

In the matter of an appeal under Section 21 of the
Workplace Health, Safety and Compensation Commission
Act, S.N.B. 1994 c. W-14

APPEALS TRIBUNAL

DECISION

Date of Hearing:	November 28, 2007
Date of Decision:	February 26, 2008
Decision Number:	20084839
Decision of the Appeals Tribunal:	This appeal is accepted

ISSUE

The appellant is appealing the April 25, 2006, decision advising that his claim for compensation benefits was finalized effective April 14, 2006, as it was determined that his soft tissue injury had resolved and that he was capable of returning to his pre-accident duties.

INFORMATION CONSIDERED

The following material was presented to, reviewed and considered by the Appeals Panel:

- Appeal Record dated November 6, 2007
- Explanations provided during the hearing by:
 - The appellant and his spouse
 - The appellant represented by a local labour community services agency
- The following document was submitted at the hearing:
E-1 Human Resources Development of Canada Notice of Entitlement

RATIONALE/CONCLUSION

The appellant, a truck driver/labourer, injured his lower back on June 16, 2005, when his foot slipped due to the wet conditions while he was attempting to pull the pin on the truck's fifth wheel. The appellant fell to the ground, landing on his left side [page 4 of the Appeal Record].

The Workplace Health, Safety and Compensation Commission (WHSCC) of New Brunswick accepted the appellant's claim on July 11, 2005, citing the injury to be a "lumbar strain" and the effective date being June 17, 2005 [page 14 of the Appeal Record].

In an ensuing consultation on September 6, 2005, the appellant's family physician, Dr. J. H. McLaughlin, reported "MRI – herniated disc L5-S1" and referred the appellant to Dr. E. P. Abraham, orthopaedic surgeon [page 39 of the Appeal Record].

In September 2005, the WHSCC requested that the appellant consult with Dr. J. Acker, orthopaedic surgeon [page 41 of the Appeal Record]. Dr. Acker reported the following on October 3, 2005:

SUMMARY AND CONCLUSION: In summary, this 48 year old truckdriver has a longstanding history of chronic low back pain, which was aggravated by a muscle sprain injury in June 2005. There are no physical findings or x-ray findings that would suggest that this back problem would be amenable to surgical intervention at this time.

I feel that he needs to be in a rehab program with modalities such as TENS, ultrasound, interferential, and perhaps acupuncture to try to alleviate his back pain and he should also be in an active back strengthening and stretching exercise program for the lower limbs, especially the hamstrings.

He does have all the mechanical assists such as the Obus forme and lumbosacral brace that would benefit him and he should continue to use those.

I expressed to him my concern about the large amount of Tylenol #3 that he is taking and suggested that perhaps he could reduce this and perhaps try some Extra Strength Tylenol or Advil instead.

He seemed to be accepting of my suggestions and seemed pleased that I did not feel that he needed back surgery as I gather his wife had back surgery and she hasn't done all that well.

I would recommend that you get him in an active physio program for rehab, either one of the physio clinics or the Workers Rehab Centre so that he could be rehabilitated and then proceed with a gradual return-to-work program. [s/c] [page 45 of the Appeal Record]

The WHSCC recommended "Work Conditioning" for the appellant, which was concurred by Dr. Abraham following his October 4, 2005, consult with the appellant [pages 48, 50 and 52 of the Appeal Record].

In his report of October 7, 2005, Dr. Abraham wrote the following:

His investigations are totally unremarkable. He has a very mild L-5 S-1 degenerative disc and also mild degenerative changes in the SI joints. These, of course, could be accident related. I could not see anything in the spinal canal that would indicate something that we should be looking at surgically nor would it correlate with the kind of symptoms that he has.

Unfortunately, I am not going to be able to help [the appellant]. He is in the process, I believe, of going to the Rehab Center for an assessment but the likelihood of him being able to return to his previous employment is extremely low. I feel that he is genuine man who has a real problem but it is exceedingly difficult to put a finger on it. Further consult via

a rheumatologist may be of benefit but I will leave that in your hands. [sic] [page 52 of the Appeal Record]

On November 30, 2005, the appellant was admitted to the Workers' Rehabilitation Centre, at which time Dr. J. Dorado, staff physician, wrote:

History of Present Illness

Dr. Acker, on October 3, 2005, commented that Mr. [the appellant] has a long history of chronic low back pain and no surgical indications were found. At that time, he was noted to have a large amount of Tylenol #3 and active physiotherapy was recommended. Dr. Abraham, on October 4, 2005, saw him in consultation and noted decreased chest expansion. The MRI showed degenerative disc disease and Dr. Abraham commented that the likelihood of returning to work to his pre accident job was extremely low and that a consultation with a rheumatologist may be of benefit.

He was assessed at the WRC, Work Conditioning program, on October 17, 2005 and found to be questionably appropriate for the program due to severe pain, decreased range of motion, decreased function and it was suggested he may benefit from local physiotherapy. If no significant change, to be admitted to the Work Recovery program. He did not receive local physiotherapy and has had no treatments since June 6, 2005. [sic] [page 78 of the Appeal Record]

The appellant was transferred to the "Pain Management Team" on January 5, 2006, as his dependence on Valium was a barrier to returning to employment [pages 88, 89 and 93 of the Appeal Record].

In the Discharge Summary from the Pain Management program, Dr. J. Ledezma, staff physician, wrote:

COURSE IN THE PROGRAM: Mr. [the appellant] underwent the interdisciplinary Pain Management program of WHSCC in [name of city], New Brunswick, receiving interventions from cognitive behavioural psychotherapy, pain medicine, nursing, occupational therapy and physiotherapy. Right from the beginning and following requests from his Case Manager, a tapering schedule to gradually decrease the intake of Diazepam was put in place, and Mr. [the appellant] is congratulated by his discipline and compliance with it. This was carried out from January 16th to April 16th, 2006, with no major withdrawal symptoms except occasional bouts of anxiety which were treated accordingly.

The chronic intake of Tylenol III was gradually discontinued along with the Flexeril, with no major withdrawal symptoms and he was placed on a Slow Release pain medication for around the clock analgesia with Codeine Contin 100 mgs, one tablet every twelve hours.

To address his depressive mood and bouts of anxiety, he was initiated in Effexor-XR at the initial dosage of 37.5 mgs and on discharge, he is taking 150 mgs in the morning with excellent results.

Mr. [the appellant] didn't have a significant past history of substance abuse and his pattern of intake of medications was monitored and he was a reliable and compliant patient. Therefore, there are no significant concerns of misuse of his current pain medications which are suggested to continue under the prescription and supervision of his new family physician, Dr. Pamela Jarrett. [s/c] [pages 117-118 of the Appeal Record]

The WHSCC notified the appellant on April 25, 2006, of the following:

As you know, your compensation claim was accepted effective June 17, 2005 for a strain to the lumbar region (soft tissue injury). You have since participated in the Work Conditioning Program, Work Recovery Program and, most recently, the Pain Management Program. Based on the medical and functional information on file, your soft tissue injury has resolved and WHSCC has deemed you to be capable of returning to your pre-accident duties. [s/c] [page 134 of the Appeal Record]

At the hearing, the appellant's representative, a workers' advocate, made the point that the appellant had not and still has not recovered from his injury, based on well documented medical reasons, to the point where he could return to his pre-accident employment. The Appeals Panel was informed that the appellant has now applied for Canada Pension Plan Disability benefits and has been accepted as evidenced in document E-1, a copy of the appellant's acceptance from Human Resources Development Canada dated November 16, 2007. The advocate referred to the appellant's ongoing visits to Dr. M. Jarrett who is treating the appellant's "chronic pain syndrome" which includes prescribing MS Contin [pages 135-136 of the Appeal Record]. The workers' advocate's final argument was that the initial soft tissue injury has developed into "chronic pain", and the appellant should be entitled to compensation in accordance with policy 25-030 Chronic Pain where it reads:

The Commission considers chronic pain to be compensable when it develops as a result of a compensable workplace injury, and the injured worker's functional capacity is reduced. For more information, see Section 4.0 – Chronic Pain and Entitlement to Benefits. [page 176 of the Appeal Record]

It was evident to the Appeals Panel that the appellant's condition has never resolved but has worsened, as it now is a case of chronic pain syndrome being managed in part with opioids. The Appeal Record contains telling statements that the Panel believes to be significant:

Dr. Abraham wrote on October 7, 2005, "...likelihood of him being able to return to his previous employment is extremely low" [page 52 of the Appeal Record].

Dr. Ledezma wrote on the Discharge Summary from the Pain Management program "ADMITTING & DISCHARGE DIAGNOSIS: (1) Chronic mechanical low back pain. (2) Chronic pain syndrome" [page 115 of the Appeal Record].

Dr. Ledezma also wrote on April 7, 2006:

Mr. [the appellant] seems to have been left with a permanent physical impairment in his low back region after the work related injury of June 16th, 2005, making a return to his pre-accident occupation as a truck driver quite unlikely. Therefore, from the preventive point of view, an alternate employment is indicated. [*s/c*] [page 128 of the Appeal Record]

The Appeals Panel is accepting this appeal and determines that the claim should not have been finalised as the appellant, in the opinion of the Panel, is NOT capable of returning to his pre-accident duties and that his claim is to be reopened and managed accordingly.

Original signed by:

JOHN CHATTERTON
CHAIRPERSON, APPEALS PANEL

Original signed by:

I AGREE
SHERRI DEVEAU
PANEL MEMBER

Original signed by:

I AGREE
LINWOOD LAWRENCE
PANEL MEMBER

JC/da