ling at the L5-S1 site to relieve a disc condition caused by the [personal information] 1991 work accident.

It is common knowledge that he had a pre-existing condition with his low back at the L5-S1 site when he accepted a job with the employer in this case. He also confirms his surgery by Dr. Ling was successful and he was able to return to unrestricted [personal information] work and had unrestricted activities of daily living.

In 1996, the Worker [personal information] to start a new career [personal information]. He had a job title of "[personal information]". He got along well with this job and had no restrictions with the required physical demands of that work.

In [personal information] 1998, while still employed, the Worker had a workplace accident and injury. This resulted while he was [personal information].

He injured his low back at the L5-S1 site and he filed a claim with the [personal information].

He disclosed to them he had injured his low back previously in 1991 and had a surgery.

The [personal information] investigated his medical history and in May 1999, approved his compensation claim from his date of work accident in [personal information] 1998 and continued full benefits until their vocational program assisted him with a return to work initiative which closed [personal information] 2001.

During the period of compensation entitlement he had a second low back surgery in [personal information] 1999 at the L5-S1 site by Dr. [personal information]. He was assessed for an anatomical loss due to the injury and was awarded twenty percent impairment.

He was provided the standard medical and vocational rehabilitation services by [personal information]. This included a period [personal information] from [personal information], 2000 to [personal information], 2000.

He was supported with a [personal information] month On-the-Job Training program which required [personal information], 2001.

He was to get training as a [personal information]. However, [personal information] and was in essence provided an ease back program for the period of [personal information] to [personal information] 2001 into the regular job duties of a "[personal information]". This was, by all accounts, rather physically demanding work.

He was successful in this return to work initiative and became a full time employee effective [personal information], 2001.

His employer was made aware of his low back problem at the time of his hire into the full time work position which actually involved [personal information] and "limited [personal information] duties".

Although the employer knew he was to have been trained into a permanent [personal information], his immediate supervisor [personal information] and continued to require the worker to perform the labour work job duties of [personal information] with limited [personal information] duties.

The Worker had been employed for [personal information] months in this position; and, he completed all the assigned work duties for his position ([personal information] 2001).

On [personal information], 2001, he had a workplace accident and injury. On the [personal information] while performing his labour work duties as a [personal information], he injured his low back while [personal information]. [Personal information]. [Personal information].

However, this work accident occurred due to the presence of [personal information]. The Worker grabbed [personal information] caused him to injure his low back at the L5-S1 site. The injury and pain was immediate. He knew instantly he hurt his low back again. The worker was [personal information] years old at the time of the accident.

Prior to this [personal information], 2001 work injury, it is clear that the Worker had low back injuries. He admits his low back at the L5-S1 disc was more venerable for new injury; and, he did have two acute flare ups during his ease back period from [personal information] through [personal information] 2001 while in his OJT with his PEI employer. However, the [personal information] paid the applicable compensation.

In his new job in PEI he worked, from [personal information] through [personal information] 2001, at his high risk [personal information] position without medication, medical intervention, or treatment for his low back L5-S1 disc.

After [personal information] 2001 he was fully functional, at a physical abilities level, to complete the requirements of both his new job and activities of daily living.

The Worker filed a claim with the WCB-PEI and disclosed his medical history on April 26, 2000. His claim was approved for compensation benefits, retroactive to his date of accident. He was provided benefits through to [personal information] 2003.

During this compensation period, WCB-PEI sought to have the compensation responsibility of the Worker's case shifted to [personal information]. The [personal information] investigated, reviewed the facts and addressed the matter with WCB-PEI.

In short, the [personal information] confirmed that as the Worker had returned to full time employment (in PEI) his [personal information] compensation file had been closed.

The [personal information] took the position that the worker did have a new work accident/injury on [personal information], 2001 and this new case would not be its responsibility.

During this compensation period with WCB-PEI, the Worker was provided with conservative medical treatment involving physiotherapy, medications and steroid injections ([personal information] 2003). None of these conservative regimes were resolving his pain symptoms resulting from his [personal information] 2001 work injury.

On [personal information], 2003 the Case Manager phoned him to advise that his case was closing and his next cheque would be his last biweekly temporary wage loss benefit payment.

The Case Manager stated that the Worker had plateaued in medical recovery to his pre-accident status of [personal information] 2001. In his decision letter dated [personal

information], 2003 he wrote:

> *as the acute phase of your disability had plateaued and you are now at your pre-accident state, I have made the decision to close your file temporary wage loss benefits and medical aid. It would appear that any continuous problems you have with your low back is related to your pre-existing condition.*

Thereafter, additional medical consult reports (which shall be referred to later) were provided to the Worker's file record and on [personal information], 2004 Shauneen Hood, Entitlement Officer, rendered another decision in the claim stating:

> *Your case had been closed as the acute phase of your disability had plateaued and* ***you are now at your pre-accident state*** *. . . Your file had been reviewed by the Workers Compensation Board Medical Director and it was the opinion of the Medical Director that the work incident that initiated this claim, at most, incurred* ***a temporary aggravation of your pre-existing condition*** *. . . On April 26, 2002 your claim was accepted for right sided sciatica with pre-existing back injury . . . your claim will not be reopened for benefits.*

Not pleased with the decision, the Worker requested a reconsideration hearing and the IRO, in her decision dated February 10, 2005, concluded by stating:

> *Based in the information on file, it is my conclusion that the worker's need for spinal surgery in 2004 was more likely a result of his workplace injury in 1998 and his subsequent "second" discectomy in 1999 rather than the incident that incurred on [personal information], 2001. Therefore, the Case Manager's decision of [personal information], 2003 that the worker had returned to his pre injury symptomatic state and that the acute phase of his*

disability has plateaued, was appropriate.

In summary, factors that influenced my decision included medical and investigative reports on the worker's file . . . Dr. Carruthers also noted in a report dated [personal information], 2002 that a CT scan taken following the [personal information], 2001 workplace incident showed findings in keeping with previous surgeries. Notebook entries [personal information] indicate the Worker had ongoing back problems throughout the Training on the Job Program.

The Worker refused to accept the Entitlement Manager's decision as being correct and or an accurate statement as to his condition:

(i) Your injury had plateaued!

(ii) You are now at your pre-accident state!

How, asks the Worker, could the Board determine on [personal information], 2003 to close his file (on the basis that he had reached a plateau in medical recovery) when his treating physician was in the process of arranging the steroid injection in an effort to relieve his dehabilitating pain. On [personal information], 2003 his physician Dr. Farmer reported:

The Worker was in to the pain clinic today for follow-up regarding his low back pain. He had previously been assessed and elected to defer any interventions and completed a trial of Elavil. His pain, unfortunately, hasn't changed significantly in the interim and he has come to the clinic today requesting a caudal epidural.

This is an indication, or should be, that at this point that the pain from the [personal information] 2001 injury is not letting up. Does this mean that, as intolerable and/or very discomforting as it may be, his condition has plateaued? Can nothing further can be done to improve his medical condition?

Two weeks after the Worker was told that he had reached a plateau in medical recovery, another treating physician, Dr. Ling says concludes:

> *He had a recent epidural steroid injection with Dr. Farmer without any sustained improvement. He persists in having significant symptoms that are causing a significant functional restriction.* ***I am not sure if this is going to improve and if he will be able to do any labourious type of activities.***

On [personal information], 2003 Dr. Farmer reported:

> *The Worker had had a previous caudal epidural which unfortunately did not give him any improvement in his pain despite being technically adequate. With this in mind he agreed to a lumbar epidural and this was performed uneventfully at about L2-3.*

How then, the worker argued, could he have plateaued in medical recovery? His treating physicians are still trying to alleviate his pain. Is another surgery an option? Not according to the Board if it maintains that he has plateaued.

At this point in time, the Board is maintaining its [personal information], 2003 position. **You are now at your pre-accident state.**

In other words, we take this to mean that he was as able to do the same physically demanding tasks that he was doing immediately before he grabbed [personal information].

Not being familiar with the protocol between the Provinces of [personal information] and PEI, this much, from the file, is clear: The [personal information] did not want to accept any responsibility as it had closed its file and terminated all benefits long before the [personal information], 2001 injury in PEI, during which time the Worker was engaged in full time,

physically demanding work - notwithstanding he was hired to do [personal information] tasks. The PEI Board was anxious to either: (i) successfully convince the [personal information] to somehow accept the financial responsibility (compensation or possibly medical aid) notwithstanding that the [personal information] had long before the accident, closed its file, or alternatively, (ii) limit its own financial involvement in this case ie., terminate all present benefits as of [personal information] 2003 and advise the Worker that any future compensation and/or treatments would be the responsibility of someone other than the PEI Board.

In fact, as early as May 21, 2003, the Entitlement Manager in a memo to the file wrote:

Claim Conclusion:

> *This writer attempted in April 2002 to return claim to [personal information] indicating that WCB PEI had satisfied due process under* ***new claim*** *of [personal information], 2001 concluding that pre-existing condition and injury the proximal event of discharge of [personal information], 2001 with [personal information] and the current need to seek medical attention layed with the initial claim with [personal information]. See documentation of April 5, 2002 response from [personal information] and in a letter concluding:*
>
> > *Although [the Worker] has pre existing condition, we definitely feel that the [personal information], 2001 incident should be adjudicated as a new claim by your Board. It would be considered as a new claim by our [personal information] if the worker was living and working in [personal information]. Supervisor, Myrt MacNevin of the Workers' Compensation Board of Prince Edward Island spoke with [personal information] concluding that the*

> *[personal information] claim was no longer active and therefore, Workers' Compensation Board of Prince Edward Island to further claim per legislation and policy?*

While PEI was not be prepared to accept this advice from the [personal information], it becomes painfully obvious that the Worker may not be merely slipping between the cracks - he may well be free-falling down the shaft.

In the [personal information], 2003 claim closure letter from the Case Manager, he noted in part:

> *On [*personal information*], 2001, **you claim** to have injured your back while picking up [personal information]. It is noted that you had a prior claim with the [personal information] and that as a result of that claim, you received extensive vocational rehabilitation assistance. In fact, it was as a result of that assistance that you secured employment with an employer on PEI. The period of your vocational rehabilitation came to an end in the [personal information] 2001 and you were with your accident employer [personal information]. During this time, it is to note that you had symptomatic back pain on an intermittent basis.*
>
> *The Workers' Compensation Act* 1988, [Sec. 6(9)] makes specific reference to the issue of pre-existing conditions. The presence of a pre-existing condition necessitates that any claim arising out of employment be allowed on an aggravation basis. Entitlement to benefits is only payable during that phase in which the aggravation of the pre-existing condition is acute. Following that, the claim is payable only until such time as the condition plateaus, reaching a state similar to that prior to the aggravation . . .

Upon my initial review of this claim file, I noted that the issue of the pre-existing condition

and the issue of the aggravation had not been addressed in this claim file. I also noted that there were medical comments to file dated [personal information], 2002 and [personal information], 2002, in which the medical advisor at the Workers Compensation Board indicated that the acute phase of your disability had indeed ceased.

I have since referred your file on to the medical advisor and asked him for further consideration of the issue. It is the opinion of the medical advisor that the work incident which initiated this claim at most, incurred a temporary aggravation of your pre-existing condition. Further, he elaborates that the objective medical evidence would appear to indicate that you had reasonably recovered from this minor incident and that **you had returned to your pre-injury symptomatic state.**

As the acute phase of your disability has plateaued and you are now at your pre-accident state, I have made the decision to close your file temporary wage loss benefits and medical aid. It would appear that any continuous problems you have with your low back is related to your pre-existing condition.

The last line of this decision is a message or warning to the Worker or so it appears, to the effect that from this date onward "any continuous problems you have with your low back is related to your pre-existing condition". We take this to mean, henceforth no further medical aid, no further compensation unless it can be related to your pre-existing condition - presumably to be dealt with by the [personal information].

The Worker may well have to go on with his life faced with his propensity to have low back related problems resulting from work duties that aggravate his pre-existing injuries. However, from our perspective**,** his main concern centers around the timing of and the medical evidence, if any, supporting the decision that his injury "had plateaued".

The Worker's contention in this case comes down to this:

- There has been no plateau in his medical recovery;
- He has not returned to his pre-injury symptomatic state;
- Any aggravation to his pre-existing symptomatic state was not temporary - it is permanent!
- The use of the word "temporary" invites the Board to conclude that his injury has plateaued - thereafter barring him from any further compensation or medical aid;
- There is ample evidence in the file that his treating physicians continued to treat him well beyond the cut off date of [personal information] 2003.
- The disclosure in the Case Manager's [personal information], 2003 letter to the effect that in his initial review of this claim file, "the issue of pre-existing condition and the issue of aggravation had not been addressed in this claim file."
- He had not "reasonably recovered" from the "minor incident".

Subsequent to the IRO Decision, the Worker's treating Orthopaedic Surgeon, Dr. Ling, continued to closely monitor and treat him up to and beyond the point where he underwent a spinal fusion performed by Dr. Alexander. The particulars of some of these medical consults will be referred to later. Suffice, at this point, to say that the Worker still feels that the Board's treatment of his case was less than appropriate.

ISSUES

The worker described the issue as follows:

> *The workplace injury I received on [personal information], 2001 should be considered a new injury not a pre-existing injury* and . . . *can be resolved by*

reinstating all my benefits by the workers compensation.

While the IRO put in a different context:

Should the injury the Worker received on [personal information], 2001 be considered a new injury and not an aggravation of a pre-existing injury and if so, entitling the Worker to further benefits beyond the closure of his claim in [personal information] 2003?

1. Pursuant to Sec. 6(9) of Act, the Worker argued that: the evidence supports he was not at a plateau in his medical recovery related to his low back L5-S1 injury on [personal information], 2003.

2. Pursuant to Sec. 6(2) of the Act, the Worker submits he was not fully compensated for his loss of earning capacity resulting from the accident [personal information], 2001 and the injury to his low back at the L5-S1 site.

The Worker challenged the rationale and analysis regarding these decisions. The issues require an analysis of the evidence to determine if, on the whole of the evidence, the Board made the correct decision.

It is noted that in reviewing a CT scan on [personal information], 2002, Dr. Ling noted that at the L5-S1 level the abnormality was more likely associated with a nerve root rather than a recurrent disc.

THE WORKER'S ARGUMENT

The Worker argued that pursuant to Sec.6(1) of the Act, he is entitled to compensation

because the evidence clearly supports he had "*a personal injury by accident arising out of and in the course of his employment.*" He noted, as proof of entitlement, Dr. Ling's [personal information], 2004 letter to the Board which states:

> *He had a recent epidural steroid injection with Dr. Farmer without any sustained improvement. He is going to get in touch with Dr. Farmer with respect to a second injection. He persists in having significant symptoms that are causing a significant functional restriction. I am not sure if this is going to improve and if he will be able to do any labourious type of activities.*

He also argued that: pursuant to Sec.6(2) of the Act, he is entitled to compensation "*resulting from the accident*" because the evidence clearly supports he was injured at the low back L5-S1 site in the accident trauma event when he unexpectedly lifted [personal information]. No weight of this item appears in the record.

He also argued that pursuant to Sec.6(9) of the Act, he is entitled to additional compensation well beyond [personal information], 2003 because of the "*result of*" his "*personal injury*" by "*accident*" for his case which was approved for "*. . . right sided sciatica*" as stated in the April 26, 2002 case acceptance decision letter by Leza Matheson-Wolters.

In addition, he also argued:

> *Clearly the L5-S1 disc was recognized, established and accepted as the injury resulting from the accident.*

Section 6(9) states:

> *Where an accident caused personal injury to a worker and that injury is*

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

The Worker further argued where the accident caused personal injury to the L5-S1 disc in this case, and that injury was clearly aggravated by his pre-existing history of two (2) prior surgeries at the same disc site which was inherent in the Worker at the time of the accident event, he should be compensated for the full injurious result until he has reached a plateau in medical recovery.

Relying upon Section 17 of the Act, the Worker maintained that the decision of the IRO "shall be made upon the real merit and justice of the case." This, says the Worker was not done in this case.

He claimed that greater weight was placed upon the comments of Dr. Carruthers, the Board's internal medical advisor; and that the IRO used excerpts from other treating physicians' reports of Doctors Ling and Alexander as supportive of Dr. Carruther's opinion.

Not enough weight, so argued the Worker was given to the reports of Drs. Ling and Alexander, whose opinions were supportive of his position that his low back problems/symptoms were related in a significant way to the [personal information] 2001 accident/injury. In fact, he argued that the IRO did not give any weight to these reports insofar as they were suggestive of a work related accident that initially, and continue to, keep the Worker from being gainfully employed.

The Worker forcefully maintained that, contrary to the Board's position/opinion, he has not reached a plateau in medical recovery; and, this is especially so, says the Worker, who in [personal information], 2003 was so advised by the Case Manager. Proof of his argument,

he states, is in the continued efforts of both Dr. Ling and Dr. Alexander to treat him with a view to relieving his pain, ultimately resulting in a spinal fusion in the [personal information] of 2004.

The Worker also argued that the Board failed him in not properly applying the Section 18 medical aid and rehabilitation to which he was entitled; and it failed to compensate him for his anatomical loss (as provided for in Section 49 - as he in fact suffered an impairment - spinal fusion).

The Worker maintained that his ongoing medical care after [personal information], 2003, and the two surgeries and rehabilitation thereafter were, in a significant way the result of his [personal information] 2001 work accident/injury, therefore the Board must compensate him.

The Worker correctly pointed out that while the IRO did indicate this section of the Act was relevant to her decision in her "References", there is no indication of this section having been addressed in her decision.

The Worker pointed out, that while he had two prior low back surgeries which were successful; thereafter, he did successfully return to work for a [personal information] month period into a new employment position with a new employer beginning [personal information] 2001 on PEI. This was after a [personal information] month ease back/OJT. There was no medical evidence indicating he would ever need a spinal fusion for his L5-S1 disc when his case closed with [personal information] in [personal information] 2001. He had reached a medical plateau at that time.

The Worker maintained that following his significant attachment to his new work and new employer, he had a new work place accident/injury, regrettably at the L5-S1 disc.

Following months of conservative intervention and treatment, the medical specialists, Drs

Ling and Alexander, concluded that he required a spinal fusion at the L5-S1 disc which was eventually done on [personal information], 2004 and another surgery to adjust the fusion hardware on [personal information], 2004.

He submits that the evidence clearly supports his need for this spinal fusion resulted in a significant, way from his [personal information] 2001 accident. Therefore, he claimed that he is entitled to an impairment assessment and award from WCB-PEI..

In further support of this claim, the Worker argued that the "Thin Skull Doctrine" applies to his case. In support of his contention that it does, the Worker cited The Supreme Court of Canada Decision - ***Athey v. Leonati*** *(1996)3 SCR 458 at phg. 34:*

> *The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin-skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.*

The worker then pointed out:

> *The doctrine has been analysed in numerous Ontario workers compensation cases and found to be applicable. In Decision No. 1800/00 (August 17, 2000) the Ontario Workplace Safety and Insurance Appeals Tribunal relied on the doctrine when deciding a case involving asymptomatic degenerative disc disease:*

It is well understood that the "Thin-Skull Doctrine" applies to workers' compensation cases. Decision No. 63/98R 48 W.S.I.A.T.R. 105 notes that the Act does not contemplate the "discounting" of worker's benefits to account for a pre-existing condition. The decision notes at 108:

> *If a worker has suffered a personal injury by accident arising out of and in the course of employment, the Act requires the Board to provide benefits for the consequences that "result from" the injury. If a consequence "results from" the injury, nothing in the Act permits the Board to reduce the benefits to account for any non-work-related factors that may have combined to contribute to that consequence. If the accident is found to be work-related, the worker is entitled to the full benefit provided by the statute for any consequence that results from the accident. If the accident is not work-related, the worker may not receive any benefits under the statute.*

Finally, the Worker argued that:

> *A workplace injury which aggravates a pre-existing condition in the worker is fully compensable, and a work place injury which is aggravated by "a pre-existing condition in the worker is also fully compensable", according to this doctrine.*

Support for his position is found in the Text: Worker's Compensation For Canada, Second Edition by Terrance G. Ison at Page 105:

> **5.41 Pre-existing causal factors**
>
> Where a worker is disabled from work following an injury that arose out of and in the course of employment, compensation is payable whether the employment was the sole cause of the disablement, or whether other factors,

such as weaknesses of the body, were contributory. If the worker was employed with his other limitations or disabilities prior to the injury, the subsequent disability is attributable to the injury and compensable as such. Similarly, where an employment even aggravates a pre-existing non-compensable disability, the aggravation is a compensable injury, and the worker is entitled to compensation for as long as the aggravation causes an absence from work.

Other helpful and applicable quotations from this text are:

3.327. Arising out of and in the course of

The presumption having the broadest application is that where an injury was caused by an accident that arose out of the employment it is presumed to have occurred in the course of the employment, unless the contrary is shown; and where an injury was caused by an accident in the course of the employment it is presumed that it arose out of the employment, unless the contrary is shown.

Where an injury arose in the course of employment, the claim must be allowed unless there is affirmative evidence of an alternative cause, and evidence that the employment was not contributory.

3.3.28. Neglect of the presumption

In practice, this statutory presumption has commonly been ignored, and it has even been replaced by contrary presumptions in the processes of adjudication. The opinion imports a presumption of the negative while the Act prescribes a presumption of the affirmative. Yet the opinion may be applied by the adjudicator as evidence rebutting the presumption of

employment causation. To reach conclusions in that way is clearly illegal.

3.7.1 Eligibility principles

Disabilities commonly result from the interaction of multiple causes. If an employment event, exposure, or other circumstance had causative significance, a claim is not barred because other factors unrelated to the employment were also causative...."**it is not necessary that the worker's employment be the most significant factor in her ongoing condition; it is sufficient that the employment was a significant contributing factor."** (emphasis added)

3.7.2 Pre-existing conditions - individual susceptibility

If a worker is vulnerable to injury because of a weakness of body structure and is injured in an occupational accident, it is not relevant that a hardier individual would have withstood the impact without injury.

3.7.6. Surgery resulting from multiple causes

Where the aggravation of a pre-existing condition is followed by surgery, the question may arise of whether the surgery and the consequences of the surgery are compensable. **However, if the surgery would not have been needed but for the employment episode, or would probably not have been undertaken by the worker if that episode had not occurred, the employment episode is at least a significant contributing cause of the surgery.** (emphasis added)

Therefore the surgery and its consequences are compensable.

5.4.4. Deteriorating conditions.

In other cases, it may appear that the deteriorating condition has been permanently worsened or "aggravated" by the compensable disability. Suppose, for example, that a worker had a spondylosis of the spine that was progressing to the point at which it might have had a disabling effect in the future, though perhaps not immediately. The Worker twisted his back at work and suffered a disc protrusion for which he was treated by a laminectomy. He might have needed the laminectomy at some stage in any event, but the need has been advanced in time and in certainty by the compensable injury. If it were not for the compensable injury, the worker might have avoided the residual disability for some significant period. In these circumstances, the whole of the resulting disability is compensable.

9.83.3 Resolving differences

It is obviously improper to do this by counting numbers of opinions one way compared with numbers the other way, or by preferring automatically the opinion of a board doctor over the opinion of an outside doctor. The legal status of board doctors and outside doctors is the same. Other things being equal, the opinion of a specialist with regard to matters lying within the scope of her specialty should usually be preferred to that of a general practitioner, and the opinion of a doctor who has examined the patient should usually be preferred to the opinion of a doctor who has not examined the patient. In Ontario, the Appeals Tribunal has said that:

> *In selecting the medical opinions it prefers, a panel will typically have regard for a number of factors, including:*
>
> 1. *The completeness and the accuracy of the report of symptoms and other relevant facts on which each opinion is based;*
> 2. *The attractiveness of the reasoning - the inherent logic - displayed in the reports;*
> 3. *The relevancy of the doctor's qualifications;*
> 4. *The quality of the doctor's qualifications - his or her training and*

experience:

5. *The opportunity the doctor had to examine the worker;*
6. *The timeliness of the examination and report relative to the issue;*
7. *Any indications of bias, conflict or non-objectivity, and*
8. *The preponderance of opinions.*

12.3.8. Aggravations

Where a compensable disability is worsened by employment in another jurisdiction, the Board in the second jurisdiction will adjudicate the new claim and pay any benefits that are due to the aggravation.

THE BOARD'S POSITION

Although there may be some repetition in the facts, it is important to reproduce the Board's statement of same in order to fully appreciate its position. All hi-lighting is done by the Appeal Tribunal.

THE FACTS:

1. This is an appeal of Internal Reconsideration Decision IR-04-62 dated February 10, 2005. The decision upholds the Entitlement Officer's [personal information], 2004 finding that the additional medical evidence provided by the Appellant does not constitute new evidence, and upholds the [personal information], 2003 decision to deny the Appellant additional benefits [Appeal Record, Tab 2].

2. The issues on appeal are as follows:

   (i) whether the [personal information], 2001 incident constitutes a new injury suffered by the Appellant; and

   (ii) if yes, whether the Appellant should be entitled to benefits beyond [personal information], 2003.

A. <u>Pre-Existing Condition</u>

3. The Appellant has had back problems and ongoing back pain symptoms which pre-date the incident which resulted in the present claim.

4. The Appellant had a discectomy and right laminectomy in 1992 and a repeat surgery of the L5-S1 discectomy in 1999 for his back [Appeal Record, Tab 116].

5. The Appellant sustained a prior low back injury on [personal information], 1998, which resulted in a compensable claim with [personal information]. This prior injury occurred while the Appellant was [personal information]. The Appellant was diagnosed with "severe back pain radiating down the right buttocks and leg" as a result of the 1998 accident [Appeal Record, Tabs 116,5,5].

6. A CT scan dated [personal information], 1999, suggested that the Appellant suffered a "disc herniation with a right S1 radiculopathy" as a result of his 1998 accident [Appeal Record, Tabs 7,8].

7. In the time between the Appellant's injury [personal information] on [personal information], 1998 and the incident in Prince Edward Island on [personal information], 2001, there are reports of the following back related complaints made by the Appellant:

- **On [personal information], 2000, Dr. [personal information] noted that the Appellant felt "he has more or less continuous low back pain which is worse with remaining in one position or with bending or with lifting"[Appeal Record, Tab 50];**

- **In the [personal information]2001, the Appellant himself noted that his back was hurting [Appeal Record, Tab 68]. Admitted he had some pain**

- **On [personal information], 2000, it was noted by the [personal information] that in attempting minor work the Appellant suffered "significant discomfort for several days afterwards" [Appeal Record, Tab 60]; Still one year after surgery still [personal information] benefits.**

- **On [personal information], 2001, the [personal information] noted that the Appellant had sought medical care for sciatic nerve inflammation and specified that his work duties were not what was aggravating his condition [Appeal Record, Tab 60];**

- **On [personal information], 2001, the [personal information] noted that the Appellant had to go to the hospital twice that month [Appeal Record, Tab 60];**

- **On [personal information], 2000, Dr. [personal information] reported that was still having "significant discomfort down the right leg, and a bit in his back" [Appeal Record, Tab 29];**

- **On [personal information], 1999, Dr. [personal information] indicated**

that the Appellant had a "fairly clear history of a lumbar disc herniation with a right S1 radiculopathy" and that this was "not improving despite extensive therapy" [Appeal Record, Tab 6];

THE PRESENT CLAIM

8. The current claim arose from an incident which took place on [personal information], 2001. The Appellant strained his back while lifting [personal information] [Appeal Record, Tab 62].

9. At the time of the incident, the Appellant was employed as [personal information] for a [[personal information]] [Appeal Record, Tab 62].

10. On [personal information], 2001, the Appellant was diagnosed with lumbar strain [Appeal Record - Tab 71].

11. The Appellant continued working for [personal information] weeks following the incident [Appeal Record, Tab 116].

12. An X-ray dated [personal information], 2001, indicated that following the incident, the Appellant's lumbar vertebra was intact and his disc spaces were "satisfactorily maintained". The report additionally confirmed that the Appellant did not have any bony lesions, spondylolisthesis, or significant degenerative changes [Appeal Record, Tab 63].

13. A CT scan dated [personal information], 2002, indicated that while the Appellant had a "mild posterior disc bulge" at the L4-5 region and a bulge at the L5-S1 level, there was no "frank disc herniation" [Appeal Record, Tabs 67, 70].

14. In Dr. Ling's review of the CT scan on [personal information], 2002, he indicated

that the abnormality noted at the L5-S1 level **was more likely associated with a nerve root rather than a recurrent disc** [Appeal Record, Tab 70].

15. The Appellant was approved for Temporary Wage Loss benefits effective [personal information], 2001, however, he was advised that his claim would continue to be monitored in light of his prior history of back problems and injuries [Appeal Record, Tab 105].

16. In a Medical Comment to File dated [personal information], 2002, Dr. Carruthers made the following finding [Appeal Record, Tab 116]:

> *[This Worker had two previous surgeries and in point of fact had ongoing symptoms following the surgeries and prior to him entering work activity in Prince Edward Island....it would be my opinion that the work activity as described* in [personal information] of 2001 *is compatible with a temporary aggravation of a pre-existing symptomatic condition from which the worker has reasonable recovered. There is* ***presently*** *no objective evidence that this worker icurred a permanent aggravation of his pre-existing problem. There is also excellent evidence that this worker was symptomatic with ongoing problems prior to the work activity which initiated this claim. Most notable is the assessment from Dr. Alexander of the recording of non-organic findings and the lack of recording of specific organic findings.*

17. Dr. Carruthers confirmed his initial findings in subsequent Medical Comments to File upon review of further medical evidence provided on the Appellant's condition [Appeal Record, Tabs 122, 134].

18. In a decision dated [personal information], 2003, the Case Manager advised the

Appellant that he had been assessed as having incurred a "**temporary** aggravation"of his pre-existing condition, that objective medical evidence indicated that **he had reasonably recovered from the incident**, and that **he had returned to his pre-injury symptomatic state.** It was specified that any continuous problems experienced by the Appellant related to his pre-existing low back condition and not the [personal information], 2001 incident. As such, the decision had been made to close the Appellant's file
[Appeal Record, Tab 136].

19. A CT scan dated [personal information], 2003, indicates that the Appellant continued to have a disc problem at the L5-S1 level. **Dr. Ling believed this "disc problem" was the cause of the Appellant's symptoms** [Appeal Record, Tabs 143,144].

20. In a report dated [personal information], 2002, Dr. Alexander found the Appellant to have a lot of non-organic symptoms and that the CT scan, while showing abnormality at the L5-S1 level, was in keeping with the fact that he had 2 previous surgeries. Dr. Alexander indicated that there was certainly **no massive** disc herniation as a result of the incident [Appeal Record, Tab 114].

21. The [personal information] denied the Appellant's request to have his [personal information] reopened on April 30, 2004. The basis for this decision was that it felt that the [personal information], 2001 incident had resulted in a new claim which was more appropriately dealt with therefore by the Workers' Compensation Board of PEI [Appeal Record, Tab 147].

The two [personal information] log entries referred in Dr. Carruthers [personal information], 2002 report, are as follows:

"*Client called as he had to go to OPD last night re. sciatic nerve inflamation. He went for acupuncture on his own in PEI without Dr's referral and I advised that I couldn't cover the cost. I asked the client if his duties are aggravating his condition and he said no. Asked him if he will be able to complete his training and he said yes. Explained my concern as [personal information] is sponsoring program.*"

"The employer returned my call and progress to date was discussed. All is still going well and training will proceed as scheduled with them beginning to pay the worker $10.00/hour commencing [personal information], 2001. She did mention that the worker sometimes tires easily and that he has had to go to the hospital twice in the past month and thus the employer is concerned that he may be doing more than he should. The employer indicated that the worker really wants to work and sometimes may be doing more than he really should and she has voiced her concerns with him.

THE STANDARD OF REVIEW

In Decision Number 37 the Appeal Tribunal ruled that the standard of review on an appeal from an IRO Decision to the Tribunal is one of correctness as opposed to "patently unreasonable". The decision, in part states:

After considering these legislative provisions and in particular, when considering same along with the specific legislative provisions of the Act, it is the finding of this Tribunal that we are not a "court" within the context of the meaning of that word in Section 32 of the Act because our review of the Act and the cases hereinafter referred to lead us to conclude that Parliament intended to provide a meaningful and efficient forum for appellants to have their cases reviewed on the standard of "correctness" as opposed to some higher standard, such as "patently unreasonable" or wholly without merit or

irrational.

THE LEGISLATION

Section 1. (1)(a) "accident" means . . . a chance event occasioned by a physical or natural cause, and includes . . . any:

(A) event arising out of, and in the course of, employment, or

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

and as a result of which a worker is injured.

6(2) Where a worker is injured in an accident, wage loss benefits are payable for his or her loss of earning capacity resulting from the accident in respect of any working day after the day of the accident.

6(4) Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

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.

17. 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. 1994,c.67, s.17.

18.(1) The Board may provide any worker entitled to compensation under this Part with medical aid, and every such worker is entitled to such prosthetic appliances and to such dental appliances and apparatus as may be necessary as a result of any accident, and to have the same kept in repair or replaced in the discretion of the Board, and to such corrective lenses as may be necessary as a result of the injury, which corrective lenses may, in the discretion of the Board, be renewed from time to time.

18.(2) The medical aid is at all times subject to the supervision and control of the Board and shall be paid for by the Board out of the Accident Fund, and such amount as the Board may consider necessary therefor shall be included in the assessment levied upon the employers.

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

49.(1) The Board may determine that a worker has suffered an impairment as the result of an accident.

(2) Where the Board determines that a worker has suffered an impairment;

(a) The Board shall pay to the worker a lump sum impairment award calculated in accordance with the regulations.

56.(6) Following reconsideration, a person who has a direct interest in the matter may, in

writing, appeal the decision to the Appeal Tribunal.

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

(20) The Appeal Tribunal has exclusive jurisdiction to hear and determine all matters and questions arising under this Part in respect of

(a) appeals under subsection (6)
(b) any matter referred to it by the Board.

POLICY NUMBER : POL04-09

PRE-EXISTING CONDITIONS

1. "Aggravation" means the worsening of a work-related injury due to a pre-existing condition.

2. "Pre-existing condition" means any condition which, based on a confirmed diagnosis or medical judgement, existed prior to the current work-related injury.

3. "Objective medical evidence", means evidence presented through a physical examination including diagnostic tests on a worker and **reported by the treating or family physician.**

5. "Plateau in medical recovery" means **there is little potential for improvement** or any potential changes in the condition are in keeping with the normal fluctuations which can be expected with that kind of injury.

POLICY:

1. The Workers Compensation Board has exclusive jurisdiction to determine whether any injury is caused by a work-related accident.

HISTORY:

November 27, 2002 - Policy revised to clarify intent of the Workers Compensation Act to compensate a worker for aggravation of a work related injury due to a pre-existing condition.

THE BOARD'S ARGUMENT

The Board apparently relying on its Policy and/or the Section 32 Privitive Clause "exclusive jurisdiction" to determine whether any injury is caused by a work related accident"; determined that while there was an incident at work on [personal information], 2001 (lifting [personal information]) the Worker only suffered a "minor" injury - an **aggravation** of his pre-existing injury and that this was a "temporary" aggravation; and, that the Worker eventually returned to his pre-incident status.

It is common ground that the Worker did have a pre-existing condition, at the L5-S1 area of his lower back.

There is considerable evidence in this file pertaining to the issue as to whether the worker in fact suffered or did not suffer an "aggravation" to his pre-existing injury and as to whether or not he reached a plateau in medical recovery.

In support of its argument, the Board noted that the worker continued to have and exhibit symptomology relating to two previous back surgeries at the L5-S1 area. It appears that the Board relied heavily on the [personal information], 2002 comment to file by its Medical

Director, Dr. Carruthers who reported that:

> *There is **presently** no objective evidence that this worker incurred a **permanent** aggravation of his pre-existing problem. There is also excellent evidence that this worker was symptomatic with ongoing problems prior to the work activity which initiated this claim.*

ANALYSIS

Jurisdiction

At first glance the Board's argument that the Act, Section 32 and Board Policy dictates that the Board has the last word on "whether any injury is caused by a work related accident", has some merit. But, upon closer analysis we are not convinced that the Board has the last word on this matter. Our reasons are as follows:

The Section 32 privitive clause gives the Board exclusive jurisdiction over certain matters, including findings of fact, of which "whether any injury was caused by an accident", is one of the questions referred to in that section. This privitive cause is subject to section 56, from which the Appeal Tribunal derives its authority to hear and determine all matters and questions arising on appeals under sub-section (6) of Sec. 56.

From our reading of the **Pre-existing conditions** Policy # 04-09 which was revised on November 27, 2002 "to clarify the intent of the *Workers Compensation Act* to compensate a worker for aggravation of a work related injury due to a pre-existing condition, we note the Board's restatement of its authority to the effect that it has "exclusive jurisdiction" to, in a pre-existing condition case, decide whether **any injury** is caused by a work related accident.

However, on an appeal to the Appeal Tribunal, the Tribunal can, and in our opinion should review any matter that could be the subject of an appeal under sub-section 6**: any person who has a direct interest in "the matter" may appeal . . . to the Appeal Tribunal).**

We do note that Section 56(17) states:

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

In our opinion that, absent the commission of an error in law and/or and error going to its jurisdiction, the Tribunal is not in any way restricted in its mandate in reviewing IRO decisions except for the requirement that it is bound by Board policy. However, any such policy, which is inconsistent with the enabling provisions of the Act must defer or give way to the statutory authority vested in the Appeal Tribunal pursuant to Section 56(6). If this is not the correct view; then the Board might be inclined to enact a simple policy by adding to 56(20) the following words:

Subject to any existing Board policy, the Appeal Tribunal has exclusive jurisdiction to hear and determine all matters, appeals and questions...in respect of all appeals under 56(6).

New Accident?

From a review of the file, it is clear that after a successful [personal information] months on the job/and or ease back training program at the premises of his new employer, from [personal information] to [personal information] 2001, the Worker was hired on a full time basis, doing physically demanding [personal information]; although, he was enrolled in the OJT program to train for and assume
[personal information]. The [personal information] notified him in writing on the [personal information], 2001 that as he had re-entered the workforce on a full time basis, it was closing its file effective [personal information], 2001. In fact, so pleased was the [personal

information], with the Worker's [personal information] that it discussed paying him $500.00 "to offset [personal information]"! The File Record does not disclose if he received this money.

For some [personal information] months from [personal information] through to [personal information], 2005, there were apparently no medical or work-related issues with the Worker at his new job until the [personal information], 2001 incident at which time he suffered a new work place accident. It is re-assuring but not binding upon the Board or this Tribunal, that the [personal information] was of the same opinion.

On April 5, 2002 the [personal information] in its letter to Ms. Matheson-Wolters, wrote:

> *We definitely feel that the [personal information], 2001 incident should be adjudicated as a **new** claim by your Board. It would be considered as a **new claim** by our [personal information], if the worker was living and working [personal information].*

On April 10, 2002, the Board in an inter-office memo wrote:

> *I have reviewed the information from [personal information] on this claim. I recommend we accept this claim acknowledging the pre-existing condition and do what we can to assist this man.*

We find and so hold that the Board was wrong, in the face of the overwhelming evidence, **in not continuing to treat** the Worker's [personal information], 2001 incident as a **new** injury resulting from a new work-place accident.

In arriving at this decision we find and so hold that none of the two presumptions which are set out in Section 6(4) of the Act have been rebutted by the Board. Section 6(4) states:

Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

RELIEF

The Worker is requesting:

1. His compensation reinstated from the date of his claim closure date, some time on or about [personal information], 2003, for the full entitlement to wage loss, impairment award, medical aid and rehabilitation benefits under the Act; and,

2. His entitlement to those compensation benefits continued until his return to work status, if any, is determined medically, functionally and vocationally.

The evidence is so strong in favour of the applicability of these presumptions in favour of the Worker that it is not necessary to apply Section 17 (Benefit of Doubt) because the evidence is not approximately equal in weight for or against the entitlement to wage loss benefits, medical aid and an impairment award.

Accordingly, the matter is referred back to the Board: to have the worker's compensation reinstated from the date of his claim closure, for the full entitlement: to wage loss, impairment award, medical aid and rehabilitation benefits under the Act; and that these benefits shall be continued until he is able to re-enter the workforce.

In reaching this decision, this Tribunal did so after a full and complete analysis of the case, the particulars of which are contained under the next heading in this Decision.

Pre-existing Condition
Aggravation: Temporary or Permanent?

Medical Plateau?

Section 6(9) States:

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

A review of the evidence that was before the IRO is necessary in order that the reader gets an appreciation of the pertinent facts in the case: To the extent possible we will attempt to follow the sequence of events in the order in which they happened:

On February 23, 2001 the employer solicited the participation of the [personal information]. In its letter the proposed employer wrote:

> *I am writing to in regards to your client [The Worker]. We are hoping to* [personal information]. *He will be an excellent candidate for this position. . . . He seemed to be very eager to work and was very accommodating to us.*
>
> *As [personal information], we anticipate the overall training period to be in*

> *the vicinity of [personal information] months as the [personal information] will take up most of the training period. He will be trained for the following duties: [personal information] and other applicable duties as required.*
>
> *We trust that you will agree with us in noting that [he] is a good candidate for this position. . . .*

On [personal information], 2001, all ties with the [personal information] were cut, as referred to earlier.

On [personal information], 2001, two days after the Worker hurt his back, he completed his worker's report in which he stated that he didn't know that [personal information]. We noticed that the worker, though his advisor suggested, that the [personal information]. (No evidence in the file.) Dr. Carruthers noted that [personal information] (probably so) and commented upon the effect that the [personal information] would have on the worker who has a predisposition to back injuries. (No evidence that [personal information]of the lifting of it by the worker).

Two days later, on [personal information], the Worker's family physician wrote on his report:
"Repetitive Strain/Twisting and lifting" as the mechanism of injury; and, he diagnosed the Worker as having "lumbar strain".

The Worker continued with his regular "[personal information]" duties for approximately [personal information] weeks.

The initial medical evidence

On [personal information], 2001, Dr. Ling concluded:

> *In 1992, I did a right sided discectomy on him. He subsequently [personal information] to work and in 1998 had another discectomy done on his right side [personal information]. He has done well since* ***but*** *on [personal information] while bending over or lifting injured his back* ***once again****. He is experiencing pain down both legs.* ***His symptoms are aggravated*** *by the valsalva manoeuvre. Currently, on examination he has decreased flexion of his lumbosacral spine. Straight leg raising is limited bilaterally with no specific neurological deficit distally. He has a central type of disc problem currently.*

The [personal information], 2002 CT Scan according to Dr. Goodwin showed:

> *L3-4: Normal. No evidence of disc herniation.*
> *L4-5: Mild posterior disc bulge. No frank disc herniation.*
> *L5-S1: The patient has had a previous partial right sided laminectomy.*
> *There are rounded, reasonable well defined density adjacent to the anterior right lateral aspect of the dural sac which I believe represents a compound nerve root sleeve.*
> *This does not have the appearance one might expect for a recurrent disc at this level. Although the disc density material is demonstrated to be more representing bulge, there is no frank dis herniation, I do not believe at this level.*

On January 29, 2002, the Worker reported to the Board, the list of the duties that his job as a [personal information] would entail; and, on the other hand the comprehensive list of strenuous labour

intensive [personal information] jobs that he had to actually perform while doing [personal information] activities. In part, his duties included:

[personal information]

He also reported that:

> *Leza: I would like to add that in the month of [personal information], I had to see a doctor regarding a swollen leg, torn muscles, which because I had to work on it, later a blood clot could develop in it. Also in the month of [personal information], my employer, came to me and told me she did not want to [personal information] any more that she was happy with it the way it was going, immediately I started to wonder why she had me [personal information]?????* From that moment on, things that were promised to me, I knew, would never come about, and that I was just another labouring employee like the rest of her employees. And in this time frame, from [personal information] until my accident I only recall of having one weekend off. Also [personal information], continued to tell my employer if I didn't stop with the hard work that I'd end up hurting my back again, and still she did nothing about hiring more people, she said "I can't afford to hire more people". Later in the fall when my back was starting to get bad, she allowed one of the other employees to come and help me in some [personal information].

On [personal information], 2002, Dr. Ling reported to the Board on the CT Scan:

> *This showed an abnormality at the L5-S1 level on the right which Dr. Goodwin reported as probably being an abnormality with the nerve root rather than a recurrent disc. He does comment on a bulge but with no frank herniation. He persists in experiencing back and bilateral leg discomfort.*

With no clear physicians diagnosis at this time made, Island Physio, on [personal information], 2002 diagnosed the Worker as having sciatica.

Later, on [personal information], 2002 Dr. Ling in his report to the Board stated:

> *I assessed the Worker today again with respect to his right sided sciatica. He still is having* ***significant signs and symptoms of nerve root impingement.***

In a response to the information that the Board faxed to the [personal information], it reported back to the PEI WCB on April 5, 2002.

> *It appears that a new accident occurred on [personal information], 2001 while [the Worker] was in the employ of [new Employer] when he lifted [personal information]. Although [he] has a pre-existing condition,* ***we definitely feel that the [personal information], 2001 incident should be adjudicated as a new claim by your Board. It would be considered as a new claim by our [personal information], if the worker was living and working in [personal information].***

By April 9, 2002, the Worker had received 19 physio treatments. The therapist reported:

> *We were unable to change his right leg symptoms. He finds that his symptoms are improving better without the physio.*

On April 26, 2002, the Worker's claim was approved for wage loss benefits with a notation to the Worker to the effort that because of his earlier back problems, the Board would be monitoring "the progression of your back".

In his [personal information], 2002 report, Dr. Ling, appearing to accepted the diagnosis of the physiotherapist reported:

> *I assessed the worker today with respect to his right sided sciatica. He persists in having low back and right sided sciatic symptoms that still exhibit nerve root tension signs. He states that any increased activity such as protracted standing, bending or even sitting seem to aggravate his symptoms. The question has arisen as to whether or not he is able to work - I don't think he is able to work at anything requiring lifting or bending. As stated, however, even protracted sitting seems to aggravate his symptoms.*

On [personal information], 2002, Dr. Ling still noted some symptoms of nerve root impingement, had not yet made a definitive diagnosis and was awaiting a report from Dr. Alexander, Professor of Orthopaedic Surgery. Dr. Alexander's [personal information], 2002 report, in part, states:

> *I saw the worker today at your request. You did an operation for him in 1991 from which he recovered and he returned to his gainful employment. He continued to do well and then in 1999 he had a recurrent disc herniation. Dr.* [personal information]*, did an operation for him that also improved him. He indicated he was doing pretty well until* [personal information]*, 2001 when he had a twisting injury to his back, and he has been off work ever since.*
>
> *On physical examination I made note of the fact that* ***he had a lot of nonorganic findings.*** *These included tenderness to light palpation over the scar. He did not permit straight leg raising beyond about 10 degrees in the supine position, but in the sitting position his straight leg raising was normal. When I tested the muscle strength in the lower extremities I found giving way of most of the major muscle groups in both legs. I reviewed the CT scan and it showed an L5-S1 abnormality in keeping with the fact that he has had two previous surgeries at that level on the right side.* ***Certainly there was no massive disc herniation.*** The radiologist felt the mass was possible a

> conjoint nerve root, but it is possible it could be a recurrent disc herniation or scar tissue.

At this point it is still unclear in the minds of the specialists as to whether there is "a conjoint nerve root" or a disc problem. Dr. Alexander noted that while there was some abnormality with the disc at the L5-S1 level, consistent with two earlier surgeries, there was **"no massive disc herniation"**and he noted the radiologist opinion it "could be a recurrent disc herniation" or scar tissue (from the previous surgeries).

In any event, decreased muscle strength in both legs, tenderness over the scar from earlier surgeries, limitations in by raising were all noted in his caution about further surgery - instead steroid injections were recommended.

On [personal information], 2001, the Board's medical consultant, after reviewing the claim in its entirety; and, after noting the earlier surgeries and the [personal information], 2001 "work event", reported:

> *There is no good information as to exactly how much [personal information]. In any event, the only force involved can be only considered that compatible with [personal information]. Interestingly enough, on [personal information], 2001, the worker did not report this specific event and the attending physician comments that it was simply the repetitive strain of twisting and lifting at work. For the next [personal information] weeks, the worker continued to work and has apparently not worked from [personal information], 2001. X-rays taken of the back on [personal information], 2001 showed no acute trauma.*
>
> *A CT scan done on [personal information], 2002 showed no evidence of disc herniation. Now on [personal information], 2002, there is then a question of nerve root compromise and on [personal information], 2002, there was*

> *documented decrease SLR on the right with an absent right ankle jerk. These findings prompted a referral to Dr. Alexander by Dr. Ling.*
>
> *Dr. Alexander's consultation of [personal information], 2002 was reviewed in depth. This consultation is interesting in that it documents extensive and actually documents no bonafide objective findings.*

At this point, it is important to look at the background under which this Worker was examined. Now as noted above, this Worker had two previous surgeries and in point of fact, had ongoing symptoms following the surgeries and prior to him entering work activity in Prince Edward Island. Specifically, the Worker obviously had ongoing symptoms as noted by his need to seek urgent medical attention in the [personal information] of 2001 (Please see Log #137 and Log #141 from the [personal information])...it is well documented that the increased SLR on the right and the absence of the right ankle jerk is a pre-existing condition . . . . I also wrote a confirmation of his ongoing symptoms in the clinical report of [personal information], 2000 which states that the Worker had "continuous low back pain which is worse with remaining in one position or with bending or with lifting" and had persistent neurological deficits in the right lower limb, both motor and sensory.

Dr. Carruthers then concludes:

Based on the above, it would be my opinion that the work activity as described in [personal information] of 2001 is compatible with a **temporary aggravation of a pre-existing symptomatic condition from which the worker has reasonably recovered.**

> *There is presently no objective evidence that this worker incurred a permanent aggravation of his pre-existing problem. There is also excellent evidence that this worker was symptomatic with ongoing problems prior to the work activity which initiated this claim.*

> *This Worker has not incurred an "ongoing impairment as a result of this* [personal information] *2001 claim and in my opinion has reasonably recovered to his pre-injury, symptomatic state". Most notable is the assessment from Dr. Alexander of the recording of non-organic findings and the lack of recording of specific organic findings...there is no objective evidence that this worker's present difficulty can be reasonably related to the injuries accepted under this claim.*

Without question, some eight months post-accident, this opinion from Dr. Carruthers, which forms the basis upon which the decision to terminate the Worker's temporary wage loss benefits, warrants some analysis and or review.

Putting the Worker's arguments in their simplest terms they include the following:

(i) At this point, [personal information], 2002, there is no clear diagnosis

(ii) The injury and/or persistent aggravation is by no means temporary in nature - as Dr. Ling confirmed that the Worker is unable to return to his work.

(iii) The Worker is, at this time, still unable to work at anything much less his pre-injury job.

(iv) He can not, in fairness, be said the have "reasonably recovered" from his injury .

(v) He may require surgery but, this is risky due to a number of factors that he takes no issue with.

(vi) Continuing medical intervention, steroid injections, may provide some relief.

(vii) It is premature; at this stage to determine if he is temporarily or permanently disabled.

Dr. Carruthers, noting that on the initial x-rays showed "no acute trauma", noting that some medical assistance sought by the worker while he was still under [personal information] and/or on the job training program with his PEI employer, as well as the "non-organic" factors that were referred to by Dr. Alexander, concluded that the Worker had not incurred an ongoing impairment and has reasonably recovered to his pre-injury symptomatic state. In other words, fit to return to the job duties as referred to earlier.

It is worthy of note that the evidence as to the precise mechanism of injury is not entirely clear. There are different versions as to whether there was [personal information]. Dr. Carruthers speculated in his decision that "the only force involved can be only considered that compatible with [personal information]".

With all due respect to Dr. Carruthers, it is a bit [personal information] (no pun intended) to suggest, in the absence of any evidence, that the lifting force was somehow (perhaps minimized) by the [personal information]. The record does not indicate this. Dr. Carruthers apparently did not discuss this with the Worker, nor did he examine him.

Ten (10) days after Dr. Carruther's report, on [personal information], 2002, Dr. Ling wrote to Dr. Farmer requesting an epidural steroid injection because the worker "has not responded to other conservative measures". A copy of this letter was sent to the Board.

On [personal information], 2002, Dr. Ling again wrote to the Board, and after referring to the worker's earlier surgeries he concluded:

> *He did well postoperatively again until [personal information] 2001. Since that time he has been experiencing ongoing right-sided sciatic symptoms that have not resolved . . . . He is also booked in [personal information] to have an epidural steroid injection with Dr. Farmer.*

In his memo to the File, Dr. Carruthers took particular note of Dr. Ling's comment about some improvement in the Worker's right-side straight leg raising. While he characterized this as "remarkable" and supportive therefore of his [personal information], 2002 opinion, he did not comment on the continuing care and pain management procedure of the [personal information] 2003 scheduled steroid injection(s) by Dr. Farmer.

In his letter to the Board on [personal information], 2002, Dr. Ling concluded that the worker had " very minimal limitation of straight leg raising on the right with no specific neurological deficit distally."

On May 21, 2003 the entitlement manager in a note to the file wrote:

> *This writer attempted in April 2002 to return claim to* [personal information] *indicating that WCB PEI had satisfied due process under new claim of* [personal information], *2001 concluding that pre-existing condition and injury the proximal event of discharge of* [personal information], *2001 with* [personal information] *and that the current need to seek medical attention layed with the initial claim with* [personal information]. *Supervisor, Myrt MacNevin of the Workers' Compensation Board of Prince Edward Island spoke with* [personal information] *concluding that the* [personal information] *claim was no longer active and therefore, Workers' Compensation Board of Prince Edward Island to further claim per legislation and policy.*

From the date of his last memo to the file in [personal information],2002, there was little new information for Dr. Carruthers to report upon, except Dr. Ling's [personal information], 2002 report that the Worker's symptoms "cause a fairly significant functional restriction", and a report from Dr. Farmer of [personal information], 2003 concerning possible steroid injections, Dr. Carruthers on [personal information], 2003 concluded:

> *Again, I feel the work incident which initiated this claim, at most, incurred a temporary aggravation of this worker's significant pre-existing condition, from which the objective medical evidence would* ***appear*** *to indicate that he*
>
> *has reasonably recovered and he has returned to his pre-injury symptomatic state.*

It is noted that Dr. Carruthers used different language in expressing his opinion to the effect that, at this time, approximately 18 months post-accident: the objective medical evidence "would appear to indicate" that the Worker has reasonably recovered . . ., and returned to his pre-injury symptomatic state.

From this, it would appear that the Worker is reasonably fit to resume his [personal information] pre-injury job on a full time basis irrespective of whether or not he is required to receive further serious medical treatment , whether it be in the form of temporary relief from persistent and/or dehabilitating pain or surgery if the advantages outweigh the risks.

A week later, on [personal information], 2003, after reviewing the latest opinion of Dr. Carruthers, the Case Manager, referring to the findings/opinion of Dr. Carruthers, notified the Worker, in writing to the effect that his injury a year and on-half ago, was a "minor" injury and that he had reached a "plateau" in medical recovery; and, that it "would appear" that any continuous problems that the worker will have, "are related or will be related to your pre-existing condition".

In his decision to close the Worker's claim it is noteworthy that, in this letter, the Case Manager was not prepared to accept the fact that the Worker had a legitimate work related accident notwithstanding that some [personal information] months post-accident, the Worker's claim had been approved for benefits on April 26, 2002.

This letter, in part, states:

> *On [personal information], 2001, **you claim** to have injured your back. I have since referred your file on to the medical advisor and asked him for further consideration of the issue. It is the opinion of the medical advisor that the work incident which initiated this claim at most, incurred a temporary aggravation of your pre-existing condition. Further, he elaborates that the objective medical evidence would appear to indicate that you had reasonably recovered from this minor incident and that you had returned to your pre-injury symptomatic state.*
>
> *As the acute phase of your disability has plateaued and you are now at your pre-accident state, I have made the decision to close your file temporary wage loss benefits and medical aid. It would appear that any continuous problems you have with your low back is related to your pre-existing condition.*

One would have to assume that the Case Manager was aware that:

(i) The possibility of a risky surgery was in the offing;

(ii) That epidural steroid injections had been considered in [personal information], 2002 by Dr. Farmer and the Worker, with a likelihood of becoming a reality.

Two weeks later, and on [personal information], 2003, Dr. Ling reported to the Board to the effect that the steroid injection did not provide "any sustained improvement". He wrote:

> *He [the Worker] had a **recent epidural steroid injection** with Dr. Farmer **without any sustained improvement**. He is going to get in touch with Dr. Farmer with respect to a second injection . . .*

> ***He persists in having significant symptoms that are causing a significant functional restriction.*** *I am not sure if this is going to improve and if he will be able to do any labourious type of activities.*

At this point, it is clear that both the decisions and or opinions of Dr. Carruthers and the Case Manager are not consistent with the realities of the medical condition of the Worker, nor are they consistent with any immediate and/or reasonable prospect of returning to gainful employment, especially with his pre-injury employer.

The record shows that two weeks following the Case Manager's decision to the effect, that the Worker had plateaued in medical recovery, he underwent a lumbar epidural by Dr. Farmer.

If Dr. Carruthers and the Case Manager were correct in their assessments of the Worker, one would conclude that this rather serious medical procedure was unwarranted, unnecessary and/or in any event, not required as a result of the Worker's [personal information], 2001 injury from which he was totally disabled up until the time of the procedure.

On [personal information], 2004 in his letter to the Board, Dr. Ling, after reviewing the [personal information], 2003 MRI reported:

> *This showed a persistence of the disc problem at the L5-S1 level I think this is currently accounting for his symptoms.*

Dr. Alexander on [personal information], 2004, after reviewing the MRI, reported to Dr. Ling:

> *[The Worker] is now* [personal information] *and he hasn't worked since 2001 . . . . and now he* [personal information]. . . .

> *I explained to him that surgery is a risky situation because of his two previous operations, and he would be at risk of having complications.*

The Worker underwent a spinal fusion on [personal information], 2004. Seeking help, the Worker requested the [personal information] to re-open his claim. That [personal information] responded as follows:

> *In reviewing your case, our Medical Advisor noted that your medical condition had plateaued by [personal information], 2001 when our [personal information] closed your claim. At that time, you were working as a [personal information] in Prince Edward Island. On [personal information], 2001, you sustained a new injury to your back when you lifted [personal information]. Since that time, your symptoms because worse and now you require spinal fusion that was to be performed on [personal information], 2004.*
>
> *The Case Management team does not believe that this spinal fusion is the result of your [personal information] work accident of [personal information], 1998. We feel that the need for this surgery is related to your more recent work accident of [personal information], 2001. You filed a claim for the [personal information], 2001 incident and the claim was accepted by WCB-PEI. Our Medical Advisor feels that you have had increased symptoms since [personal information], 2001 and have not returned to your 2001 pre-injury status.* ***The fact that you now require a spinal fusion confirms that you have not returned to your 2001 pre-injury status.***

This Tribunal is in agreement with the assessment of the Worker's plight as set out in this response. Our assessment is based, not so much on anything that the [personal information] concluded, but upon a full review of the whole file and in particular all of the medical reports

and especially those of the treating physicians.

In all of the circumstances we find that the overwhelming, expert medical evidence from the numerous treating physicians was not given due consideration by the Board and in particular, in the face of same, the decisions of Dr. Carruthers and the Case Manager are not in accord with the medical information in the file indicating that the worker suffered a new injury in [personal information]of 2001 from which he has not at all recovered, notwithstanding all of the medical interventions to date, and especially including: the steroid injections, lumbar epidural, spinal fusion and post-operative procedures, which were necessary in the weeks and months following the arbitrary closure of his file on [personal information], 2003.

While it is the decision of the IRO that is being appealed in this case, this Tribunal is of the opinion and it so holds, that the decision of the IRO is nothing more than a restatement of the [personal information], 2003 decision of the Case Manager, Paul Fortin, who relied almost exclusively on the last opinion of the Board's Medical Director which was somewhat more equivocal than his previous (first opinion).

In addition, the [personal information], 2004 decision of the Entitlement Officer, while also a restatement of Dr. Carruther's opinion that the Worker incurred "at most a temporary aggravation" of a pre-existing injury, does not indicate any analysis or even an acknowledgement of the content of the numerous medical reports.

Apparently relying on Board Policy, the Board determined that not one of these reports had anything of significance in them to warrant at least a review of the Worker's claim in the context of his file.

In the reconsideration decision of February 10, 2005, the IRO noted and apparently accepted the finding of the Case Manager, Paul Fortin, to the effect that the aggravation to the Worker's pre-existing condition was "well beyond the acute phase and that the worker had

returned to his pre-accident state". It is noted that she quoted Mr. Fortin's conclusion to the effect that some eighteen (18) months post-accident, the worker "had reasonably recovered from this minor accident."

It is noted that in none of the medical reports from [personal information] 2002 to date, does the word "minor" appear.

In her decision the IRO noted that the Board originally accepted the Worker's claim as a new claim for right-sided sciatica, aware of the fact that the Worker had previous back problems/injuries in the past.

She noted that the claim was closed in [personal information] of 2003 "as it was felt that the claim was allowed as an aggravation basis and that **the aggravation had long since ended**!"

The IRO did note that the Worker did experience some ongoing problems with his back while on the job training program in PEI.

Somewhere along the way the focus shifted, from the Board's perspective, from the Worker suffering a new injury to an injury which aggravated a known and admitted pre-existing condition. By [personal information], 2003, the Worker was notified, by the Case Manager, that the case involved a "temporary aggravation of the pre-existing injury", after which the worker had reached a medical plateau and was therefore "back to his pre-injury symptomatic state."

The IRO noted that the [personal information] informed the Worker that his medical condition "had plateaued" by [personal information], 2001 when the [personal information] had closed his claim.

As noted earlier, the worker started his job after [personal information], 2001 as a full time

Worker with his new PEI employer.

The IRO, however, took issue with the [personal information] position and argued that the Worker's condition had not in fact plateaued (from his accident in [personal information]) notwithstanding his new job, in a new province, with a new employer, doing [personal information] work [personal information] hours per week.
On the other hand, in the face opinions from a variety of expert medical treating physicians: Dr. Alexander, Dr. Goodwin, Dr. Farmer and Dr. Ling; and, with a report from the Island Physio confirming, that after more than 15 treatments, there is no improvement and/or the Worker is doing better without; physio, and, in the face of medical confirmation that the steroid injections did little more than provide temporary relief; and, knowing that the surgery resulted only in some improvement; the IRO nevertheless held that the Case Manager's [personal information], 2003 decision, to the effect that the Worker "had returned to his pre-injury symptomatic state and that the acute phase of his disability had plateaud," was appropriate.

This conclusion is, in our opinion, not one that can be reasonably supported by the facts. It is not supported by the evidence. In fact, the evidence points strongly in the other direction. The Policy on the weighing of the evidence has little or no application on the facts of this case; and, even if it did, the evidence is manifestly and predominantly in favour of the Worker's entitlement to compensation.

At some point, and after a proper assessment of all the relevant medical evidence, it may well be the worker has or will have reached a plateau in medical recovery. Should he return to work and become fully employed and successfully maintain a new attachment to the workforce, that will remain to be seen.

In reaching our decision, we are of the view that, for the reasons just stated, the Benefit of the Doubt provisions of the Act have little or no applicability to this case as the evidence

strongly favours the worker's position and/or claim.

We are of the view that the Section 6(4) presumptions apply in this case and there is no credible evidence in favour of the Board to rebut them.

This Tribunal is bound by Board Policy, and in particular its policy on pre-existing conditions. However, that policy is only binding if:

(a) It does not run contrary to the spirit and intent of **the Act**; and,

(b) It is not applied in an arbitrary manner, without regard to otherwise strong, convincing, expert medical opinions from treating physicians, so as to result in a denial of a worker, who suffers a legitimate work place injury, to all of the benefits that the current legislation provides in the circumstances of his case.

In reaching this decision, this Tribunal noted, in particular, the directives given by the Appeals Division of the Supreme Court in **MacLeod vs. WCB**.

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

The Worker was not required to conclusively prove his entitlement to compensation, it is sufficient if his case can "reasonably be brought within the scope of the legislation". This Tribunal holds that the decision of the IRO, which affirmed that of the Case Manager, was not reasonable nor was it correct in all of the circumstances. There was ample medical evidence from which it could and should have decided in favour of the Worker, even if it had to draw inferences to do so.

Mr. Justice Mitchell in the ***Blanchard*** case stated:

> *On any application for compensation an applicant is entitled to the benefit of the doubt, which means that it is not necessary for the applicant to adduce conclusive proof of his right to the compensation applied for, but the Board is entitled to draw and shall draw from all circumstances of the case, the evidence and medical opinions, all reasonable inferences in favour of the applicant . . . (emphasis added)*

In conclusion, it is our finding that the Board was wrong in denying the Worker his claim and all of the benefits incidental thereout. In addition, even applying the test of reasonableness in all of the circumstances, we are also of the opinion that the decision of the IRO was so clearly wrong that it was patently unreasonable.

For the reasons hereinbefore referred to, the Appeal is allowed and it is hereby ordered that the Board shall: have the worker's compensation reinstated from the date of his claim closure for the full entitlement to: wage loss, impairment award, medical aid and rehabilitation benefits under the Act; and, that these benefits shall be continued until he is able to re-enter the workforce.

This Appeal is therefore allowed.

DATED this 12th day of June, 2006.

Allen J. MacPhee, Q.C. Chair of the Appeal Tribunal	Jamie Matthews Tribunal Member

Kevin Hughes
Tribunal Member

WORKERS' COMPENSATION BOARD

APPEAL TRIBUNAL

BETWEEN:

THE WORKER

APPELLANT

AND:

WORKERS' COMPENSATION BOARD

OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION #45
