WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2368/05

BEFORE:	S. Ryan, Vice-Chair D. McLachlan, Member representative of employers, M. Ferrari, Member representative of workers.
HEARING:	November 30, 2005, at Toronto Oral
DATE OF DECISION:	January 9, 2006
NEUTRAL CITATION:	2006 ONWSIAT 32
DECISION(S) UNDER APPEAL:	I. Millers, Appeals Resolution Officer, dated May 6, 2004; and M. Evan, Appeals Resolution Officer, dated October 31, 2003.

APPEARANCES:

For the worker:	None
For the employer:	H. Tabrizi, Lawyer
From the Tribunal:	T. Zigomanis, Counsel Office
Interpreter:	None

REASONS

(i) Introduction

[1] The worker suffered an injury to his lower back and neck in a motor vehicle accident (MVA) while in the course of employment on December 10, 1989. The Board accepted the claim and he received temporary benefits to January 20, 1990, when he returned to work. The worker contacted the Board in September 2000 requesting ongoing entitlement for his lower back. In the decision of May 6, 2004, I. Millers, Appeals Resolution Officer, denied the worker entitlement to lost time benefits between November 1999 and March 2000, chiropractic treatment and a pension award under the claim established for the worker's low back injury of December 10, 1989.

[2] On January 13, 1995, the worker stopped working following an altercation with his supervisor, HK. He remained off work until April 10, 1995. The worker claimed entitlement for traumatic stress. In the decision of October 31, 2003, M. Evans, Appeals Resolution Officer, denied the worker entitlement for traumatic stress and lost time benefits.

[3] The worker appeals both Appeals Resolution Officer decisions to the Tribunal. The worker appeared without representation. He advised that he wished to proceed without a representative.

[4] Following a discussion with the worker and Ms. Tabrizi, the employer's representative, it was agreed that the Panel would determine whether the worker suffered a permanent injury to his lower back as a result of the compensable MVA of December 10, 1989. We advised that if we found in favour of the worker on that issue, we would remit the ancillary issue of lost time benefits after January 20, 1990 back to the Board for adjudication. It was also agreed that the Panel would determine whether the worker has entitlement for traumatic mental stress as a result of an altercation with his supervisor on January 13, 1995 and, if so, whether he is entitled to temporary benefits to April 10, 1995, when he returned to work.

[5] The Panel addressed the matter of witnesses with the worker and Ms. Tabrizi. Prior to the hearing and at the worker's request, the Tribunal Counsel Office issued summons to six witnesses. The employer objected and the matter was brought to our attention in the days leading up to the hearing. In a pre-hearing memorandum, we directed the Tribunal Counsel Office to cancel the summons. We advised that we would first hear testimony from the worker and HK, his supervisor, and determine which, if any, additional witnesses should be called at a future reconvening. During the course of the hearing on November 30, 2005, the worker withdrew his request to have other witnesses testify. Accordingly, a reconvening was not necessary.

(ii) Background of the back claim

History to December 10, 1989

[6] In February 1988, the worker was hired by the accident employer, a municipality. He held a number of manual labour jobs. Prior to the compensable accident, he worked as a manual labourer in a crew of other workers and was responsible for removing large items of garbage from city streets. The worker testified that this job entailed heavy lifting.

[7] The worker was questioned about his medical history prior to the compensable accident. He stated that he might have experienced some back discomfort while working with a different employer in the 1980s. In that job, he was required to perform heavy work. However, he did not lose time from work due to back pain. The worker acknowledged information in the Case Record regarding a non-compensable MVA in the mid-1980s. The worker stated that this information was inaccurate because he did not recall being involved in any MVA other than the compensable one at issue in this appeal.

[8] The worker was questioned about medical information in the Case Record which indicated that he suffered back pain in November 1989. The worker testified that he hurt his back at work toward the end of a shift. He explained that he was cleaning an incline when he "wiped out", landing on his back. The worker testified that a supervisor witnessed the accident and asked him if he wanted to complete an accident report. The worker explained that he decided not to report the injury until after an examination at a local hospital. He stated that his plan was to report the accident to the Board only if medical investigations showed a serious injury or if his pain persisted.

[9] An emergency department report issued by Toronto Western Hospital dated November 25, 1989, indicated the following history:

> [Complained of] back pain [times] 2 days. Pain radiating to l[eft] leg. No [history] of trauma.

[10] Attached to the emergency report is a hand-written note from the emergency physician which stated:

> …low back pain [times] 2 days. Patient [complained of] low back pain of gradual onset over past 2 days. No previous h[istory] of low back pain. Pain radiates to knee on l[eft]…leg weakness. No change in bowels or bladder.

On examination, the emergency physician found no bony or neurological abnormalities.

[11] The worker could not explain the discrepancy between his history of "wiping out" in November 1989 and the history of a gradual onset without trauma in the contemporaneous medical evidence. He testified that he advised the emergency physician at Toronto Western Hospital that he was not "filing" an injury report because no serious injury to his back was detected. The worker also stated that he did not lose time from work as a result of the November 1989 incident and that his back was "pretty good" upon returning to work. Ms. Tabrizi pointed out to the worker that attendance records (Exhibit #8) indicate that he took two sick days off work in late November 1989. The worker replied that he may have taken two sick days to rest his back before returning to work.

History from December 10, 1989 to November 1993

[12] The worker testified that on December 10, 1989, he was a front seat passenger in a crew "cab" (i.e. truck) when the MVA occurred. He explained that his co-worker, who was driving at the time, failed to turn onto an intended street. Rather than drive around and return to the street, the co-worker drove in reverse at a speed of about 40 kms per hour over a distance of several meters. The crew cab struck a large lamp post "dead-on". The worker stated that the crew cab was

"scrapped" and that a co-worker also in the vehicle remained off work for one year. The driver returned to work shortly after the accident, but wore a neck brace for six months.

[13] The worker was taken by ambulance to Toronto Western Hospital for emergency treatment. Notes from an emergency department nurse indicated that the worker complained of lower back and neck pain. Upon examination, an emergency physician found the worker to be tender between his shoulder blades and in the lumbosacral region. An x-ray of the worker's lumbar spine taken on the date of accident was negative except for a "posterior osteophyte at the inferior aspect of the L5 vertebral body". At the time of the accident, the worker was 32 years old.

[14] In a Doctor's First Report dated December 11, 1989, Dr. W. Black, the worker's family doctor, advised that the worker suffered a sprain to his lower back associated with left-sided sciatica as well as a cervical hyperextension injury. He felt that the worker would be disabled for a period of 7 to 14 days and recommended bed rest and heat during the interim,

[15] However, information in the Case Record indicates that the worker was also sent on a course of daily physiotherapy. In a progress report dated December 29, 1989, the worker advised that his back pain was "improving slowly". A clinical note from Dr. Black dated January 9, 1990 indicated that the worker "feels great". In a progress report dated January 15, 1990, the worker advised:

> Pain gone. Doing a 3 step stretch exercise for a week, before returning to work. Physio not necessary now.

[16] The next documentary evidence concerning the worker's lower back condition is a clinical note from Dr. Black dated March 5, 1993 (more on this below).

[17] At the hearing, the worker denied that his lower back pain had completely resolved following the compensable MVA. He testified that he continued to experience residual symptoms requiring various healthcare modalities including acupuncture and chiropractic treatment. He testified that he paid for these treatments himself. He stated that he did not continue with chiropractic treatment because the chiropractor advised the treatment would not help in the long term. Unfortunately, due to the passage of time, documentary proof of his treatment is no longer available. However, he did direct us to a bank statement which indicated that he made two payments to a pain and headache clinic in January and February 1992 (Exhibit #1).

[18] The worker also testified that he did not return to his pre-accident duties on January 20, 1990. He recalled that while he was recovering from the MVA, a superintendent contacted him and offered him a "litter picker" job which the worker described as a lighter job. The worker recalled that he was initially expected to return to work at four hours per day. However, he explained, he really enjoyed the work because it did not involve heavy lifting and he could work with considerable independence. He was able to complete a full shift beginning on his first day back at work. The worker testified that he asked a superintendent, who at that time was PD, if he could remain in this job on a permanent basis and the superintendent agreed.

[19] The worker testified that between January 1990 and March 1993, he took many sick days off work because of back pain. He stated that he found snow shovelling during the winter months to be particularly painful for his back. The worker explained that he was able to take as many as

three consecutive sick days off work without having to provide a medical note to his employer to justify his absence.

[20] The worker recalled that beginning as early as 1991, PD was becoming concerned about the number of sick days he was taking. The worker testified that he told the superintendent that most of his sick days were required because of back pain attributable to the compensable MVA.

[21] In a clinical note dated March 5, 1993, Dr. Black advised that the worker presented with back pain "since the MVA at work". He understood that the accident employer wanted him to be seen by an orthopaedic surgeon. The worker testified that supervisory staff were becoming increasingly concerned about the number of sick days he was reporting and, at their request, arrangements were made to explore his back problem. Following questioning from the Panel and Ms. Tabrizi, the worker acknowledged that some of his sick days were for reasons other than back pain. He estimated, however, that 70 percent of his sick days were taken because of his back condition.

[22] On May 12, 1993, the worker was examined by Dr. J. Gollish, orthopaedic surgeon, and a physiotherapist at the Orthopaedic and Arthritic Hospital in Toronto. The examiners noted the worker's history of back pain which the worker attributed to the compensable MVA. At the time of their assessment, the worker complained of activity-related low back pain which radiated toward the left side then to the right side. The worker reported that his sleep was disturbed by back pain. Upon examination, the worker was found to demonstrate reduced range of lumbar motion particularly on extension. The examiners opined that the worker suffered a myofascial strain of the lumbar spine "in an injury which occurred in November 1989".[1] They recommended that the worker participate in an exercise therapy program while participating in "the essential duties of his usual work".

[23] Clinical notes from Dr. Black indicate that the worker complained of back pain on June 1 and 15, 1993. On the former date, Dr. Black advised that the worker was not taking medication or physiotherapy for his back pain. On the latter date, Dr. Black advised that the worker experienced pain with all lumbar movements (flexion, extension and lateral rotation). The worker also complained of pain in his lower thoracic area. In a clinical note dated October 1, 1993, Dr. Black advised that the worker continued to complain of back pain.

History from November 1993

[24] In a clinical note dated November 29, 1993, Dr. Black advised:

> Slipped down stairs – concrete. L[eft] sided back [and] elbows. Went to [hospital], [prescribed Tylenol [and] Valium. Wants to re[turn] to work.

[25] There are no hospital reports in the Case Record concerning this incident. At the hearing, the worker recalled that he was on a "day off". He slipped and fell on concrete steps sustaining an injury to his left upper back, a fractured elbow and bruised ribs. He recalled that he had great difficulty breathing and went to hospital. The worker thought that his difficulty breathing might

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[1] This date may be a typographical error. The examiners understood that the MVA occurred in November 1989, not December 1989 as clearly indicated in the Case Record.

explain why Dr. Black prescribed to Valium. The worker denied losing time from work as a result of this injury. However, as pointed out by Ms. Tabrizi, attendance records (Exhibit #8) indicate that the worker was "ill" on November 29 and 30, 1993 as well as on December 1, 1993. The worker acknowledged this information, but emphasised that he lost more time from work following the compensable MVA.

[26] A medical note from Dr. Black dated December 6, 1993, indicated that the worker fell "5 days" previously resulting in left lumbar pain. He advised that all investigations were negative. He advised that "[t]oday sneezed during dinner – same pain". Dr. Black suspected that the worker suffered a "ruptured disc".

[27] In a clinical note dated in late December 1993,[2] Dr. Black advised that the worker continued to experience pain in the left side of his back after falling on concrete one month previously. The worker reported difficulty sleeping, but had stopped taking Tylenol #3 and Flexoril.

[28] The next clinical note from Dr. Black is dated in 1994. The worker could not attend the appointment because of snow removal duties. A report from Dr. Black dated December 16, 1994, addressed to whom it may concern, advised that the worker suffered from a chronic back problem and had to wear a back brace. Dr. Black advised that wearing overalls at work caused the worker increased pain in his upper back.

[29] The next contemporaneous medical evidence is a January 30, 1996 report from a physiotherapist at the Canadian Back Institute. The physiotherapist advised that the worker complained of intermittent left-sided back pain with occasional radiation down his left lower extremity ever since "an injury that occurred at work in 1989". The physiotherapist advised that the worker was overweight with decreased lumbar spine extension and no neurological abnormalities. The physiotherapist opined that the worker would not experience any improvement unless he resumed a physical conditioning exercise program.

[30] The worker testified that starting in 1996, supervisory staff were much more understanding of his chronic back problems and allowed him to rest more frequently while carrying out his duties at work. He stated that this accommodation was very beneficial for his back pain.

[31] On November 18, 1997, the worker suffered an injury to his upper back at work after lifting a block of ice. Dr. Black diagnosed back sprain, thoracic area. Clinical notes from the family doctor indicate that the worker's condition improved by November 24, 1997 and he returned to work on November 26, 1997.

[32] On September 15, 2000, the worker called the Board inquiring about a pension assessment for his back condition. He advised that when he returned to work, he performed light duties as a litter picker and continued to perform those duties. Following an investigation into the worker's claim, the Board denied the worker a pension assessment largely on the grounds of a lack of medical continuity.

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[2] The precise date in December 1993 is not legible.

[33] On January 1, 2001, the worker attended St. Michael's Hospital in Toronto following an exacerbation of back pain. The attending physician completed a Physician's First Report and advised that the worker twisted his back at work resulting in a "muscle strain". He recommended that the worker return to work within a few days and avoid heavy lifting. There are no other medical reports in the claim file and no indication that the Board accepted this claim.

[34] The worker underwent an MRI scan of his lumbosacral and thoracic spine on November 16, 2001. The ensuing report revealed degenerative disc disease between the L3-4 and L5-S1 levels and a central disc herniation at the T10-11 level.

[35] On December 12, 2002, Dr. S.K. Garg, Board Medical Consultant, advised after a review of the claim file that in his opinion the worker's back pain was attributable to "pre-mature degenerative changes in the spine" and unrelated to the compensable MVA of December 10, 1989.

[36] A CT scan conducted on April 12, 2002, revealed a mild posterior disc bulge at the L3-4 level, a posterior bulge at the L4-5 level and disc space narrowing at the L5-S1 level. The report characterised these findings as "degenerative".

[37] On January 10, 2004, the worker sought medical attention following a slip on ice at work. Dr. S. Martinilak diagnosed back strain and recommended pain management. A chiropractor's report dated April 1, 2004 repeated the diagnosis and advised that the worker was likely to experience "chronic symptoms". There is no indication that the Board accepted this claim.

[38] At the hearing, the worker testified that his back condition is presently worse than it was previously. When asked to be more specific, the worker explained that pain in his upper back is predominant. On occasion, his lower back pain takes a "vacation" and all he experiences is upper back pain. He attributed his ability to continue working as a litter picker to changes in the job. The vast majority of snow removal activities since 1998 are performed by workers contracted by the accident employer. He estimated that his snow shovelling activities have been reduced to about "2 percent" of what they used to be.

(iii) Background of the traumatic mental stress claim

[39] The worker testified that HK was his supervisor between 1991 or 1992 and 1993. During that period, he did not encounter any difficulties with his supervisor. In 1993, HK was transferred away, so there was little interaction between the two gentlemen until late 1994 or early 1995.

[40] Between 1993 and late 1994 or early 1995, the worker was supervised by RA. RA re-assigned litter pickers to different geographic locations. The worker was assigned the "bus terminal" area or "beat" which was previously tended to by a co-worker, NM. This beat also encompassed the worker's apartment residence. The advantage to this arrangement for the worker was that he did not have to check in at the "yard" before starting a shift. He simply had to start work on time. The worker explained that the accident employer demonstrated substantial trust in him by assigning him to the area that encompassed his residence.

[41] In late 1993 or early 1994, HK returned as the worker's supervisor. The worker testified that when HK discovered that litter pickers were reorganised into different beats during his absence,

he was not happy. The worker's correspondence of February 8, 1995 (Exhibit 3) explains the ensuing chronology of events from his perspective:

> [HK's] first day on the job…he drives up to me and says not good morning how are you, but how come your [sic] on this beat. I explained how I transferred here months ago, he just looked at me and said "well I'll have to fix that won't I", and drove away.
>
> His third day on the job he picks me up and star[t]s yelling at how dirty [an area of my beat] is and why haven't I cleaned it up yet; Well H I said, "It's only 8:30 a.m. and I don't clean up there until after lunch. So we get in the van and drive over to this supposed mess, all the while he's rambling on about how Mr. D has been getting all this static from the Commissioner for the past few months [that area of my beat] being such a mess in the mornings. Anyway we get there and low and behold there isn't even a paper cup on the street or sidewalk, sure there is a mess but in [another area] which is not part of my area of responsibility, he tells me to clean it anyway, OK no problem I told him, but after I'm done pick me up and bring me into the yard. Why he asked? I told him if there's been complaints for months why was it never brought to my attention and straightened out by the previous foreman. Needless to say he drives off, comes back 10 minutes later and says okay never mind I'll have a truck come in here in the mornings and clean up.
>
> On three different occasions he's come up to me on a payday saying he can't find me, I answer him by saying that I don't know how he can't find me what do you think I'm doing hiding so he can't give me my check I mean get real with you.
>
> Then there is a lane way…again here he comes, why haven't you been cleaning it. He starts yelling in my face, I tell him shit H it's a dam [sic] private lane I was never told to clean it and it's not on my map. Well I'm telling you to clean it and clean it everyday, fine I said okay. Well the next day I'm in the lane cleaning it when a man walks up to me and says what are you doing I say cleaning up, well he says I have a cleaner that gets paid to clean not only this lane but also the building. I then informed H who casually said well then leave it.
>
> Then there's a walkway…here he comes again out of the van and in my face, what is it this time H I asked, [worker] he says I've noticed you haven't been cleaning this walkway, well I was never told to clean it H what is your problem? The problem is this walkway has to be done when it's dirty so start looking after it. Now that I know okay I'll watch it no need to flip out.
>
> Then there's been at least 6 more times when he's jumped in my face yelling that this street is dirty and that street, why isn't it done yet, then we would get into a[n] argument for fifteen to twenty minutes. Finally, I convince him that at 8:00 a.m. you can't expect every street to be done, and to make up his mind on what streets he wants done first. During these flare-ups I asked him three times to bring me into the yard to settle our disagreements and all three times he drove away, to come back later and say never mind just do it the way you were doing it.
>
> Then there was the last day we worked before the Christmas break when he drove up to me…the same thing out of the van in my face again like a nut, telling me the streets are dirty here and there. I told him that we had a previous snowfall, it had just thawed out leaving a week's worth of work, and why is he screaming at me at 7:45 a.m., well I'm doing the best I can right now. He takes off to check the rest of the beat and comes back saying that there's a mess everywhere to concentrate on the main streets and do what else I can time permitting as we are only working a half day, which is what I was telling him in the first place. We started arguing again, this time I told him I'm not putting up with his fist for no reason if he has any complaints to bring me into the yard and as far as the streets are concerned at least give me a chance to get there to clean them up.

> Jan[uary] 12/95 payday as usual he says he couldn't find me earlier so I don't get my pay till after lunch which really pissed me off.
>
> Jan[uary] 13/95. It's 7:10 a.m. I met one of my co-workers…
>
> "Have you seen H and the crew go up yet.
>
> "No not yet"
>
> "If you do tell him to find me, I need a new bag, thanks."
>
> Now its 10:00 a.m.. I'm standing by the underground entrance on C street talking to the attendant when H arrives… I whistled to him he turned his head I wave my bag to let him [know] I needed a new one. Well I walked over to meet him at the back of the van he says
>
> "What are you doing…?" He yells.
>
> "Just talking to the attendant, what's the problem?"
>
> "The problem is I'm taking you off this beat."
>
> "Here we go again. What the hell for H?"
>
> "Cause I can never find you."
>
> "That's funny H, you always seem to fnd me to tell me you can't find me."
>
> "Well I'm moving you and that's that, I'm the boss what I say goes."
>
> That was it, I could hear my heart pounding and my head felt like it was going explode, I thought I was going to pass out. I told him to book me off sick and I'll report to the yard on Monday. I've had enough of his crap so I went to my doctor and you have his report.

[42] The medical report referred to by the worker is a Physician's First Report completed by Dr. Black dated January 26, 1995. Dr. Black advised that on January 13, 1995, the worker suffered stress at work and became very upset, was shaky, had trembling hands and difficulty breathing. The family doctor diagnosed anxiety and panic attacks. He proposed treatment consisting of counselling and Ativan. There are no other medical or health care reports concerning the worker's psychological condition in the available materials.

[43] When questioned about the history of his relationship with HK by Ms. Tabrizi, the worker denied taking advantage of his beat by frequently visiting his home during working hours. He advised that he owned a dog that was conditioned to go for a walk whenever he came home. For this reason, he avoided going into his residence until after he completed his shift. Ms. Tabrizi suggested that HK telephoned the worker and discovered that he was in his home during working hours on January 13, 1995 in contravention of his employment obligations and that this was reason for the altercation on that date. The worker emphatically denied being telephoned at his residence on January 13, 1995 and repeated his explanation that he avoided going home because of his dog until his shift was completed.

[44] The worker testified that he experienced no prior or subsequent episodes of traumatic stress. He stated that Dr. Black counselled him frequently between January 13, 1995 and April 10, 1995. He was not referred to a psychiatrist. The worker understood that Dr. Black was not only a

family physician, but also a psychiatrist.[3] The worker testified that during the period of his layoff, he stayed up most nights and slept during the day. The worker denied any significant non-occupational source to account for his anxiety in 1995.

[45] The worker recalled that he returned to work in the spring of 1995 and resumed his duties under the supervision of HK. He stated that HK apologised and the two men put the incident of January 13, 1995 behind them.

[46] When asked to explain HK's possible motivation for his alleged malevolent behaviour, the worker theorised that HK wanted to reinstate NM—a friend of HK's—into the worker's beat. The worker testified that shortly after his return to work, he was in fact re-assigned to a different beat. Soon after that, HK was also re-assigned to new duties and was no longer his supervisor.

[47] HK testified and presented a very different history of his relationship with the worker. He explained that in the fall of 1994 his job title was foreperson and he was responsible for the supervision of approximately 30 workers (including the worker) consisting of cleaning staff and labourers. In early 1995, he was asked to reduce the number of beats. He recalled that the worker approached him and asked to work on the beat that encompassed his home. HK testified that he agreed to give the worker that beat on the condition that the worker would not abuse the privilege by going home during working hours. HK testified that it was uncommon, but not unprecedented, for litter pickers to be assigned beats that encompass their residence. He stated that workers who were afforded the privilege to work in a beat that encompassed their home had to be trustworthy enough to start work on time, not go home during working hours and not leave work before the end of a shift.

[48] HK testified that on January 13, 1995, he could not locate the worker. He stated that shortly after 12:00 p.m., he telephoned the worker's residence and the worker answered. HK testified that he asked the worker why he was at home. HK testified that he told the worker he would meet him at his home within minutes. When HK arrived at the worker's apartment complex, he saw the worker ascending the parking ramp. HK testified that he advised the worker, "Come Monday morning, you're going to report to the district yard". HK explained that reporting to the district yard was a duty not expected of the worker while he worked on the beat surrounding his own residence.

[49] Upon the worker's questioning, HK denied that there was any acrimony between them prior to and including January 13, 1995. He stated that, at most, there might have been a "difference of opinion" from time to time.

[50] Upon our questioning of HK, we pointed out that documentary evidence in the Case Record from the employer suggested that his discussion with the worker on January 13, 1995 occurred closer to 10:00 a.m., not 12:00 p.m. as he suggested.[4] HK insisted that the time of his visit to the

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[3] According to the College of Physicians and Surgeons of Ontario, Dr. William Patrick Galloway Black whose address corresponds with the address on the medical reports issued under his name in the Case Record is a family doctor, not a psychiatrist.

[4] Employer's Report of Injury/Disease, dated January 24, 1995 (Exhibit #3)

worker's residence on January 13, 1995 was at around 12:00 p.m. HK acknowledged that he probably yelled at other workers from time to time, but he could not recall any occasion where he yelled at the worker. He explained that he had "no concerns" with respect to the worker's job performance.

(iv) Analysis

[51] We have carefully considered all of the available evidence in the Case Record, testimony of the worker and HK as well as the submissions of the worker and Ms. Tabrizi.

1. **Did the worker suffer a permanent injury to his lower back as a result of the compensable MVA of December 10, 1989?**

[52] The back injury at issue in this appeal occurred on December 10, 1989. Accordingly, Section 45 of the pre-1989 *Worker's Compensation Act* applies. It states, in part:

> **45.**--(1) Where permanent disability results from the injury, the impairment of earning capacity of the worker shall be estimated from the nature and degree of the injury, and the compensation shall be a weekly or other periodical payment during the lifetime of the worker, or such other period as the Board may fix, of a sum proportionate to such impairment not exceeding in any case the like proportion of 90 percent of the worker's average earnings.

[53] At the time of the compensable accident, there was evidence of degenerative changes in the worker's lumbar spine. An x-ray report taken on the date of accident revealed degenerative changes in the form of a "posterior osteophyte at the inferior aspect of the L5 vertebral body". Degenerative changes were noted on subsequent radiological investigations. An MRI scan conducted in November 2001 showed degenerative changes between the L3-4 and L5-S1 levels and a central disc herniation at the T10-11 level. The findings in the worker's lower back were repeated in the CT scan report of April 12, 2002.

[54] In determining whether or not the compensable accident of December 10, 1989 is responsible for the worker's subsequent back pain, given the fact that at the time of the accident there were degenerative changes in his lumbar spine, we apply the significant contributing factor test. This is a legal test of causation that is widely applied in Tribunal decisions. The Panel in *Decision No. 32*, 2 W.C.A.T.R 1 considered an example of a worker who has pre-existing degenerative disc disease and is entirely symptom-free before an injury at work. After the injury, the worker experienced continuous pain. The Panel found that it would be reasonable to conclude, on the balance of probabilities, that the injury was at least a significant contributing factor to the ongoing symptoms even with the presence of an underlying degenerative disc disease. Alternatively, if the worker's symptoms disappeared after a brief period following the injury and did not reappear for a long period of time following the injury, the Panel found that it would not be reasonable to conclude, on the balance of probabilities, that the work injury was a significant contributing factor to the subsequent emergence of symptoms in the context of underlying degenerative disc disease. The Panel noted at page 5:

> …in this type of case, the Appeals Tribunal cannot help but rely heavily on evidence concerning the experience of symptoms **prior to** the incident and…**following** the incident.

[55] In *Decision No. 280*, 6 W.C.A.T.R. 27, the Panel elaborated on the nature of "significant contributing factor". They wrote at page 36:

> A "significant contributing factor" is a factor of considerable effect or importance or one which added to the worker's pre-existing condition in a material way to establish a causal connection.

[56] The Panel in *Decision No 72*, 2 W.C.A.T.R. 8, noted that, for cases involving a pre-existing degenerative disc disease, consideration must also be given to the possibility that the emergence of symptoms is associated only with the underlying disease with no causal relationship to the compensable accident. That Panel observed:

> In any case where there is a related pre-existing disease, there is the possibility that the injury arose out of the disease and not out of the employment.

[57] The Panel in *Decision No. 559/91*, 20 W.C.A.T.R. 26 indicated that central to the issue in a case involving degenerative disc disease is whether or not the underlying condition was aggravated by the employment. The Panel noted at page 29:

> If the aggravation accelerates the progression of the underlying condition, then the resulting disability is a compensable one…

[58] In *Decision No. 661/93*, 33 W.C.A.T.R. 64, the Panel considered the question of how to approach the issue of causation in a context where the there may be a number of potential factors or causes including the compensable accident to explain the emergence of a subsequent medical condition. The Panel concluded at page 77:

> …the Panel is required to apply [the evidentiary standard of] a balance of probabilities…[where] there are…several possible scenarios, [the] Panel must decide what the most probable scenario is.

[59] We accept and adopt the legal test of causation described in these decisions. In this case, the issue can be characterised as whether, on a balance of probabilities, the compensable accident of December 10, 1989, significantly contributed to the worker's subsequent low back pain.

[60] The worker acknowledged that he experienced back pain prior to the compensable accident. He stated that he likely experienced back discomfort while working for a previous employer. However, his duties with that employer involved a lot of heavy lifting. The worker acknowledged his visit to hospital for back pain only weeks before the compensable accident. However, he testified that his back pain at that time was precipitated by a fall at work that he chose not to report to the Board. As noted above, medical reporting in November 1989 offers no history of trauma. Instead, it indicates a gradual onset of back pain with radiation and weakness into his left lower extremity.

[61] In his report of December 11, 1989, Dr. Black advised that the worker suffered a sprain to his lower back with associated pain down his left lower extremity. The family doctor anticipated that the worker would be disabled for a period of 7 to 14 days. Progress reporting from the worker and Dr. Black indicated improvement with physiotherapy in the worker's back condition. Dr. Black advised on January 9, 1990 that the worker reported his back "feels great". In a progress report dated January 15, 1990, the worker reported that his pain was "gone".

[62] There is no medical evidence of any problem in the worker's lower back until March 1993. We acknowledge the worker's testimony that he participated in acupuncture and chiropractic treatment at his own expense after he returned to work in January 1990. We also acknowledge his testimony that he lost various days from work as a result of back pain in the ensuing years. However, given the history of back pain prior to the compensable accident, the evidence of degenerative changes in his lower back at the time of the compensable accident and the documentary evidence of a resolution of back symptoms by January 1990, we find, on a balance of probabilities, that the compensable accident of December 10, 1989 did not significantly contribute to the worker's ongoing back pain.

[63] We have no doubt that the worker experienced episodic back pain in the years that followed the compensable accident, but we find his back pain was more likely than not the result of progressive degenerative changes in his lumbar spine[5] as evidenced in subsequent radiological investigations.

[64] With respect to the change in the worker's duties upon his return to work in January 1990, we accept that the employer offered the litter picker job as a modified work program. The worker's continued assignment to litter picker duties, however, was the result of his personal preference for the job—not as a result of medical restrictions stemming from the compensable accident.

2. Does the worker have entitlement for traumatic mental stress as a result of an altercation with his supervisor on January 13, 1995?

[65] Section 102 of the Workplace Safety and Insurance Act (WSIA) states that the pre-1997 *Worker's Compensation Act*, as amended, continues to apply with respect to pre-1998 injuries.

[66] Under section 126 of WSIA, the Tribunal is bound to apply Board policy when making its decisions. The Board identified *Operational Policy Manual* Document #15-02-02, "In the Course of and Arising out of" – Traumatic Mental Stress" as an applicable policy in this appeal (Exhibit #2). Ms. Tabrizi submitted that the policy applies to this appeal. The policy states at page 4 of 5:

Sudden and unexpected traumatic event	In order to consider entitlement for traumatic mental stress, a decision-maker must identify that a sudden and unexpected traumatic event occurred. A traumatic event may be a result of a criminal act, harassment, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family members, or others. In all cases, the event must arise out of and occur in the course of the employment, and be • clearly and precisely identifiable

[5] A discussion on the natural progression of degenerative disc disease is found in the March 1997 Tribunal Medical Discussion Paper entitled, "Back Pain" prepared by Dr. W.R. Harris, orthopaedic surgeon and Dr. J.F.R. Fleming, neurosurgeon (Exhibit #3)

- objectively traumatic, and
- unexpected in the normal or daily course of the worker's employment or work environment

This means that the event

- can be established by the WSIB through information or knowledge of the event provided by co-workers, supervisory staff or others, and
- is generally accepted as being traumatic

Sudden and unexpected traumatic events include

- witnessing a fatality or a horrific accident
- witnessing or being the object of an armed robbery
- witnessing or being the object of a hostage-taking
- being the object of physical violence
- being the object of death threats
- being the object of threats of physical violence where the workers believes the threats are serious and harmful to self or others (e.g., bomb threats or confronted with a weapon)
- being the object of harassment that includes physical violence or threats of physical violence (e.g., the escalation of verbal abuse into traumatic physical abuse)
- being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g., tampering with safety equipment; causing the worker to do something dangerous).

. . .

Acute reaction

An acute reaction is a significant or severe reaction by the worker to the work-related traumatic event that results in a psychiatric/psychological response. Such a response is generally identifiable and must result in an Axis I Diagnosis in accordance with the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV).

An acute reaction is said to be immediate if it occurs within four weeks of the traumatic event.

. . .

An employer's work-related decisions or actions	There is no entitlement for traumatic mental stress due to an employer's decisions or actions that are part of the employment function, such as • terminations • demotions • transfers • discipline • changes in working hours • changes in productivity expectations

Ms. Tabrizi argued that the circumstances surrounding the worker's claim for mental stress constitutes an employer work-related decision or action and, pursuant to Board policy, is explicitly excluded as a basis for entitlement.

We note that the policy is dated May 24, 2002 and was minuted by the Board of Directors on April 25, 2002. The policy purports to apply to:

> …any single traumatic event, or in the case of the cumulative effect the most recent traumatic event, occurring on or after January 1, 1989.

[67] In *Decision No. 871/99I* (February 18, 2000), a Panel of the Tribunal considered a worker's appeal for a stress-related emotional disability. Following a detailed review of Board documents and Tribunal decisions regarding "policy", the Panel noted that prior to January 1, 1998, it was the Board's general practice to limit entitlement in mental stress cases to injuries resulting from "sudden, shocking and life-threatening" occurrences. The Panel concluded that there was no Board policy on chronic stress prior to January 1, 1998 within the meaning of section 126 of the WSIA. Accordingly, the Panel proceeded to hear the merits of the worker's appeal.

[68] Policy document #15-02-02 was produced after *Decision No. 871/99I* and was considered in *Decision No. 471/03* (April 1, 2004). In that case, the worker claimed that he developed depression from mental stress resulting from traumatic activities during the course of his employment for a cemetery and crematorium from January 1987 to December 1989. The Panel found that Policy document #15-02-02 in effect created two classes of workers injured due to mental stress from January 1, 1989, to January 1, 1998: those whose cases were decided by the Tribunal prior to May 24, 2002, and those whose cases were decided after that date. The Panel cited *Decision No. 2828/01* (December 9, 2003) (discussed below) and commented:

> In many cases, the more stringent limitations imposed by the policy would deprive the workers whose case falls in the latter category of benefits to which they could expect to be entitled under Tribunal jurisprudence for that period. However, the factors affecting whether an appeal is decided before or after May 24, 2002, will, in most cases, be factors completely unrelated to the substance or merits of the case; they will often relate instead to the absence of time limits prior to 1998, appeal delay, and even the necessity of appealing to obtain the correct decision. It is not apparent why these factors should alter the substantive law applied to a worker's appeal.

[69] The Panel in *Decision No. 2828/01* (December 9, 2003) considered the enhanced status of Board policy under the WSIA and whether, by virtue of its enhanced status, policy created under section 126 can reasonably be applied retroactively. The Panel found that the WSIA does not permit the Board to adopt policy under section 126 and apply it retroactively. The Panel also found that retroactive application of policy under section 126 is not authorized by necessary implication. The Panel noted that there was provision for limited retroactivity of regulations under section 183(6) of the WSIA, but no similar legislative provision for Board policy. The Panel relied on principles relating to the construction of statutes and case law in reaching its finding that there is a presumption against the retroactivity of Board policy under section 126.

[70] Given the determinations made in *Decision Nos. 2828/01* and *871/99I*, the Board did not have a policy on mental stress within the meaning of the WSIA prior January 1, 1998 and there is no statutory provision in the WSIA for creating retroactive policy under section 126. In this case, the circumstances surrounding the worker's claim for mental stress occurred prior to January 1, 1998. Thus, it is questionable whether *Operational Policy Manual* Document #15-02-02 applies at all.

[71] Prior to the enactment of the WSIA, many Tribunal decisions applied a "chronic stress, average worker" test for the purposes of considering overall causation (see for example, *Decision No. 422/96*). Essentially, this two-part test asks:

1. Is it reasonable that workers of average mental stability would perceive the workplace events to be mentally stressful?
2. If so, would such average workers be at risk of suffering a disabling mental reaction to such perceptions?

Tribunal decision-makers have determined that if the answer to either question is "no", the psychological damage would not be compensable.

[72] It is not necessary to determine whether *Operational Policy Manual* Document #15-02-02 applies to this case. Having considered all of the available evidence, including the testimony of the worker and HK, we find that there is no basis to grant entitlement for mental stress under either Board policy or under the "chronic stress, average person" test.

[73] The worker's version of events is vastly different from the version of events offered by HK. HK testified that on January 13, 1995, he advised the worker to report to the yard at the beginning of his next shift. HK testified that his actions were influenced by a perception that the worker was often difficult to locate and was at home on January 13, 1995 during working hours in contravention of his employment obligations. HK's actions, from his perspective at least, were clearly "part of the employment function" as described in Board policy.

[74] The worker believed that HK's conduct, not only on January 13, 1995, but also in the preceding months, was aggressive, unjustified and motivated by a desire to reinstate a friend into the worker's beat. The worker felt harassed by HK and offered examples of HK's harassment including inconsistent work instructions, failure to deliver paychecks and several occasions of "yelling".

[75] It is not necessary to reconcile or determine many of the factual discrepancies in this case such as the dispute about whether the worker was actually at home on January 13, 1995 in contravention of his employment obligations. We find it more likely than not that HK's conduct, despite his testimony to the contrary, was at times aggressive. He denied yelling specifically at the worker, but acknowledged a history of doing so with other workers under his supervision. While HK's conduct was at times aggressive, it was consistent with his duties as a supervisor and was not, in our view, sufficient to cause a disabling mental reaction for an average worker. Entitlement for mental stress in these circumstances is not available under either Board policy or the Tribunal's "chronic stress, average worker" test.

DISPOSITION

[76] The worker's appeal is denied.

DATED: January 9, 2006

SIGNED: S. Ryan, D. McLachlan, M. Ferrari