WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2110/10

BEFORE: S. Darvish: Vice-Chair

HEARING: October 28, 2010, at Hamilton
Oral
Post-hearing activity completed on November 9, 2010

DATE OF DECISION: December 3, 2010

NEUTRAL CITATION: 2010 ONWSIAT 2771

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) dated July 18, 2005

APPEARANCES:

For the worker: Ms. J. Vieira, Paralegal

For the employer: Not participating

Interpreter: None

REASONS

(i) Introduction to the appeal proceedings

[1] The worker appeals a decision of the ARO, N. Grunenko, dated July 18, 2005, which concluded that the worker did not have a recurrence as of July 8, 2002[1]. The ARO rendered a decision based upon the written record without an oral hearing.

[2] At the Tribunal hearing, Ms. Vieira represented the worker. Post-hearing activity was completed on November 9, 2010. On December 8, 2006, the Office of the Vice-Chair Registrar asked the worker's representative to provide copies of the soliciting correspondence to Drs. B. Gibson and S. Nash. However, Ms. Vieira did not have the copies of these letters with her at the hearing. The Vice-Chair provided Ms. Vieira additional time post-hearing to provide these letters. Post-Hearing Addendum No. 1 marked as Exhibit No. 6 included copies of the soliciting correspondence sent to Drs. Gibson and Nash from the worker's representative.

(ii) Issue

[3] The issue in this appeal is whether the worker had a recurrence on July 6, 2002 of a low back injury originally sustained in a compensable accident of January 8, 1995.

(iii) Background

[4] The following are the basic facts.

[5] The now 40 year old worker started as a service technician with the accident employer in 1991. He injured his low back on January 8, 1995 when he slipped and fell as he was pulling an oil drum from a trailer. The worker was diagnosed with mechanical low back pain. Treatment consisted of rest, heat, medication, physiotherapy and exercises. The Board granted entitlement for lost time. The worker returned to work on April 3, 1995.

[6] The worker claimed a recurrence on July 6, 2002. The Board denied the worker's claim on the basis that the worker's further low back problems were not related to the compensable accident of January 8, 1995. The worker has appealed this matter to the Tribunal.

(iv) The worker's testimony

[7] The worker testified that he started working for the accident employer on March 10, 1991 as a service technician. He performed service work which included checking engines and generators, changing oil and water pumps, rebuilding engines and monthly inspections. On January 8, 1995 he was performing an oil change. It was snowing and the ramps were slippery. He unloaded a 45 gallon oil drum from a trailer. While he was in the process of rolling the oil drum down the ramp, he slipped on the ramp and fell from the ramp onto his back onto a concrete floor. The worker sustained an injury to his low back. The worker took some time off work, but returned to work on modified duties on April 3, 1995. The modified duties included preparing reports and quotes in the office and performing inspections. The modified duties did

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[1] The ARO decision noted July 8, 2002 as the recurrence date, but the file documentation indicated that the date was actually July 6, 2002. Nothing turns on this change of date.

not include any service work. The worker was on modified duties for approximately two months, following which he returned to his regular duties with the accident employer. The worker stated that although he returned to his regular duties, he continued to experience low back pain. He coped with the pain by taking over-the-counter medication.

[8] The worker changed employment in 1996 (Employer 2) and again in 2001 (Employer 3). The worker performed service work with Employer 2. The duties included changing oil and tires, moving equipment which varied in size and weight, and delivering equipment. The worker also worked as a service technician with Employer 3. His duties included making deliveries, moving equipment and loading and unloading trucks. While working with Employers 2 and 3, the worker had low back pain and performed his duties slowly. His supervisors were aware of the prior back injury.

[9] The worker testified that he performed his regular duties at work on July 6, 2002. His back had bothered him throughout the day. However, during the middle of the night, he noticed extreme low back pain and he was numb from the waist down. He went to the hospital emergency room for examination.

[10] The worker testified that on June 29, 2002, he had helped his relatives move. His back was painful that day but it was not out of the ordinary. The worker testified that on June 1, 2001 he moved a bed out of his house, however, a neighbor helped him to move the bed. The worker stated that the move was the same level of difficulty as his workplace duties. The worker was involved in three to four non-compensable car accidents since 1986. In particular, he had a car accident in 1999. However, he stated the car accidents did not result in any bodily injuries or significant damage. He did not injure his low back in those car accidents.

[11] The worker testified that prior to January 8, 1995 he did not have any problems with his low back. After the January 1995 accident, the worker only visited the doctor if the low back pain was particularly severe. Dr. Nash became his family doctor in 1999. Prior to that, Dr. Seguin was his family doctor. The worker attended physiotherapy the odd time after April 1995. The worker explained that his low back has progressively deteriorated over time. The pain was initially only in his low back, whereas now the pain radiates from the low back into his legs. The worker underwent surgery for a disc herniation in December 2002.

(v) The documentary evidence

[12] On January 9, 1995, Dr. D. Seguin, the worker's family physician at the time, completed a Physician's First Report (Form 8) which diagnosed the worker with mechanical low back pain. Dr. Seguin recommended that the worker remain off work for two weeks initially. In a Progress Report dated February 10, 1995, Dr. Seguin repeated the diagnosis and noted that the worker was in daily physiotherapy. In a Progress Report dated February 27, 1995, Dr. Seguin put a checkmark beside the notations "rotation, lateral flexion, lateral extension, hip muscles, dorsiflexion and power". He further noted that the worker's low back pain was resolving. In a Progress Report dated March 30, 1995 Dr. Seguin noted that the worker had pain at L5-S1 which was worse at the end of the day. Dr. Seguin recommended that the worker could return to full duties on April 3, 1995. Dr. Seguin indicated that full recovery was expected.

[13] A Functional Abilities Evaluation (FAE) Form completed by a physiotherapist on March 7, 1995 reported the following results:

- Standing – 30 minutes; worker reported ache in the right side of low back;
- Sitting – no restriction reported or demonstrated;
- Kneeling/crouching – no restriction;
- Reaching – no restriction;
- Grip strength – no restriction;
- Pushing/pulling upper extremity – maximum 75 pounds at waist level; worker reported pain in low back;
- Lifting - maximum 25 pounds on occasional basis; worker reported pain in low back;
- Carrying – 30 pounds maximum; worker reported pain in low back;
- Walking – 45 to 60 minutes; worker reported pain in low back;
- Climbing – 100 steps at moderate pace; worker reported pain in low back;
- Forward bending – maximum 5 minutes; worker reported pain in low back;
- Repetitive squatting – no restriction.

[14] The clinical notes of Dr. Nash, the worker's family physician, from October 1999 to July 2002 were included in the file. The notes documented the worker's low back pain complaints beginning on October 7, 1999 with a diagnosis of mechanical low back pain. Low back pain complaints were reported on October 29 and November 4, 1999. The October 29, 1999 note indicated that the worker had low back pain for the past five years. The worker also reported numbness, tingling, and radicular left leg pain at the time. The next complaint of low back pain was one year later on October 10, 2000. On that date, Dr. Nash made the following notations:

- low back pain for two days;
- recurrent;
- back injury at work 1995.

[15] Low back pain complaints were reported on October 30, 2000, November 30, 2000 and January 8, 2001. On June 1, 2001, Dr. Nash noted that the worker hurt his back the prior week as he was lifting a bed into the house. The next complaint of low back pain was on February 1, 2002 where Dr. Nash reported that the worker had a sore back which had bothered him for a few months. He described the pain as "similar to the previous episodes". Low back pain complaints were reported on February 8 and March 28, 2002. Dr. Nash referred the worker to Dr. R. de Villiers, a neurosurgeon, on April 2, 2002. The entry for July 8, 2002 indicated that the worker had been to the emergency room on July 6, 2002 for back pain. The balance of the entries for July 2002 documented continued complaints of low back pain.

[16] A CT scan of the worker's lumbar spine on March 15, 2002 showed multilevel degenerative disc disease worse affecting the L4-5 level and a left paracentral disc herniation at L3-4 level causing spinal stenosis.

[17] The worker consulted with Dr. de Villiers, a neurosurgeon, regarding his low back condition on June 10, 2002. Dr. de Villiers outlined the history of low back pain as follows:

> He presents today with a problem of back pain which he relates to a work related injury about seven years ago…Since then his back has had a tendency to "go out" from time to time. This may occur with strenuous activity or even with relatively minor activity…He finds that sitting aggravates his pain and he is quite stiff in the morning…The most recent attack of pain was in January this year which lasted for about three weeks and at that time he also noticed some sensation of weakness in his legs…

[18] Dr. de Villiers' impression was that the worker probably had a degenerative disc condition and a herniated disc at the L3-4 level. He referred the worker for an MRI.

[19] An Emergency Report dated July 6, 2002 indicated that the worker had injured his back on the weekend while moving. It was also noted that the worker had back problems since 1994[2] which have acted up since then. The worker had complained of increased low back pain radiating across the back.

[20] In a Physician's Report Re-opened Claim dated July 19, 2002, Dr. Nash diagnosed the worker with a L3-4 moderate to large paracentral disc herniation causing moderate to severe spinal stenosis. It was noted that the worker had severe pain across his back as of July 6, 2002. Dr. Nash indicated that there was no particular accident that had occurred on this date.

[21] An MRI of the worker's lumbar spine on July 20, 2002 revealed a large left posterior paramedian disc herniation at L3-4 with superior extrusion. There was a much smaller left paramedian herniation at L4-5.

[22] In an Investigation Report dated August 23, 2002, the Claims Investigator spoke with the shop foreman at Employer 2 regarding the worker's back condition. The foreman stated that he was aware of the worker's previous back injury. The worker's symptoms were ongoing and "seemed to come on with bending, twisting, getting up and down". The Claims Investigator also spoke with the store manager at Employer 3 regarding the worker's back. The manager indicated that from the outset, the worker informed everyone about his back condition. The worker would avoid certain tasks, such as heavy lifting or jobs that required a lot of bending. The worker complained regularly that his back was sore and he missed work on occasion if he had a flare up. The manager further indicated that the worker took the day off work on June 29, 2002 to help his in-laws move. That following week, "the worker seemed to have a lot of back discomfort and ended up in the hospital".

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[2] While the report states 1994, I accept that the doctor meant 1995. Nothing turns on this error in the date.

[23] In a report of September 12, 2002, Dr. de Villiers recommended the worker for a laminectomy procedure. The worker underwent surgery on December 3, 2002. The procedure was a lumbar laminectomy at L3-4 and L4-5 with left L3-4 and L4-5 foraminotomies and microdisectomy at L4-5. Dr. de Villiers reported that the worker's pain was in the lower back with radiation into the left leg and up to the knee. The worker also complained of feeling pins and needles up and down the back.

[24] A report from Dr. de Villiers dated January 8, 2003 indicated that the worker's condition had improved since the back surgery, but it was still stiff in the mornings. Dr. de Villiers stated that the worker would not be able to continue working as a mechanic unless there was a significant improvement in his symptoms.

[25] Dr. de Villiers was asked by the worker's representative to comment on the cause of the worker's low back condition. In a letter dated June 26, 2003, Dr. de Villiers commented that there is no definite way of dating the onset of a particular injury beyond the history provided by the patient. He noted that continuity of complaint from the time of the reported injury is helpful in such cases. Since Dr. de Villiers started treating the worker seven years after the initial injury, he could not verify such continuity. However, Dr. de Villiers affirmed that "a relapsing recurring course is very typical of lumbar disc problems and so resolution of symptoms does not necessarily mean that a return of pain represents a new injury or incident". Dr. de Villiers also indicated that it was not possible to conclude at that time whether the worker had a permanent impairment. I note however that the issue of permanent impairment was not before me.

[26] Dr. Nash indicated in a report of March 19, 2004, that the worker has suffered from recurrent episodes of mechanical back pain since 1995. Dr. Nash noted that although it was difficult to know how much of a role the January 1995 injury has played in the subsequent back problems, the 1995 injury was very likely the inciting event.

[27] Dr. B. Gibson, a specialist in occupational and environmental health, opined in a report dated August 23, 2004 that the worker's compensable 1995 accident was exacerbated on July 6, 2002 and was linked to the worker's disc herniation. Dr. Gibson provided the following analysis:

> I believe that the January 8, 1995 accident injured [the worker's] discs at the L2-3, L3-4 and L4-5 levels. I do not find the reasons cited by the WSIB for denying further entitlement to [the worker's] claim satisfactory because:
>
> The initial injury was not minor – [the worker] held onto the trolley as he fell;
>
> A period of several years without significant problems after an injury to the vertebral disc is a common occurrence;
>
> The June 1, 2001 aggravation of his low back pain was minor; [and]
>
> The exacerbation leading up to July 6, 2002 emergency room visit started in February 2002. Significant physical findings were present when Dr. Nash examined [the worker] on February 7, 2002. The CT scan was done in March 2002 and [the worker] saw Dr. de Villiers for the initial consultation on June 10, 2002.

[28] Dr. Gibson further noted that the accident history was compatible with the later manifestation of disc herniation as follows:

> As noted in Dr. de Villiers' letter…on July 26, 2003, a relapsing, recurring course is very typical of lumbar disc problems. A return of pain does not necessarily indicate a new injury. The significant point in the story is that [the worker] gives of the original accident is that he held onto the trolley when he fell. His injury was not simply a blow to the lower back when he hit the floor. There was also significant traction across the lumbar vertebrae – he fell in a forward-flexed position with tension on the lumbar spine. It is common to find a history of an earlier injury to the back, often many years earlier, in patients who present with a herniated disc. Damage is done to the annulus that surrounds the intervertebral disc. This damage becomes the focus for triggering protective lumbosacral spasm when the person re-stresses the area that was injured. After a number of years and repeated strains on the disc there is an acute herniation of the disc. I believe this is what happened in [the worker's] case.

[29] Dr. N. Levine, a Board Medical Consultant, opined in Board Memorandum No. 28 dated February 4, 2005, that the worker completely recovered from the 1995 injury. Furthermore, the injury sustained in 1995 was minor and there was no evidence of a disc herniation or permanent injury. Dr. Levine went on to state the following regarding the non-compensable intervening events:

> The worker had several other injuries after the initial [date of accident] which were not reported as work related (Oct. 1999, Oct. 2000, June 2001), before the disc herniation was noted. The injury in 2001 was due to lifting a bed – in my opinion, and with all due respect to Dr. Gibson, this heavy lifting was just as likely (and probably more likely) to have been the etiology of the disc herniation which was subsequently diagnosed. This episode would likely have involved more stress on the lower back (and a compressive force on the discs) than the initial injury in 1995.

[30] Dr. Levine concluded that there was no relationship between the disc herniation diagnosed in 2002 and the compensable 1995 injury.

(vi) The submissions

[31] Ms. Vieira submitted that the worker's low back injury from 1995 never resolved. The worker continued to experience low back pain symptoms since the initial compensable accident until the recurrence on July 6, 2002. The worker masked the pain symptoms by taking over the counter medications.

[32] There was no precipitating event to trigger the worker's low back pain. There was no new accident. Dr. Nash documented the worker's complaints of low back pain from 1999 onwards. The recurrence was not caused by the worker's activity of moving furniture on June 29, 2002. By then, the worker's back had already been progressively deteriorating. This was evidenced by the fact that the worker consulted with Dr. de Villiers on June 10, 2002.
Ms. Vieira relied on the opinion of Dr. Gibson. She submitted that Dr. Gibson linked the worker's condition in 2002 to the compensable 1995 accident. Ms. Vieira also submitted that the non-compensable intervening events in 2001 and 2002 may have aggravated the worker's compensable pre-existing low back condition, but they did not cause the disc herniation.

(vii) Law and policy

[33] Since the worker is claiming a recurrence of the 1995 injury, the pre-1997 *Workers' Compensation Act* is applicable to this appeal. All statutory references in this decision are to the pre-1997 Act, as amended, unless otherwise stated. The hearing of the appeal commenced after January 1, 1998; therefore, certain provisions of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") also apply to the appeal.

[34] Specifically, section 4 of the Pre-1997 Act governs the worker's entitlement in this case.

[35] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #7, would apply to the subject matter of this appeal:

- Package #1 – Initial Entitlement;
- Package #32 – Non Work Related Conditions;
- Package #38 – Recurrence; and
- Package #300 – Decision Making/Benefit of Doubt/Merits and Justice

[36] I have considered *Operational Policy Manual* ("OPM") Document No. 15-03-01, entitled "Recurrences"[3] as necessary in deciding the issue in this appeal.

(viii) Analysis

[37] The issue before me is whether the incident of July 6, 2002 was a recurrence that was causally related to the worker's original low back injury of January 8, 1995. In other words, did the January 8, 1995 compensable injury make a significant contribution to the worker's low back disc herniation in 2002?

[38] OPM Document No. 15-03-01 provides that a worker is entitled to benefits for a recurrence of a work-related injury. A recurrence may result from an insignificant new accident, or may arise when there is no new accident. To identify a recurrence, the Board must confirm that there is clinical compatibility between the original injury and the current condition, or a combination of clinical compatibility and continuity. To establish clinical compatibility, a comparison is made between the worker's current clinical condition and to that following the initial accident. The following factors are considered:

- whether the parts of the body affected now are the same as, or related to, those affected initially;
- whether the body functions affected now are the same as those affected initially; and
- the degree to which body functions are affected now, as compared to the effect of the initial condition.

[3] Published October 12, 2004. This policy applies to all decisions made on or after January 1, 1998, for all accidents.

[39] Similar clinical conditions indicate that the current problem may be a result of the original injury, whereas dissimilar or unrelated conditions indicate that there is no compatibility, and therefore no recurrence.

[40] To establish continuity, the following factors can be considered:

- whether the worker has complained to supervisors, co-workers, or health care practitioners on an ongoing basis since the original injury;
- whether the worker has demonstrated ongoing symptoms since the original injury;
- whether the worker has required restrictions or job modifications;
- whether the worker had ongoing treatment for the original condition; or
- whether the worker experienced a lifestyle change since the original accident.

[41] With respect to compatibility, I find that the majority of the medical evidence supports compatibility between the worker's condition on July 6, 2002 and the original low back injury of January 1995. The difficulty in this case is that there was no diagnostic imaging results of the worker's lumbar spine from 1995 to compare with the CT scan and MRI results from 2002. Dr. Nash's clinical note of October 29, 1999 mentioned that the worker was sent for an x-ray, but the results of that x-ray were not provided. Nonetheless, I rely on the medical reports of the worker's treating physicians, all of whom indicated that there was a link between the worker's disc herniation in 2002 and the original back injury of 1995. Dr. Nash opined on March 19, 2004 that the January 1995 injury was very likely the causal agent of the worker's disc herniation at L3-4. Dr. Gibson unequivocally linked the worker's disc herniation at L3-4 to the January 1995 accident in his report of August 23, 2004. Dr. de Villiers also indicated on June 26, 2003 that the worker's history of low back pain complaints was very typical of lumbar disc problems. While I acknowledge the opinion of the Board Medical Consultant, Dr. Levine, I prefer the opinions of the worker's treating physicians in this case as their opinions were based on assessments of the worker over time. In addition, I note that the worker had complained of low back pain with radicular left leg pain, numbness and tingling as early as October 29, 1999 to Dr. Nash. These symptoms were similar to the worker's later symptoms in 2002.

[42] Dr. Levine's opinion was based in part on a finding that the worker recovered from the original injury. However, I find that the evidence shows that the worker did not in fact recover from the original injury. The clinical notes of Dr. Nash, show continuity of the worker's low back pain symptoms between October 7, 1999 and July 2002. The period of concern here is between April 4, 1995 (the date of the worker's return to work with the accident employer) and October 7, 1999. There were no medical reports on file to show that the worker continued to have low back pain symptoms throughout this period of time. However, Board Policy does not specifically require clinical evidence to establish continuity. The worker stated that during this time period, he coped with the pain by taking over the counter medication. However, the worker maintained that he continued to have low back pain on an ongoing basis since January 1995. I find that the worker's testimony regarding his ongoing low back pain was supported by the Investigation Report. In that report, the shop foreman of Employer 2 confirmed that the worker had ongoing pain during his employment tenure with them. In particular, the following was reported by the shop foreman:

> During the time they worked together, he [the shop foreman] was aware that he [the worker] had a strain in his back. [The shop foreman] would describe the problems as pretty much ongoing during that time. The symptoms seemed to come on with bending, twisting, getting up and down.
>
> …He recalls sending the worker home one day because he was in too much pain…
>
> …He believes the worker mentioned that it was a previous injury that would flare up depending on what he was doing...

[43] The worker worked for Employer 2 between 1996 and 2001. I am therefore satisfied that the worker had ongoing low back pain symptoms between 1995 and 1999. In addition, although the worker did not have specific restrictions for his low back condition, he did modify his job duties to accommodate his back. This was explained in the Investigation Report by the store manager of Employer 3 who stated:

> From the outset, the worker made everyone aware that he had a bad back. He would avoid certain tasks, such as heavy lifting or jobs that required a lot of bending, whenever possible…They would try and help him out whenever possible. He always seemed to be careful not to aggravate his condition, but still would complain fairly regularly that his back was sore. He would miss the odd afternoon because his back was acting up.

[44] Therefore, I find that continuity of the worker's symptoms was established pursuant to Board Policy.

The effect of the intervening events and the applicable causation test

[45] In this case, there were also two non-compensable intervening events between January 1995 and July 2002. Whether or not these non-compensable incidents contributed to the development of the worker's disc herniation is relevant to the issue of compatibility. The standard of proof in workers' compensation cases is the balance of probabilities, subject to the statutory provision regarding benefit of the doubt. In determining causation, the Tribunal applies a "significant contribution" test. The rationale for this approach was explained in *Decision No. 915*. There is a long line of jurisprudence at the Tribunal which establishes the Tribunal's longstanding approach to causation.

[46] Having said that, the issue of which causation test is to be applied was addressed by the Supreme Court of Canada in *Resurfice Corp.* v. *Hanke*, 2007 SCC 7. In that decision, the Court held that "the basic test for determining causation remains the 'but for' test." The Court recognized that a material contribution test may apply in special circumstances, where two conditions are present. The first is that it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the but-for test, for reasons that are beyond the plaintiff's control. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury.

[47] In *Monks* v. *ING Insurance Company of Canada*, [2008] ONCA 269, the Ontario Court of Appeal indicated that *Resurfice* did not alter basic causation principles set out in *Athey* v. *Leonati*, [1996] 3 S.C.R. 458. This issue was recently considered again in the workers' compensation context by the Alberta Court of Queeen's Bench in *Shuchuk* v. *Alberta (Alberta Commission for Workers' Compensation)*, 2010 ABQB 432. The Court found that the "but for" test did not fully address the issues in the case. He held at para 81:

> I am of the view that the Commission erred in determining that the "but for" analysis applies to the consideration of intervening or subsequent events. The question, rather, is whether any such events had the effect of breaking the chain of causation such as to be considered wholly severable from the factors enumerated in the Policy. This approach is consistent with the remedial purposed of the Act and the Policy.

[48] The *Shuchuk* decision supports the use of the significant (or material) contribution test in determination causation when there are intervening events. In fact, the *Resurfice* decision suggests that when there is sufficient evidence available to apply the "but for" test, that test and the significant contribution tests should generally produce the same result (see *Decision No. 1472/05R*). In this case, the applicable test is the significant contribution test as this is a situation in which the evidence is insufficient to show what might have occurred to the worker's back "but for" the workplace accident of January 8, 1995.

[49] In this respect, the principles espoused by the Supreme Court of Canada in *Athey v. Leonati* are applicable. *Athey* stands for the proposition that an "indivisible" injury with multi-factorial causes cannot be apportioned. That is because the person would not have suffered the injury in the absence of (or "but for") the compensable cause. However, when the non-compensable injury would have occurred irrespective of the compensable injury, the test of material contribution set out in *Athey* does not apply to render the entire condition compensable.

[50] In *Athey*, the plaintiff suffered a disc herniation while doing an exercise routine at a fitness centre. He had had two prior accidents to his back, and it was accepted that the injuries resulting from these prior accidents were the responsibility of the respondents. He also had an underlying pre-existing back condition. By applying the thin skull rule and the law of material contribution, the Court found that the prior accidents had been a causative factor in the disc herniation, and that the respondents were liable despite the fact that the pre-existing underlying condition was also a causative factor. The Court found that the trial judge had erred in apportioning responsibility for the disc herniation between the causes of the injury: that is, between the pre-existing degenerative disc disease and the causal effects of the prior accidents. The Court stated:

> In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable.

[51] The *Athey* decision rejected the argument that the incident in the fitness centre had been an intervening cause that was itself responsible for the worker's symptoms. The Court stated:

> The Fitness World incident was not a cause: it was the effect. It was the injury. Mere stretching alone was not sufficient to cause disc herniation in the absence of some latent disposition or previous injuries.

[52] In this case, I find that the worker's disc herniation was not a divisible injury. The worker injured his low back in 1995. Although it was initially anticipated that the worker would recover from his injury, the evidence suggested that he did not recover but continued to experience ongoing low back pain. The worker continued to work in a job that was physically demanding. The evidence showed that he had ongoing low back pain and flare ups of low back pain periodically depending on his activities. I do not find that the two moving incidents in 2001

and 2002 were sufficient on their own to cause or significantly contribute to the worker's disc herniation. It is important to note that the worker's disc herniation was first documented in a CT scan on March 15, 2002. This was several months prior to the June 2002 moving incident. Given that the disc herniation was apparent prior to June 2002, the June 2002 moving event could not have contributed to it.

[53] The only other notable non-compensable incident that occurred prior to 2002 involving the worker's low back was in June 2001 where the worker was moving a bed. However, the worker testified that he did not move the bed on his own. A neighbor assisted him with the move and the bed was not heavy. He testified that it was no more physically demanding than the duties he performed at work. Although the worker had low back pain following this activity, the clinical note of Dr. Nash on June 1, 2001 indicated the low back pain resulting from this activity was limited to that one complaint. It did not appear that the worker's low back pain relating to this activity continued on an ongoing basis. In fact, I note that Dr. Nash next reported low back pain from the worker several months later on February 1, 2002. I acknowledge that the June 2001 moving incident temporarily aggravated the worker's low back pain. However, there was no cogent evidence to suggest that this incident rendered the 1995 accident insignificant. This event did not have the effect of breaking the chain of causation. I find that the January 1995 injury was a significant contributory factor to the worker's disc herniation.

[54] Therefore, based on the foregoing reasons, I find that the January 8, 1995 compensable injury significantly contributed to a recurrence on July 6, 2002.

DISPOSITION

[55] The appeal is allowed. The worker had a recurrence on July 6, 2002 which was related to the initial compensable accident of January 8, 1995. The nature and duration of benefits flowing from this decision will be returned to the Board for further adjudication, subject to the usual rights of appeal.

DATED: December 3, 2010

SIGNED: S. Darvish