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WORKERS' COMPENSATION BOARD
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W.C.B. #97-019991; D/I: 07/25/97;

Within five days after issuing this decision, the hearing officer may request that the full Workers' Compensation Board review the decision. *See* 39-A M.R.S.A. §320.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the Clerk of the Law Court within 20 days of receipt of this decision, and then filing a petition seeking appellate review with the Law Court within 20 days thereafter. *See* 39-A M.R.S.A. §322.

EDWARD L. NADEAU
(Employee)

v.

UNITED PARCEL SERVICE
(Employer)

and

LIBERTY MUTUAL INSURANCE COMPANY
(Insurer)

Pending before the Board is the employee's PETITION FOR AWARD OF COMPENSATION filed on October 18, 2000, pertaining to an asserted July 25, 1997 work injury. The employee is represented by Charles W. March, Esq.; and the employer/insurer is represented by John P. Flynn, III, Esq.

The Board has considered the evidence in this case, including employee Exhibits 1 and 3; employer Exhibit 1; Medical Records Stipulation last dated March 12, 2001; and

the March 12, 2001 testimony of the employee. The Board has also considered the position papers submitted by the parties.

FINDINGS OF FACT

1. The employee, now 45, began working for the employer in 1986. Prior to that time he had been employed for several years as a rural police officer. He had no prior back injuries or problems. During his first six years with the employer the employee worked as a local package delivery driver operating a delivery truck on rural routes in the Calais, Maine area. In 1994 he was reassigned to the position of "feeder driver" which involved operating a tractor trailer truck for a nine-hour shift five days a week from Calais to Bangor on Route 9, from Bangor to Waterville on I-95, and returning to Calais on the same route. The Calais to Bangor portion of the route, approximately 100 miles on Route 9, a secondary road, also known as the "Airline," tended to be a rough trip because of the condition of the road including bumps, frost heaves, culverts, extended areas (up to 10 miles) of road construction work. Winter months would ordinarily be the worst for driving discomfort because of frost heaves and culverts. The narrowness of the road in certain areas would occasionally require that the truck be driven onto shoulders in order to avoid oncoming traffic.

2. When the employee first began the job as feeder driver he operated a Mack tractor with an air seat and air suspension. The latter was a suspension system designed to isolate the truck chassis from the cab so as to limit the movement of the cab when it was operated over rough roads. However, the Mack did not have power steering and, as a result, employee developed arm problems. Therefore, in 1995 he was provided with a Ford tractor which had power steering but no air suspension system.

3. Shortly after he began to use the Ford tractor employee noticed that he

was experiencing low back pain as a result of being jostled up and down as well as against the back of the cab when going over bumpy roads. In order to compensate he would attempt to anticipate the bumps and grab on to the steering wheel to pull himself off the seat to avoid being jarred.

4 After about six months of operating the Ford tractor he notified his supervisor of the low back discomfort he was experiencing and, as a result, was provided with another tractor, an International which rode slightly better but was not equipped with an air ride suspension. He continued to experience back pain when being jostled on rough roads.

5. From July 25, 1997, to August 19, 1997, the employee participated in a strike by his union against the employer.

6. On July 25, 1997 the employee notified the employer that he was being treated by his primary care provider, Dr. Ludington, for a low back condition as the result of "constant pounding from using a tractor not equipped with an air ride suspension and a cab that is too small. Always hitting back wall with seat."

7. On August 7, 1997 the employee began chiropractic treatment for his low back with Peter Knowles, D.C., who had previously treated the employee for his arm complaints. Dr. Knowles treated the employee through December, 1997 for a condition he diagnosed as lumbar strain, lumbar disc syndrome, and spinal subluxation and which he indicated on practitioner's reports (M-1's) was "work-related."

8. Upon initially returning to work on August 19, 1997 after the strike the employee was assigned to local package delivery. When he resumed the feeder driver job in October, 1997 he complained of increasing low back symptoms. However, after being assigned a different tractor in November, 1997 he reported an improvement in his

level of symptoms. The new truck was an International which, although without an air suspension, had a shock absorber mechanism which provided somewhat better ride.

9. On December 18, 1997 the employee was seen, upon referral from Dr. Ludington by orthopedic surgeon, Christopher FitzMorris, D.O. The employee reported a two year history of low back pain which had become worse during the previous several months. Dr. FitzMorris obtained lumber xrays which showed moderately severe degenerative changes, including disc space collapse at L1-2, 2-3, and 4-5 and severe degenerative changes to the vertebral bodies at L3 and, to a lesser extent, L4 and L2. Dr. FitzMorris assessed the employee to be suffering from degenerative joint disease of the lumbosacral spine. He further concluded that employee's job involving prolonged sitting and "bumping and bouncing as he drives," was aggravating his underlying degenerative lumbar condition. Dr. FitzMorris approved of the employee remaining "at regular duty work, as only a change in occupation is likely to significantly improve his discomfort at this point." He prescribed medications including Lodine and Norflex for the control of the employee's pain. Subsequent office notes by Dr. FitzMorris indicate that the employee was able to continue functioning at his regular job with the use of Lodine. He reported worsening symptoms during the winter months on account of frost heaves in the road. When he was on vacation he would report being largely "asymptomatic," leading Dr. FitzMorris to conclude that "certainly driving seems to exacerbate his symptoms," and to advise the employee against continuing in his present occupation. On March 15, 1999 the employee again reported increasing pain during the winter months and Dr. FitzMorris order noted "significant paravertebral spasm in the lumbar region," leading him to prescribe additional medication. The employee continued to use a soft back brace while driving. Dr. FitzMorris took additional xrays which showed "no significant progression of degenerative changes as compared to film from 16 months ago." In

subsequent office notes Dr. FitzMorris noted that attempts to lower the dosage of Lodine had resulted in an increase in the level of symptoms.

10. On September 20, 1999 Dr. FitzMorris wrote a letter recommending that the employee be provided with "a better quality truck, with better shock absorption and a smoother ride," explaining that "it could make the difference in terms of keeping him in the workplace for several more years, as opposed to early disability."

11. In December, 1999 the employee was provided with a Mack CH model truck with air seat and air suspension. He told Dr. FitzMorris on January 10, 2000 that the new truck had improved his level of symptoms. However, he continued to require a high dosage of Lodine as well as Ultram. As a result Dr. FitzMorris recommended that the employee seek a surgical consultation.

12. In a letter dated December 12, 2000 Dr. FitzMorris responded to an inquiry from the employee's attorney as follows:

I think that [the employee's] degenerative disc disease in the spine was significantly aggravated by his work, in particular, long periods of driving on less than perfect roads. I think he has responded well to conservative treatment, however, it is possible that at some time in the future he may need surgery to control his symptoms.

13. On May 22, 2000 the employee was seen, upon referral from Dr. FitzMorris, by orthopedic back surgeon, Peter E. Guay, D.O. Dr. Guay noted that an MRI done in October, 1999 showed "multi level advanced degenerative disc disease with some endplate disruptions and interosseous disc herniations at multiple level but advanced changes at L4-5." Dr. Guay noted the employee's history of gradual onset of discomfort beginning in about 1996 as well as continued discomfort with long haul driving. Dr. Guay concluded that the employee was suffering from chronic back pain as a result of degenerative disc disease "and some probable aggravation of same with his prolonged seated driving work activity."

14. On September 20, 2000 Dr. Guay performed surgery consisting of an anterior lumbar interbody fusion at L4-5 with an iliac bone graft.

15. In a letter dated January 1, 2001 Dr. Guay explained his opinion regarding the work-related nature of the employee's condition:

The patient has degenerative disc disease, which I do not feel is work-related. However, certainly an aggravation of the underlying degenerative disc disease from his prolonged sitting is work related. Degenerative disc disease is progressive in nature, although can remain relatively asymptomatic without aggravation.

16. On February 1, 2001 the employee was seen, on referral from the employer/insurer, by John Pier, M.D. for a comprehensive medical evaluation. As a result of that evaluation Dr. Pier concluded as follows:

He is a nonsmoker. He has very few risk factors for degenerative disc changes and segmental disc collapse. By history, this appears to be the diagnosis. [The employee's] only risk factor for degenerative disc change is his time working as an over-the-road driver. It would be reasonable to assume, therefore, that his time driving the police cruiser and his UPS truck have contributed to his degenerative changes. Approximately 50% of his risk factors may be hereditary with an additional 50% occupational. Of that occupational risk factor, 75%-80% would be his work for UPS.

On February 19, 2001 Dr. Pier, after receipt of additional medical records, provided a supplemental report which included the following:

...He has few risk factors for low back pain except for long-haul trucking in non-air-ride seats, which has been found to be a risk factor.

Obviously, the work does not cause the underlying degenerative disc condition. I would agree with Dr. Guay in this regard. The long-haul trucking would certainly be one risk factor.

I had previously stated that 50% of the risk factors would be hereditary and 50% occupational. It also must be understood that any individuals who are 45 years old will have some elements of degenerative disc changes without any risk factors. This is certainly a condition that develops over time. Unfortunately, [the employee's] condition progressed to the point where he required surgical intervention. I would make an educated assumption that his employment slightly accelerated the "degenerative disc disease." He likely would have gotten to the point of requiring surgery regardless of his employment, but it may have taken an

additional five perhaps seven years. Again, please understand that this is an assumption based on risk factors and epidemiology. There is absolutely no way for a physician to make a statement such as this with any certainty.

...

...I had felt his employment at UPS may have contributed approximately 40%. Again, it must be understood that this is an estimation and that the contribution may be as low as 10% and as high as 50%. I would certainly not place his risk any higher than 50%. The major risk of degenerative disc disease is time. It is a condition which will develop as every individual gets older. The only question is when it develops, how rapidly, and whether it develops to a degree significant enough to require medical care and surgical intervention. It can be assumed that [the employee's] condition would have progressed. Based on the lack of any significant risk factors, as well as the fact that he had been driving in a non-air-ride seat, the work may have accelerated the condition by anywhere from one to seven years.

17. Dr. Guay was deposed on May 24, 2001. He explained that the employee had an underlying degenerative disc disease at multiple levels, likely as the result of a genetic predisposition, and that as a result of some trauma or multiple traumas he had developed osteoarthritis. He explained that in view of the underlying condition activities such as prolonged sitting are capable of aggravating the underlying condition itself as well as aggravating symptoms from the underlying condition:

I feel it definitely aggravated his symptoms and whether or not it was responsible for that one particular level becoming more degenerative than the other is unknown.

With regard to the possible contribution from activities prior to his work for the employer Dr. Guay noted that it was a possible contribution although in the absence of any symptoms at that time it was not likely. Dr. Guay explained the prolonged sitting is known to aggravate underlying degenerative discs although it could not be determined whether prolonged sitting had actually accelerated or hastened the degenerative process in and of itself.

All I can say is he has underlying degenerative disc disease, he's now more symptomatic than he was in the past to the point where he's

becoming dysfunctional. When he is most symptomatic is when he has long car rides, at work, and therefore I feel that's playing some role in his symptoms. You cannot say that it is markedly progressing one level or another level. That's impossible to tell.

Asked about the impact of driving over rough roads 200 miles a night, five days a week,

Dr. Guay acknowledged that

Anyone with degenerative disc disease who does not have a well-supported lumbar roll seat and well-cushioned is more at risk to cause aggravation of their underlying degenerative disc disease and become more symptomatic.

DISCUSSION

Through his petition the employee seeks capacity benefits from September 8, 2000, to March 12, 2001 related to his fusion surgery and post-surgery recovery. There is essentially no dispute that the employee was totally incapacitated during that period prior to returning to work for the employer on March 13, 2001.

There is no dispute that he had an underlying pre-existing condition, degenerative disc disease in the lumbar spine, at multiple levels. The employee has testified, credibly, that he did not have any low back injuries or problems until about 1995 when he was assigned to operating a Ford truck not equipped with an air suspension. At some point during 1997 he consulted with his primary care provider, Dr. Ludington, regarding his symptoms and was prescribed Ibuprofen 800. On July 25, 1997, the first day of a strike, the employee formally notified the employer of his claim of a work-related low back condition which had occurred during the previous six to eight months as a result of driving over secondary roads with a non-air-ride tractor.

The employee's treatment providers, including Dr. Knowles, Dr. FitzMorris, and Dr. Guay have all indicated that the employee's work activities as a feeder driver, operating a tractor trailer five days a week from Calais to Waterville and back (over 300 miles round trip), had caused an aggravation of the underlying degenerative disc disease

so as to render it increasingly symptomatic to the point where the fusion surgery was warranted as a reasonable and necessary procedure to restore the employee to a reasonable level of functioning. Prior to this aggravation caused by extended periods of driving, much of it over rough secondary roads, the employee's degenerative disc disease was essentially asymptomatic. Therefore, in accordance with the opinions expressed by both Dr. FitzMorris and Dr. Guay, the Board is persuaded that the employee's disability on account of his underlying degenerative disc disease was "caused, or made greater, by his employment" as a driver for the employer. See Hamm v. University of Maine, 423 A.2d 548, 550 (Me. 1980). The employer's consulting physician, Dr. Pier, has concluded that even though it is likely the employee's degenerative disc disease would have progressed eventually regardless of his work activities, the occupational risk factors inherent in his work as a truck driver accelerated the progression of the underlying condition significantly. Dr. FitzMorris has opined that the employee's degenerative disc disease "was significantly aggravated by his work, in particular, long periods of driving on less than perfect roads" and that absent "the bouncing and bumping over rough roads" the employee would have been able to remain "in the work place for several more years as opposed to early disability." Thus, he essentially agrees with Dr. Pier that the employee's work resulted in an aggravation of the underlying degenerative process and not just symptoms as a natural result of that process.

Based upon the foregoing, the Board is persuaded that, more likely than not, the employee suffered a work-related gradual injury on or about July 25, 1997 which aggravated or accelerated a pre-existing, asymptomatic, lumbar disc disease. The Board is also persuaded that the employee's disability from September 8, 2000, through March 12, 2001, on account of his fusion surgery was contributed to by the employment, i.e. his gradual aggravation injury, in a significant manner. See 39-A M.R.S.A. §201 (4).

CONCLUSIONS OF LAW

In view of the foregoing findings and conclusions the employee has met his burden of proof on his Petition for Award and that petition is granted. The employee is granted the protection of the act for his July 25, 1997 work-related gradual aggravation injury to his low back and is awarded total incapacity benefits from September 8, 2000, to March 12, 2001 based on an applicable average weekly wage stipulated to be \$1,095.88 (not including fringe benefits which were not discontinued during this period).

The employer/insurer is reminder of their notification obligation under Board Rule 8.12.

PURSUANT TO BOARD RULE CHAPTER 13, §19, ALL EVIDENCE AND TRANSCRIPTS IN THIS MATTER WILL BE DESTROYED IN 60 DAYS UNLESS (1) THIS OFFICE OF THE WORKERS' COMPENSATION BOARD RECEIVES WRITTEN NOTIFICATION THAT ONE OR MORE PARTIES WISH TO HAVE THEIR EXHIBITS RETURNED TO THEM, OR (2) A PETITION FOR APPELLATE REVIEW IS FILED. THE 60 DAYS WILL NOT BEGIN TO RUN UNTIL ALL POST-DECREE MOTIONS HAVE BEEN DECIDED OR OTHERWISE DISPOSED OF.

So Ordered.

Dated: August 16, 2001

Bangor, Maine

WORKERS' COMPENSATION BOARD


GARRY L. GREENE
HEARING OFFICER

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