Decision No. 364

**Frederick W. Hasselback,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute and composed of Jan Paulsson, President, Francisco Orrego Vicuña and Florentino P. Feliciano, Judges. The application was received on 22 September 2006 and the case was listed on 15 March 2007.

2. The Applicant challenges the denial of a workers' compensation claim and the subsequent rejection of a request for reconsideration, as well as a decision of the Workers' Compensation Review Panel (the "Review Panel") of 11 May 2006 affirming the denial.

3. The Applicant seeks compensation for all medical costs incurred or likely to be incurred as a result of an aggravated injury, and ultimately compensation for pain and suffering, past and estimated for the future, in the amount of $200,000, as well as reimbursement of legal fees and costs in the amount of some $10,000. The Bank asks the Tribunal to dismiss the application and deny the Applicant's request for costs.

Factual Background

4. The Applicant worked at the Bank as a Finance Specialist from December 1987 until December 1995. The relevant medical records which were available to the Review Panel, and now to the Tribunal, go back to 1993 when the Applicant visited an orthopedic surgeon, Dr. Louis E. Levitt, about pain in his left thigh. In November 1993, Dr. Levitt noted that the Applicant's "sciatic notch [was] tender to deep palpation," but that he had "no associated back pain." Dr. Levitt's impression, as indicated in his notes, was that the Applicant was suffering from sciatic nerve irritation, acute lumbar radiculopathy, and possibly underlying disc disease. A Magnetic Resonance Imaging test (MRI) confirmed his suspicions that "disc disease is the source of the patient's leg pain." Dr Levitt then initiated a course of epidural steroids, which appeared successful.

5. The Applicant returned to see Dr. Levitt in January 1994 following unrelated toe surgery. On the third of these visits, the Applicant also complained of recurring sciatic pain, for which Dr. Levitt prescribed some exercises. As the pain continued, the Applicant was referred to a Dr. Kahanovitz, who according to the Applicant performed surgery on his disc in March 1994. Afterwards, the Applicant states, he "was capable of functioning and moving around, including intermittent periods of improvement, but was not able to do any movement or exercise that put stress on his back."

6. Almost a year later, in February 1995, the Applicant returned to see Dr. Levitt. He recounted that he had done well through the summer of 1994 following his surgery, but was now experiencing persistent left leg pain. Dr. Levitt's impression, according to his notes, was that it might be a recurrence of the Applicant's lumbar radiculopathy. On 23 February 1995, the Applicant informed Dr. Levitt by telephone that he had seen Dr. Kahanovitz again, and had undergone a myelogram and an MRI scan. Dr. Levitt concluded from the Applicant's account that "he apparently does not have discogenic back disease that requires additional surgery." According to the Applicant, Dr. Kahanovitz had advised him that a second surgery "would be more likely to create long term problems than to provide short term relief and may result in side effects such as scar tissue, which is known to cause sciatica nerve troubles." The medical records available do not include this advice (nor indeed any written records of Dr. Kahanovitz's interventions).

7. The Applicant was treated with two epidural steroid injections, but the second injection offered "little relief." As the pain continued to increase, the Applicant reported in May 1995 that he was "plagued with back pain and continued leg dysthesias." Dr. Levitt referred him to the National Rehabilitation Hospital in Bethesda for treatment of his chronic back pain.

8. On 19 June 1995, the Applicant returned to Dr. Levitt, complaining of continued severe pain in his left leg. According to Dr. Levitt's notes that day, the Applicant informed him of a recent trip to Europe where he had had difficulty even moving. (In his application, the Applicant alleges that his Bank supervisors had sent him on a mission to Europe although they were aware of his back condition, and he had no choice but to go.) While on that mission, he experienced increased pain as a result of extended periods of sitting and sleeping in a hotel bed that could not accommodate a person of his above-average height. He also alleges that he fell in a construction site hole, herniating a lower disc, and had to conclude his meetings from a stretcher. Dr. Levitt noted that if the recommended treatment did not help, further surgery might be required.

9. On 14 July 1995, the Applicant consulted with Dr. Arthur I. Kobrine, a neurological surgeon. According to Dr. Kobrine's office notes, the Applicant explained that he underwent a lumbar laminectomy for the herniated disc in April [sic] 1994. He improved to some degree until June 1995, when he was "running in Europe and developed severe pain in his left leg." An MRI confirmed a large-fragment herniated disc. Dr. Kobrine recommended a second surgery, which he performed on 20 July 1995, removing a large, free fragment of disc from under the nerve root.

10. The Applicant filed a claim with the Bank's Claims Administrator in November 1995, describing the circumstances leading to the injury as "the airplane travel and sleeping on short bed in Hotel in Lithuania [sic] aggravated my disc, resulting in operation." The Claims Administrator considered the claim compensable and paid for the Applicant's treatment.

11. On several follow-up visits to Dr. Kobrine in August and September 1995, the Applicant reported that he was symptom-free.

12. Between 1997 and 2005, the Applicant visited a number of doctors and underwent multiple tests about various pains in his left leg and lower back, as well as other injuries to his knee and ankle due to different physical activities. In March 1997, the Applicant visited Dr. Kobrine complaining of progressive left leg pain and informing him that acupuncture had not helped. An MRI performed on 26 March 1997 ruled out recurrent left lumbar radiculopathy, but showed "some epidural fibrosis in the area of previous surgery." Dr. Kobrine noted that some of the Applicant's exercise routines might be the cause of the sciatic nerve irritation, and suggested that he take an anti-inflammatory and cease those exercises.

13. In April 1997, the Applicant consulted Dr. Richard N. Edelson, a neurologist, and told him, among other things, that he believed a new onset of leg pain was caused by a 17-hour flight in March 1997. An MRI revealed no evidence of recurrent disc problems. Dr. Edelson noted that there appeared to be fibrosis at the operative site, and that his impression, after further examination, was that the fibrosis was irritated at a nerve root. He recommended a short course of steroids, physical therapy and acupuncture, as well as an Electromyography (EMG) and nerve conduction study.

14. Three weeks later, the Applicant returned to Dr. Edelson and reported that the pain persisted. Dr. Edelson suggested to him, among other things, that he see Dr. Donlin Long, an expert in "low-back pain and failed back syndrome" at Johns Hopkins University, for further testing. A number of neurological tests revealed findings consistent with the Applicant's prior radiculopathy. The Applicant states that in October 1997, Dr. Basil Harris, a renowned neurologist, concluded that the Applicant's problem was due in large part to scar tissue from the second disc surgery, a problem that further surgery would exacerbate. There is no evidence of Dr. Harris' diagnosis in the record.

15. The Applicant thereafter moved to Seattle. Another MRI in February 1998 revealed mild to moderate

degenerative disc disease throughout the lumbar spine, but no evidence of recurrent disc herniation, and no evidence of enhancing scar tissue adjacent to the surgical site.

16. In September 1999, the Applicant saw Dr. David Kauff, a specialist in internal medicine. The reason for the visit was back pain that had started about a month prior to the visit, following a run on the beach and the onset of persistent sharp pain in the areas of his prior surgeries. Dr. Kauff recommended an X-ray and physical therapy, and prescribed some pain medication.

17. In March 2000, the Applicant visited Dr. Philip Hummel, another specialist in internal medicine. He reported to Dr. Hummel the two back surgeries, as well as "recurrent sciatica in the left leg since the first [disc] surgery" but noted that he could "work and ski without problems."

18. In August 2001, the Applicant saw Dr. Richard W. Arnold, complaining of back pain. He reported to him his history of lower back pain and treatments by neurologists and neurosurgeons. Dr. Arnold suggested physical therapy and a referral to a spine specialist. Dr. Arnold's diagnosis was sciatica and lower back pain.

19. It is not clear whether the Applicant followed through on the spine specialist referral. According to the medical records, he returned to Dr. Arnold's clinic about 10 days later for a knee injury caused by a fall three weeks prior while skateboarding. (The Applicant says in his submissions that he never skateboarded "in his life," and that the notation in the medical records was in error. The Tribunal considers this to be a detail of no moment.) Pre-patellar bursitis was diagnosed and pain medication was prescribed. He returned to the clinic on 25 August 2001 for a follow-up visit. Dr. Arnold, who examined the Applicant, noted that the Applicant had an injury to the right knee but had continued to rollerblade (i.e., in-line skating) and hike, which did not "allow the inflammation [in his knee] to subside." He advised rest with a gradual return to normal activity.

20. There are no documented medical visits for the next two years. The Applicant's next recorded visit was with Dr. Hummel, on 7 July 2003. The reason for the visit was pain in his left ankle, which had occurred, according to the Applicant, while he hiked down a mountain. The Applicant seemed to question whether the ankle condition was related to his sciatica. There does not appear to have been a specific diagnosis in that connection, but it appears that the Applicant thereafter visited an orthopedic specialist, Dr. Dennis J. Kvidera, for his ankle.

21. Dr. Kvidera, whom he appears to have visited twice, noted no pain in the ankle but continued swelling due to activities. He diagnosed the Applicant with "peroneal nerve insufficiency, and, thus, atrophy and weakness of his lateral dynamic stabilizers." The Applicant was encouraged to continue using an air-cast splint for hiking and other intense activities. According to the Applicant, Dr. Kvidera opined that the ankle injury was due to a failure in the second disc surgery to stimulate muscle activity and support in his left ankle. Again, the medical records do not substantiate this statement.

22. On 1 March 2004, the Applicant visited Dr. Hummel and expressed concern about a possible aneurysm in his head. He complained of severe shoulder pain with tenderness in the trapezius.

23. The Applicant returned to Dr. Hummel on 10 January 2005. His chief complaint was sciatica. It appears that it is this last episode of sciatic pain that triggered the Applicant's current claim. Dr. Hummel recorded the Applicant's reference to an injury while on a World Bank assignment overseas. According to Dr. Hummel's notes, the Applicant stated that he had fallen the previous summer (2004) and that some atrophy in his left leg muscles had led to a sprained ankle. The Applicant complained of leg numbness with pain radiating into the mid-calf, which was worse when sitting. Dr. Hummel recommended another MRI as well as a neurological consultation.

24. The same day, the Applicant contacted the Bank about filing a workers' compensation claim related to his "sciatica nerve problem stemming from a World Bank mission accident" (which was the subject of the first claim he filed with the Claims Administrator in November 1995, and for which he had been compensated). He indicated that "my sciatica nerve problem stemming from a World Bank mission accident has progressively

deteriorated to a level of sharp pain and leg numbness today. I have both past claims to file and questions to ask you." He asked whether the Bank would pay for a visit to a neurologist that he needed to see "ASAP" and whether it would reimburse him for therapy or any programs recommended by his doctor.

25. On 27 April 2005, the Bank advised the Applicant of its conclusion that his current sciatica symptoms were not causally related to his June 1995 injury. The Bank informed him of his right to file an appeal pursuant to Staff Rule 6.11, and that he had 90 days under the Staff Rule to do so.

26. On 13 May 2005, Dr. Hummel wrote to the Bank that he had been seeing the Applicant since 1999 for a problem with sciatica, which originated in 1993 and related to an on-the-job injury. The record suggests that Dr. Hummel did not review the Applicant's medical records, but rather based his diagnosis on information given to him by the Applicant.

27. On 22 June 2005, the Bank informed the Applicant by letter that his file had been reviewed again but that based on the medical documentation he had provided, there was "no causal relationship between your injury of June 11, 1995 and your present symptoms [of sciatica]." He was informed again of his right to appeal the decision within 90 days of his receipt of the letter.

28. On or about 1 August 2005, the Applicant requested administrative review of his claim. The Claims Administrator asked Dr. Robert Gordon, an orthopedic surgeon, to review the Applicant's medical records. Dr. Gordon issued a report on 15 September 2005.

29. In his report, Dr. Gordon noted that it was unclear on the basis of the medical records how the Applicant's back pain had developed in 1993. He also noted that it "ma[de] absolutely no sense whatsoever" to him that the claim that the Applicant had filed in 1995 was connected to a job-related injury. He continued that the records showed that the Applicant's sciatic and other back pain had been diagnosed as of 1993, well before the 1995 injury, and were not in any way related to an on-the-job injury in 1995.

30. Dr. Gordon also noted that, on the basis of the medical records which he was provided for his evaluation, the Applicant appeared to have obtained some relief from the disc surgery in 1995, albeit with some intermittent symptoms,

> which is not at all surprising considering the fact that he has had two back operations and that he continues to apparently do fairly strenuous athletic activities, some of which … I would [not] recommend [to] a person [having had] two back operations with some degenerative changes in his lumbar spine.

31. On 9 May 2006, the Review Panel, comprised of the Director of the Health Services Department, a Human Resources Manager, and a representative of the Staff Association, affirmed the Claims Administrator's determination denying the Applicant's current claim for benefits, and found that it was supported by substantial evidence and reached in accordance with the Staff Rules.

32. Specifically, the Review Panel found that:

> The only question for it to decide was whether there was a causal relationship between the Applicant's current condition and the injury alleged in 1995, assuming it was compensable.
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> The burden of proof was on the Applicant per Staff Rule 6.11, para. 2.01, and the applicable standard of proof was "by a preponderance of the evidence," as opposed to the standard established in Section 32-1521 of Chapter 15 ("Workers Compensation") of the District of Columbia Code (the relevant portions of which are referred to below as the "D.C. Act"). The Review Panel explained that "the D.C. Act does contain a presumption of compensability, which, were it applicable, would afford [the Applicant] a rebuttable presumption" that the sciatica at issue in his current claim was causally related to the 1995 injury. The Review Panel determined that the above-noted provision of the D.C. Act would be applicable only if it were expressly adopted in the Staff Rules, which was not the case.

The fact that the Applicant had fully recovered from the work-related aggravation that had caused the 1995 surgery was apparent from the record: there were no treatments after the 1995 disc surgery until 1997, and the Applicant had told Dr. Edelson that he was pain-free until 1 March 1997, after a long (17-hour) flight.

Based on the medical records reviewed, several factors could have contributed to the Applicant's recurrent pain, including the 17-hour flight and the Applicant's exercise regimen.

Several statements made by the Applicant about what various doctors had told him were not substantiated by the evidence, and were considered hearsay because the Applicant did not submit pertinent records. These included Dr. Kahanovitz's warning about scarring following disc surgery, and Dr. Harris' conclusion that the Applicant's condition had been caused by scar tissue from the second disc surgery.

Dr. Hummel's report of 13 May 2005 asserting that the Applicant's condition was related to an on-the-job injury in 1993 contained inconsistencies that were not persuasively explained by the Applicant.

Dr. Gordon's opinion should carry greater weight than Dr. Hummel's because Dr. Gordon examined all of the medical records, while it was not apparent that Dr. Hummel had done the same. Moreover, Dr. Gordon is a specialist in orthopedic surgery whereas Dr. Hummel is a specialist in internal medicine. Finally, Dr. Hummel's opinion was imprecise, whereas Dr. Gordon's was corroborated by the evidence.

The Parties' Contentions

The Applicant's first contention: Provisions of the D.C. Act not expressly incorporated into the Staff Rules, including those regarding a rebuttable presumption, should be deemed to be incorporated into the Staff Rules where they are manifestly reasonable

33. The Applicant interprets the Staff Rules to include, where reasonable, D.C. Act provisions even if they are not expressly incorporated into the Staff Rules. He bases his argument on *Courtney (No. 4)*, Decision No. 202 [1998], para. 14, in which the Tribunal held that because several provisions of the D.C. Act not expressly mentioned in the relevant Staff Rule "embody principles that are manifestly reasonable, the Tribunal will apply them here." The Applicant argues that the provision in the D.C. Act that deals with a rebuttable presumption of compensability to which any claimant is entitled is manifestly reasonable and should therefore be incorporated into the Tribunal's interpretation of Staff Rule 6.11.

34. The Applicant explains that the D.C. Act's provision is intended to give claimants, such as himself, the benefit of a "fair burden of proof" in a "complicated medical situation where there is no clear answer among experts." He argues that because the Bank in 1995 determined that the injury was compensable, and the Applicant's claim is for aggravation of that injury, the Applicant is entitled to a rebuttable presumption of compensability.

35. The Bank responds that when the Tribunal in *Courtney (No. 4)* agreed to incorporate certain provisions of the D.C. Act into the Staff Rules, it did so "primarily because the parties had both agreed" to it. In particular, the Tribunal made clear that the provisions were not applicable *per se* because they had not been expressly incorporated into the Staff Rules, but that "the parties have treated those [D.C. Act] provisions as applicable." The Tribunal decided on this basis to apply the D.C. Act provisions in that case. In the present case, the parties have not agreed to incorporate the specific D.C. Act provisions relating to a rebuttable presumption. Furthermore, if the Tribunal decided to incorporate them, it would "destroy legal certainty, make administration of the Staff Rules impracticable and generate litigation."

The Applicant's second contention: The Review Panel's decision is not reasonably warranted by the evidence and is not in conformity with the Staff Rules

36. The Applicant disagrees with the Review Panel's finding that the denial of the claim was reasonably sustained on the basis of the evidence, because he has allegedly demonstrated that "it is more likely than not that the recent injury was causally linked to the previously compensated injury in 1995." Accordingly, the Applicant argues, the Review Panel did not act in accordance with the Staff Rules.

37. Specifically, the Applicant emphasizes in his Reply his theory that the second disc surgery caused scar tissue (i.e., epidural fibrosis) to develop, resulting in his subsequent back and leg problems. For example, he quotes a medical article found on the Internet to substantiate his theory. He notes that his doctors told him after the first disc surgery to limit his physical activities, but his forced job-related trip to Latvia caused him to rupture a disc, which required him to have further surgery and which ultimately resulted in fibrosis. He states that the herniated disc was a condition that appeared only in 1995, prior to the second disc surgery. He also refers to his several medical diagnoses since 1997 as supporting the conclusion that epidural fibrosis developed after his 1995 surgery.

38. Finally, he argues that Dr. Gordon's evaluation is speculative because he did not have all the relevant medical records and never examined the Applicant.

39. The Bank stresses the propriety of the Review Panel's finding that the record did not establish a causal relationship between the disc surgery in 1995 and the current sciatica symptoms. First, Dr. Kobrine's notes following the second disc surgery, and the fact that the Applicant did not seek any treatment for about one and a half years after the surgery, support the conclusion that any aggravation of the Applicant's injury was fully resolved by the surgery in 1995. Second, the facts that the Applicant himself attributed the reemergence of his symptoms in 1997 to a 17-hour flight to Saudi Arabia, and none of the Applicant's doctors attributed the recurrence to the previous disc injury, are further indications that his symptoms were not related to the 1995 injury. Third, Dr. Kobrine's notes in 1997 seem to indicate that the Applicant's physical activities might have caused the reemergence of the Applicant's condition. Fourth, the Review Panel concluded that Dr. Gordon's opinion should be given more weight than Dr. Hummel's because Dr. Gordon was better qualified and he had examined the medical records in their entirety while it was not clear that Dr. Hummel had done the same. The Bank notes that this conclusion is consistent with the Tribunal's findings in *J*, Decision No. 349 [2006], para. 35, that "[t]he opinion of personal physicians may be valuable, but in case of doubt or uncertainty those of independent medical examiners may reasonably be assigned more weight."

40. In addition, the Bank notes that the medical opinion of Dr. Harris was not evidenced in the Applicant's medical record, and furthermore that some of the statements in the notes of Dr. Kvidera were "quite different" from the conclusion attributed to him in the application.

41. The Bank observes that the application fails to mention the multiple injuries caused over the years by the Applicant's physical activities, including the injuries sustained while rollerblading and hiking, and also by the 17-hour flight to Saudi Arabia in 1997, well after leaving the Bank's service. All of these contributed to the Applicant's condition. The evidence submitted by the Applicant in fact shows a causal relationship between his present condition and the herniated disc condition that began in 1993, the long plane flight, and the many injuries he suffered due to his physical activities. Dr. Gordon suggests that they are more likely the factors related to the Applicant's condition in 2005.

42. Finally, the Bank argues that Dr. Hummel's note in May 2005 seems to confuse the emergence of the herniated disc in 1993 with the aggravation that occurred while the Applicant was on mission in 1995, and to assume, without providing any explanation, that the present condition is due to the injury in 1995.

43. In response to a new argument developed in the Applicant's Reply as to the scar tissue from the second surgery having caused the current condition, the Bank notes that this is not sustained by the medical evidence. The evidence shows that the Applicant had a herniated disc for which he had surgery back in 1994, prior to the job-related trip which allegedly led to the second disc surgery. This fact is clearly noted in Dr. Kobrine's office notes of 14 July 1995 about the 1994 surgery, Dr. Levitt's office note of November 1993, as well as the office notes of Drs. Kobrine and Kahanovitz about a "recurrent" herniated disc.

44. The Bank supports Dr. Gordon's evaluation of the medical records, and stresses that he is an orthopedic surgeon who undertook a fuller review of the medical records than did Dr. Hummel. The Bank also argues that the Applicant asserts a medical conclusion – that fibrosis was the cause of the current sciatica pain –

unsupported by medical experts.

45. Even the supporting evidence cited by the Applicant is, in the Bank's view, speculative: Dr. Blazina could not determine with certainty whether evidence of radiculopathy was a residual from the old surgeries or whether it constituted new findings, and Dr. Edelson seems to have retreated from his original impression after a few weeks.

The Tribunal's Analysis and Findings

46. The Tribunal recalls the relevant standard as reaffirmed in *Hayati (No. 2)*, Decision No. 311 [2004], para. 6:

> [T]he Tribunal's authority, as stated in *Chhabra (No. 2)*, Decision No. 193 [1998], para. 7, is not to undertake a *de novo* examination of a case:
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> > The task of this Tribunal is limited to reviewing the decision of the Review Panel, by reference to the evidence before that body, with a view to determining whether the conclusion reached by the Review Panel could be reasonably sustained on the basis of that evidence and also whether the Review Panel has acted in accordance with the relevant legal rules and procedural requirements.

47. Staff Rule 6.11, para. 2.01, provides in pertinent part:

> The Claims Administrator will determine whether an injury … arises out of and in the course of employment and otherwise administer the workers' compensation program in accordance with the provisions of the D.C. Act specified in this Rule, except that where the provisions of this Rule differ from the provisions of the D.C. Act specified, the provisions of this Rule will govern. Provisions of the D.C. Act not specified in this Rule will not apply.

48. Under the D.C. Act, the standard of proof in cases such as this is a "rebuttable presumption." The Applicant relies on *Courtney (No. 4)* to assert that the Tribunal has in the past accepted to incorporate sections of the D.C. Act found to be manifestly reasonable, and that, accordingly, the Tribunal should do so in this case. The Applicant argues that in a case where there is a "complicated medical situation" and "where there is no clear answer among experts," the D.C. Act's provision is intended to give claimants, such as himself, the benefit of a "fair burden of proof."

49. This argument is unpersuasive, given that the Tribunal in *Courtney (No. 4)* specifically stated that provisions of the D.C. Act that are not expressly incorporated into the Staff Rules should not apply, by virtue of Staff Rule 6.11, para. 2.01. The reason some provisions of the D.C. Act were applied in *Courtney (No. 4)* was because the parties had agreed to it and the specific provisions were found to "embody principles that are manifestly reasonable."

50. Accordingly, it appears that the Review Panel did not err in finding that when filing the claim with the Claims Administrator, the Applicant bore the burden of proving, "by a preponderance of the evidence," that the current sciatica condition was causally related to the 1995 injury. (Indeed, it appears to be the case that in connection with workers' compensation claims in D.C. itself, in the absence of the statutory presumption of compensability, "the Claimant bears the burden of proving, by a preponderance of the evidence, that the injury alleged was caused by the accident," *Waugh v. D.C. Dept. of Emp. Svcs.*, 786 A.2d. 595 (D.C. 2001)). The Tribunal has no warrant – even if it were so disposed – for disregarding the final sentence quoted above from Staff Rule 6.11, para. 2.01.

51. As to whether the conclusion reached by the Review Panel could be reasonably sustained on the basis of the evidence before the Review Panel, and whether the Review Panel acted in accordance with the relevant legal rules and procedural requirements, Staff Rule 6.11, para. 3.02, provides in pertinent part:

> The Claims Administrator will … decide whether a claim is compensable or continues to be compensable.

52. In *Shenouda (No. 2)*, Decision No. 218 [2000], para. 23, the Tribunal wrote:

> Even after an initial claim has been accepted, it is reasonable to treat a claimant who anticipates receiving future workers' compensation benefits as making a continuing claim – and it is thus reasonable to interpret paragraph 3.03 [of Staff Rule 6.11] as allowing the Claims Administrator to decide whether such a claim is related to the original injury and is covered by the program.

53. In *J*, Decision No. 349 [2006], para. 35, the Tribunal also observed that

> [t]he opinion of personal physicians may be valuable, but in case of doubt or uncertainty those of independent medical examiners may reasonably be assigned more weight in view of the fact that under Staff Rule 6.11, paras. 3.02 and 3.03, it is the Claims Administrator's function, in deciding whether a claim is compensable or continues to be compensable, to select a medical examiner to help make its assessment. (*Shenouda (No. 2)*, Decision No. 218 [2000], para. 23, *Courtney (No. 4)*, Decision No. 202 [1998], para.20.)

54. In this case, the Review Panel first determined that it was not necessary to reassess the original claim from 1995. The Review Panel's conclusion was reached on the assumption that the original claim was in fact compensable. The Review Panel stated that the decision in this case depended on whether the claim continued to be compensable. The Review Panel found that the Claims Administrator's decision not to accept the claim was reasonably sustainable by the evidence and in compliance with the relevant legal rules and procedural requirements.

55. The Review Panel considered the evaluation prepared by Dr. Gordon, an orthopedic surgeon and independent medical examiner who, at the request of the Claims Administrator, had reviewed all of the Applicant's medical records dating back to 1993. The Review Panel also considered the medical records submitted for the evaluation, as well as some other records it specifically requested. The Review Panel found that the determination by the Claims Administrator that there was no causal relationship between the present condition and the 1995 injury was justified by the evidence in the record. The medical records included a large number of notes from a variety of visits to doctors, specialists, surgeons, etc., and evidenced that:

> The Applicant had fully recovered from the work-related aggravation that had caused the 1995 surgery. There was no treatment after the disc surgery until 1997. Moreover, the Applicant told Dr. Edelson that he was pain-free until 1 March 1997, after he had completed a 17-hour flight.
>
> Several factors could have contributed to the Applicant's recurrent pain, including the 17-hour flight in 1997 and the Applicant's exercise regimen.
>
> Several statements made by the Applicant about what various doctors had told him were not substantiated by the evidence, and were considered hearsay because the Applicant did not submit the appropriate records. These included Dr. Kahanovitz's warning about scarring following surgery, and Dr. Harris' conclusion that the Applicant's condition had been caused by scar tissue from the second surgery.
>
> Dr. Hummel's report of 13 May 2005, asserting that the Applicant's condition was related to an on-the-job injury in 1993, contained inconsistencies about dates and conditions that were not persuasively explained by the Applicant.
>
> The Review Panel gave greater weight to Dr. Gordon's opinion than Dr. Hummel's because Dr. Gordon had examined all the medical records, while it was not apparent that Dr. Hummel had done the same. Moreover, Dr. Gordon, a specialist in orthopedic surgery, was better qualified with respect to the Applicant's condition than was Dr. Hummel, a specialist in internal medicine. Finally, Dr. Hummel's opinion was imprecise, whereas Dr. Gordon's opinion was corroborated by the evidence.

56. In the Tribunal's view, the record appears to justify the Review Panel's findings. In particular:

> Full recovery: The Applicant explains that after the first disc surgery, his doctors recommended that he limit

his physical activities in order to avoid the risk of a second disc surgery that could possibly result in the formation of scar tissue.

The evidence shows that the Applicant had a herniated disc for which he had surgery back in 1994, prior to the job-related trip which allegedly led to the second disc surgery in 1995. This fact is clearly noted in Dr. Kobrine's office notes of 14 July 1995 about the 1994 surgery, Dr. Levitt's office note of November 1993, and the office notes of Drs. Kobrine and Kahanovitz about a "recurrent" herniated disc. There is insufficient evidence to back the Applicant's argument that incidents in the course of his mission in 1995 to Latvia (long flight, small bed and fall in a pothole) caused him to rupture a disc and thus required him to have disc surgery ultimately resulting in fibrosis – in turn the cause of many of his subsequent problems, including the ankle injury.

The medical records give a basis for concluding that the Applicant's current condition is likely to have been caused by various physical activities, including, *inter alia*, running, hiking and rollerblading, as well as by a 17-hour flight in 1997.

A number of the arguments advanced by the Applicant rely on unsubstantiated statements attributed to various doctors. In fact, most statements made by the Applicant about scar tissue in the area of the disc surgeries were uncorroborated by evidence. The only evidence in the record on this point includes two statements, both noting the existence of some scar tissue at the location of the surgery. However, neither of the statements was found by the Bank to be conclusive with respect to causality: Dr. Blazina could not determine with certainty whether evidence of radiculopathy was a residual from the old surgeries or whether it constituted new findings, and Dr. Edelson seems to have retreated from his original impression after a few weeks.

While the Applicant argues that his medical diagnoses since 1997 suggest that epidural fibrosis developed after his 1995 disc surgery, the Bank persuasively argues that the Applicant reached a medical conclusion – i.e., that fibrosis was the cause of the current sciatica pain – unsupported by medical experts.

The Applicant argues that Dr. Gordon's evaluation is speculative because he did not have all of the relevant records and never examined the Applicant. Yet it was hardly irrational to consider that for this question an orthopedic surgeon was better qualified than a specialist in internal medicine. Furthermore, although Dr. Gordon never examined the Applicant, it is clear that he based his analysis on the Applicant's medical record. From the office notes available in the record, it is not clear that Dr. Hummel did so.

57. The Tribunal does not presume to substitute its views for those of the Review Panel. Its function is to review the decision by reference to a significantly narrower criterion, i.e., whether the Review Panel's decision was reasonably sustainable and reached in accordance with relevant rules and procedures. By reference to this test, the Applicant's case falls well short.

Decision

For these reasons, the application is hereby dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Washington, DC, 28 March 2007