

Workers' Compensation Appeal Tribunal

Decision # 1

Claim No. 96-1308

Date of Hearing: June 26, 2000

Date of Decision: July 20, 2000

Appeal Committee Members

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Hank Ambrose
Member representative of workers:	Joseph Radwanski

In attendance: The Worker
The Worker's representative – Michael Travill
(The worker's mother was present but did not participate in the hearing.)
Reporter/Recorder – Doug Ayers

Location: Boardroom 2C, Elijah Smith Building
300 Main Street, Whitehorse, Yukon Territory

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Introduction

The worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Internal Review Committee ("IRC") dated April 13, 1999. In its decision, the IRC upheld the December 22, 1998 decision of a board adjudicator denying the worker any entitlement to further wage loss benefits or to further vocational rehabilitation services because his current earning capacity exceeded his pre-accident earning capacity. The adjudicator's decision is what is known as "deeming." It was made under board Policy CS-08 under the authority of section 23 of the *Workers' Compensation Act* ("Act").

On May 20, 1999 the worker appealed the IRC decision to an appeal panel of the board. The hearing was scheduled for December 13, 1999. The hearing was convened but then adjourned because the Worker's Advocate did not have the same documents as Appeal Panel Counsel had at the hearing.

On April 1, 2000, the Workers' Compensation appeal tribunal came into existence under amendments to the *Act* known as Bill 83. On May 15, 2000 the worker appealed the IRC decision to the new tribunal and the appeal was heard by an appeal committee of the tribunal as established by the tribunal Chair under section 18.3(1) of the *Workers' Compensation Act*, 1992 as amended by SY 1999, c.23, s.11. The hearing was held on June 26, 2000 in Room 2C of the Elijah Smith Building.

At the outset of the hearing, the appeal committee determined that it had jurisdiction under section 18.2(a) and 90.(1) (c) of the *Act* to hear the appeal.

The worker appeared personally and gave evidence under oath. The worker was represented by Worker's Advocate, Mike Travill. No one appeared on behalf of the employer. The proceedings were recorded by court reporter Doug Ayers.

The appeal committee considered all of the worker's record as provided by the board as well as board policies CS-07, "Vocational Rehabilitation" and CS-08, "Fitness for Employment, Suitable Occupation, Deeming", also provided by the board as relevant to the matter under appeal according to section 18.3 (4) of the *Act*. In addition, the following documents were marked as Exhibits in the hearing:

- Exhibit 1: Board Submission regarding Worker's Weekly Loss of Earnings dated May 1, 1995.
- Exhibit 2: Confidential Memorandum from General Counsel, Yukon Workers' Compensation Health and Safety Board, to the Advisory Committees concerning Board Chronology Regarding CL-35 and File Audits, dated April 20, 2000.
- Exhibit 3: Page 224 (definition of "demonstrate") from Black's Law Dictionary, Abridged Fifth Edition, published by West Publishing Co., 1983

Subsequent to the hearing, the Workers' Advocate submitted copies of:

- (1) Paul Weiler's 1980 report, "Reshaping Workers' Compensation for Ontario"; and
- (2) a table of maximum annual earnings covering the years 1987 to 2000 from "Worker's Compensation Benefit Comparisons 2000" published by the Association of Workers' Compensation Boards of Canada".

The Worker's Advocate had referred to both documents in the hearing but did not provide copies at that time.

Lastly, prior to the hearing the Workers' Advocate was given a File Summary and tabbed Documents relating to the appeal prepared by tribunal staff for easy reference to documents from the worker's record during the hearing. The Worker's Advocate requested and the appeal committee agreed that the File Summary be amended as follows:

Item 1, fourth sentence now reads "the "Earnings Information" section of the [Worker's Report of Injury/Illness dated December 12, 1996] states that the estimate of total earnings for the past 12 months is \$30,000."

Item 8, second sentence now reads, "That Worker's Report of Injury/Illness, dated February 12, 1998 and copied at Tab 7 indicates the worker estimates his total earnings for 12 months prior to the injury are \$24,000."

Evidence from the Worker's Record

In order to properly address and understand the issues in this case it is necessary to set out a fairly extensive account of the history of this claim as revealed in the worker's record by way of background. As part of this account, we will comment on that history.

- (1) The worker was originally injured in a work-related accident on December 11, 1996. He fell while operating a chainsaw and hit his head on a log. The doctor who examined him the day of the accident diagnosed a soft tissue injury to shoulder and arms with one to six days required off work. Two days later, the worker was assessed by another doctor. He ordered X-rays because the worker reported symptoms of continuing pain and numbness. The X-rays did not indicate a fracture or dislocation. The following month [January], this same physician referred the worker to a neurologist because the worker continued to report having pain and parathesia and the doctor could find no objective abnormality to account for these ongoing complaints.
- (2) Before the worker was seen by the neurologist in May 1997, the board adjudicator on the worker's claim requested that the board medical consultant review the worker's file. The medical consultant reviewed the doctors' reports. These included one from a treating physician which stated he suspected the worker was

“malingering” [that is, faking illness in order to avoid work] because he could find no objective abnormality to account for the worker’s symptoms.

- (3) On January 31, 1997, the medical consultant advised the adjudicator that his initial impression was “that the primary problem could be a psychiatric condition such as conversion hysteria” [Note: defined by *The Merck Manual, 17th edition* as the unconscious process of transforming psychic conflict and anxiety into a physical symptom, traditionally linked with hysterical behaviour.] He stated this psychiatric condition occurs in stressful situations. He noted that the worker had no money and had both parents in hospital and “a fall at work could be the additional stressor necessary to produce a type of conversion reaction.” (The medical consultant did not interview or examine the worker.) The medical consultant also stated that the other possibility was a soft tissue injury as diagnosed by the first doctor who saw the worker after his injury. If that were the case, recovery would usually be very fast but could take up to 6 weeks. He also stated that there was no investigation which could prove one way or the other what was causing the worker’s problem. In addition, he said if the worker’s condition was a type of hysterical paralysis, further investigations could make the situation worse. Lastly, he stated that the worker “appears to have fully recovered”. [Emphasis added.] However, the last medical report reviewed by the medical consultant was written by the treating doctor on January 17, 1997 and states that as of that day, the worker still complained of pain in his neck as well as tingling in I and II finger cleft bilaterally. This doctor states that he is to be off work until he sees the specialist “hopefully in early February, 1997.” In other words, the treating physician was of the view that further investigation in the form of an examination and consultation with a neurologist would be a useful step in determining the cause of the worker’s ongoing symptoms.
- (4) It is not clear whether or not, before making his January 31 report, the medical consultant had reviewed the handwritten letter the worker sent by fax to the board dated January 28, 1997. In that letter the worker does not report that he is fully recovered. To the contrary, he states that his hands were completely numb for the first three weeks after his injury and that he had a continuing sharp source of pain at the top of his spine at the base of his neck. He says that as he writes the letter, “it feels like I am wearing a pair of gloves because I can barely feel the pen in my hand”. He also refers to the length of time it will take for him to see the specialist. The letter ends thus: “All that I know is that as of this date Jan. 28, 1997, I have \$7.28 in the bank, a VISA payment, a \$520 bank loan payment, two parents in the hospital in Vancouver (and their household bills to pay myself) and most importantly the current inability to work at my previous job. . . . It is in complete and utter desperation that I write you this letter.”
- (5) The worker’s benefits were terminated on January 31, 1997.
- (6) According to an adjudicator’s July 31, 1997 letter to the worker, his claim was initially accepted as a soft tissue injury and he received disability benefits from the date of injury (December 11, 1996) to January 31, 1997. According to financial

documents in the worker's record, these benefits were paid at the maximum wage rate. This letter also states: "the benefit of the doubt was extended to you, as the medical information did not show any objective findings. As you know your employer failed to supply a report to support the incident, even though they were given several opportunities to do so. Soft tissue injuries normally heal within six weeks. You were extended eight weeks of benefits. You reported that you had recovered and returned to work as a skidder operator at the beginning of February." In this regard, there is a Note to file by the adjudicator dated January 31, 1997 which states, "He [the worker] stated many times that he has improved so much that he is quite happy. He still has some numbness in his fingers however that too is going."

- (7) In May of 1997, the worker saw the neurologist who noted that "at the end of February, he tried going back to work using a skidder and loader but after working for several hours he felt very much worse and had to rest for the next couple of days because of pain in his neck and arms. He complained of a lot of tingling sensation and numbness in both his neck and in his arms. He found that any jarring of his neck would exacerbate the symptoms. He decided that he should avoid any jarring activities and he took a job in his parents' sawmill piling lumber and doing light mechanical work. He feels that his symptoms have since improved. He only very occasionally experiences numbness and tingling in his hands." The neurologist's report states that sensory examination and nerve conduction studies are normal. Then he gives his diagnosis: "it is likely that he did suffer a concussion of his cervical spine leading to the numbness and the parathesia in his hands. His symptoms are improving and there is no evidence at the present time of any motor or sensory deficit. He should avoid jarring movements and any work with a lot of impact for the next six months until his cervical problem has healed completely." [Emphasis added. Also note, "next six months" would put recovery into November, 1997.]
- (8) The board did not follow this expert's advice. In a report dated July 29, 1997 the medical consultant refers to the specialist's report but says the specialist "suggested" the worker avoid jarring movement for the next six months and concluded that it was "possible" the worker's symptoms were related to his accident. In fact, the specialist used the word "likely" when diagnosing concussion which on our reading of his report is clearly linked to the initial accident in which the worker "jarred his neck" and the subsequent symptoms which appeared within the next day. The medical consultant goes on to state that there is a difference of opinion between the worker's doctor and the neurologist. The medical consultant notes that the worker's doctor has now deferred to the neurologist's report. [This indicates to us that the worker's doctor has never had any difference of opinion with the consultant because he never disagrees with the consultant neurologist's opinion: the attending doctor accepts the neurologist's explanation for the worker's ongoing symptoms – spinal concussion. It is true that the attending doctor had earlier suspected that the worker's symptoms were attributable some degree of underlying

malingering but that was before the worker was examined by the neurologist who then diagnosed spinal concussion.]

- (9) For reasons that are not clear to us, the medical consultant states: “unfortunately, after the fact, it may be impossible to determine the exact cause of the worker’s symptoms . . . It would be possible to have the file reviewed by another consultant neurologist to determine the possibility of a spinal concussion causing the symptoms. At this stage, one could only speculate as to the cause and it is unlikely that any definitive diagnosis can be made. It does appear that the worker is fit for suitable employment and should have no permanent impairment of function as a result of the incident which occurred at work.” The medical consultant gives no reason for not accepting the original neurologist’s diagnosis of spinal concussion.
- (10) It appears that the adjudicator relied upon the medical consultant’s report in her letter of July 31, 1997 (referred to in paragraph 6) in which she denies the worker’s request to have his claim reopened and benefits extended for the period from February 1 to April 6, 1997 because “there is no clinical evidence of any disability suffered as a direct result of the reported incident. The medical findings throughout your claim have been subjective only.”
- (11) More than a year after his compensation benefits terminated, the worker filed another “Worker’s Report of Injury” on February 12, 1998. At this time, he was working at his parents’ sawmill. The report states that he injured his upper back when a severe jarring motion of the skidder he was operating caused sharp pain and numbness in his upper back. In answer to the report form’s question “when were you first absent from work as a result of this injury?” the handwritten entry states “prior injury on file as a claim”. This indicates to us that worker clearly linked the current problem with his upper back to his original injury. On March 25, 1998 the board writes to the worker’s parents [now his employers] asking that they fill out an “Employer’s Report of Injury/Illness”. On this letter in handwriting signed by the worker’s mother is the following note (apparently faxed back to the board):

As per this letter stating a new claim of injury by the Worker. There wasn’t any accident. It was just an old injury that was reported on December 10, 1996 that was aggravated again. We hired the worker with the knowledge that he had an injury but had been cut off compensation before it was healed and had no way of supporting himself without working. Over the past 10 months if I made out an accident report every time he had to lay off work you would have over 50 of them in there by now. The Doctor’s bill should be under claim No. 96-1308 which was the claim when he was injured. There never was an accident at this time.

- (12) The adjudicator on April 27, 1998 asks the medical consultant to review the worker’s files to determine whether the current symptoms can be related to the new incident and/or the earlier December 1996 incident. She also asks whether a referral

for an MRI is feasible. Lastly, she states: “the worker’s attending physician has suggested a change to a less labour intensive job. As the worker’s complaints remain subjective only are there any reasons why he cannot continue in his present occupation?”

- (13) Before continuing with the history of this claim, we would like to offer the following on the adjudicator’s comments that the worker’s complaints were subjective only. The board in dealing with the claim to this point has noted the lack of “objective findings”. [As will soon be discussed, objective findings were finally provided by the MRI test a year and a half after the worker’s injury.] However, there seems to have been an unwillingness to accept the “subjective” reports by the worker of his symptoms as sufficient evidence of injury, absent “objective findings”. In this regard, we note that Terence Ison in his text *Workers’ Compensation in Canada* (2nd ed.) states at page 210-211 the following:

(iii) Sufficiency of Evidence

9.7.9 General Principle - There is no general requirement that for a conclusion to be reached, it must be supported by evidence of any particular type or of any particular weight

9.7.10 Corroboration - There is no requirement that the evidence of the worker must be corroborated by other evidence. . . .

9.7.12 Medical Evidence - It is usually desirable to have medical evidence in relation to any medical issue, but that is not always possible. Thus, for example, the testimony of a worker relating to the existence of pain and its aggravation by work can be sufficient proof of an incapacity to work. There is no requirement that the incapacity must be proved by objective medical findings. Indeed, if such were a requirement, there would be no compensation in the majority of bad back cases. . . .

For example, a conclusion that there is no organic disability [based on objective findings] may mean simply that the physician is unable to detect any organic disability by any diagnostic test known [or ordered or conducted] by the physician. That is consistent with absence of organic disability. But it is also consistent with the existence of organic disability the detection of which is beyond the capacity of that physician [or any tests he has ordered], and perhaps any physician. In such a case, evidence of the worker relating to the onset of pain could be more cogent. . . . Similarly, if it is concluded that the worker is an untruthful witness, a conclusion against the worker may be reached notwithstanding the absence of any medical evidence in support of a negative conclusion. [Emphasis added.]

We agree with this summary of the law concerning evidence in workers’ compensation cases. On the facts in this case, the initial lack of objective findings

simply meant that a doctor had not ordered a test [an MRI] able to detect the disc herniation until almost a year and half after the initial injury.

- (14) On May 19, 1998, the medical consultant reports on his review of the medical reports with respect to the worker. In one of these reports dated February 24, 1998 the worker's physician stated that the worker "has not been able to work more than _ to 1 hr on equipment or with a chainsaw before feeling pain in lower neck and down arms . . . suggest he get thinking about other job options and seek retraining in non-manual type of work." The medical consultant states that "none of these medical reports provide any objective findings. . . . After the incident, there were no objective findings of ongoing problems At the present time the diagnosis is not clear. There are certainly no objective findings reported and previous evaluations have been normal." [We note here, the emphasis again on lack of objective findings and the disregard of the neurologist's diagnosis of likely spinal concussion, an injury consistent with the worker's symptoms which the neurologist had stated needed six months to heal]. The medical consultant states that a neurological or orthopaedic consultation would be helpful, possibly with the addition of an MRI to the cervical and thoracic spines, to determine whether or not there was any significant injury to the spinal cord. He recommends that the adjudicator forward the medical reports from the treating doctors to the consultant specialist but does not recommend that the report from the original neurologist (who diagnosed a concussive injury to the spinal cord) be forwarded.
- (15) On June 17, 1998, the orthopaedic surgeon reports to the board after examining the worker and reviewing the results of an MRI [magnetic resonance image] completed on that day. He states that the MRI "shows a 3 level disc herniation at C 3-4, C 4-5, and C 5-6 . . . from an axial twisting load placed upon his head nearly a year and a half ago that has resulted in some neurological symptoms, that being parathesia, numbness and tingling into his left arm." He also reports that " a return to heavy duty employment and activities requiring jarring will likely continue to recreate the numbness, tingling and discomfort and therefore are discouraged. . . . I don't think it's very realistic that he return to the heavy logging and bucking activities in this situation. . . . I would suggest a mild exercise program with caution and lifting activities and a lighter duty employment to manage this multi-level disc herniation on a conservative basis."
- (16) In a report dated July 2, 1998, the medical consultant reviews the findings from the MRI and the orthopaedic surgeon and says that both clearly relate the worker's symptoms to the original injury suffered in December, 1996. He finds that the worker has a permanent impairment of 6% of the whole person. [However, there is no impairment award paid to the worker until April 7, 1999.] The medical consultant also states that the reports make it clear the worker is fit for suitable employment and therefore a functional capacity evaluation ("FCE") to guide his vocational rehabilitation as well as an admission to the POWER Program would be helpful.

- (17) On July 9, 1998, a board rehabilitation counsellor writes the worker advising him of a referral for an assessment and an FCE at the POWER program. The letter also states that the objective for the worker's vocational rehabilitation "is to pursue a different job with a different employer." The FCE is done on July 21 and 24, 1998. It states as follows:

The limitations noted in the FCE with waist to overhead and elevated work do correlate with the MRI findings and although are not fully contraindicated need to be controlled. Other activities such as vibration, bouncing and sudden head movements are also not recommended due to the identified pathology. In general, work duties that are classified as medium are indicated, provided that they do not have more than a rare to occasional activity which are elevated or overhead in nature.

- (18) The FCE also states under "Job Demand" that the worker was employed as a buckler at the time of his injury. "Since that time, he has tried to drive a skidder which flared his symptoms; scaling logs and pine cone collecting were tolerable activities."
- (19) On September 3, 1998, a board vocational counsellor did a Vocational Rehabilitation Planning Report for the worker which states:

"The goal of vocational rehabilitation according to Policy CS-07 is to 'return a worker as close as possible to their pre-injury earnings pattern as determined over a period or periods of time that equitably reflect the worker's pre-injury earning capacity.'"

[The worker] earned \$17,038 as a buckler/sawmill labourer in the year prior to his accident. The report also identifies three jobs which would "allow the worker to reintegrate back into the workforce without further training or education and earn as much or more as he did prior to his accident." They are (1) retail salesperson capable of earning an average full-time salary of \$29,000 in the Yukon; (2) bartender with average full-time full-year salary of \$35,000; and (3) log scaler at \$200-350/day on a 10 hour day but not available in the Yukon. The report concludes by recommending that the worker focus on work in retail sales with a referral to the Job Finding Club for active job search.

- (20) On September 10, 1998, a board rehabilitation counsellor writes to the worker to set up an appointment to discuss the worker's vocational options. The letter states:

The goal of vocational rehabilitation is to help you to return to work in a job that matches your vocational profile (interests, aptitudes, work experience, transferable skills and physical abilities) and pre-accident earnings. Vocational testing has been completed to evaluate your vocational profile and your adjudicator has determined that your accident earnings to be \$17, 038 per year (\$8-9/hr).

It has been determined that your vocational profile matches job options

that allow you to earn as much as you did before your injury without further training or education. I would like to meet with you to review these options and to provide you with job search training. We will provide you with 4 weeks of re-employment assistance (equal to the amount of weekly compensation that you are receiving now) while you actively search for work.

I understand that you have long term goals that involve re-education. Although we cannot sponsor you for this, I can assist you with developing an action plan based on your vocational assessment.

- (21) From financial documents on file, and a reporting letter on closure of the worker's file dated December 22, 1998, it is clear that after the February 11, 1998 aggravation of the original injury, the worker receives retroactively temporary total disability and wage loss benefits for approximately 18 months, 12 of which are continuous from September 1, 1997 to August 31, 1998. However, except for the eight weeks of wage loss benefits paid from the date of injury on December 11, 1996 to January 31, 1997, none of these payments are at the maximum wage rate.
- (22) At the time of his accident in December of 1996, the worker was earning \$200 per day and made \$6700 in the period October 5 to December 10, 1996. Notes to file by an adjudicator dated July 9, 1998 make reference to phone conversations with the worker concerning the application of Policy CL-35 ("Average Weekly Earnings") to his case and indicate that the adjudicator requests income information from the worker for the years 1994, 1995, and 1996.
- (23) As well, an undated document in the worker's file entitled "Average Weekly Earnings" [same title as Policy CL-35] shows how the board calculated the figure of \$17,038 as the worker's pre-injury earnings for the year before the accident. This document shows that the worker attended school in January and February, 1996 (no income for these months) and then worked in his parents' business for the months of March up to and including October for a total of \$10,338. He then worked for his employer at the time of his accident from October 5 to December 10, 1996 for a total of \$6,700. The two totals added together equal \$17,038. It is clear that his earnings at the time of his accident were not taken as the basis for his average weekly earnings, but rather an average of his earnings for the 12 months prior to his injury was used instead.
- (24) On December 4, 1998 the worker took a job at the High Country Inn and earned \$1,693.51 for 203 hours of work ending on January 21, 1999 for an hourly wage of approximately \$8.34 for approximately seven weeks work. A "Record of Employment" states the worker was released because he "did not show or call for scheduled shifts."
- (25) In a letter dated December 22, 1998, an adjudicator notifies the worker that his claim is being reviewed for closure. The letter states: "Information on file shows you have returned to work as a bartender. According to the Labour Market

Information, the average annual earnings for all bartenders in the Yukon are \$20,000 and \$35,000 who worked full time all year long. Your current earnings capacity exceeds your pre-accident earnings capacity, therefore, there is no further entitlement to wage loss. No further vocational rehabilitation services are required as well.”

- (26) The worker appealed the decision to close his file and terminate all benefits to the IRC. In its decision, the IRC states the issue on appeal as follows:

Whether the worker has returned to his pre-injury level of employability, including a restoration of his pre-injury earnings pattern.

- (27) The IRC finds that the board has met the requirements of Policy CS-08 which requires the board to demonstrate that a worker’s estimated earning capacity in a suitable occupation is reasonable given the current wage scales and that the occupation for which a worker is deemed capable is reasonably available to the worker. The IRC finds that the fact that the worker found employment as a bartender within a month of referral to the Job Finding Club demonstrates conclusively that a suitable occupation is reasonably available to the worker. The IRC accepts as the benchmark for what is a suitable job a pre-injury earning capacity of \$17,038 for a year. The IRC then calculates, based on the Record of Employment figures (see paragraph 24), that the worker had found a job that equalled approximately 75% of a full-time job. Based on the hourly rate for this work of \$8.34, the IRC calculates annual earnings for full time work at \$17,326 which it finds is greater than the worker’s pre-injury average weekly earnings. Therefore, the IRC concludes that the worker does not have a loss of earning capacity due to his disability and denies his appeal.

Evidence and Argument From the Hearing

- (28) The Workers’ Advocate submitted a number of documents with respect to the board’s consideration of policy changes to Policy CL-35, “Average Weekly Earnings” dating from May 1, 1995. In our view, these documents are not needed for our analysis of the application of CL-35 to this case and our conclusions.
- (29) The Workers’ Advocate argues that the worker was and is entitled to compensation based on the *Act* and board policies in place at the time of the accident.
- (30) The Workers’ Advocate submits that the worker’s loss of earnings should not have been calculated using an average based on the worker’s earnings for the 12 months prior to his injury, including the two months he was attending school with no income. He submits that Policy CL-35 section B (a) should have been applied. This section of the Policy states that a worker’s “average weekly earnings will be calculated by (a) the worker’s hourly rate at the time of the disability times the

weekly hours of work, times 52 weeks.” He further submits that it is an error to apply an application document with respect to CL-35 passed in 1997 to a 1996 claim.

- (31) The Workers’ Advocate submits that section 24 of the *Act* should apply to establish average weekly earnings for a recurrence of a disability after returning to employment. This section states,

“for the purpose of paragraph 23 (a), the average weekly earnings of a worker who was previously entitled to compensation and has suffered a recurrence of the disability after returning to employment, shall be equal to the greater of the worker’s average weekly earnings immediately before the

- a) disability first arose and indexed in accordance with section 34, and
- b) recurrence of the disability.”

- (32) The Workers’ Advocate submits that according to Policy CS-08, “when a worker is ‘deemed’, [the board] shall demonstrate that a worker’s estimated earning capacity in a suitable occupation is reasonable given current wage scales, and that the occupation for which a worker is deemed capable is reasonably available to the worker.” He argues that the board did not meet its onus of “demonstrating” the worker could earn full-time wages for bartending. He submits that evidence that the worker was only able to obtain casual, part-time work as a bartender at close to the minimum wage should have been used to determine the worker’s estimated earning capacity in terms of what was reasonably available to him.

- (33) The worker says as part of his active job search in November, 1998, he initially applied for retail jobs as an ASE Electronics Desk Person, for a managerial position at Hougen’s, for a position at Whitehorse Motors, for positions at Erik’s and positions in Horwood’s Mall Stores. However, there were no jobs available. So as a “last ditch effort” he looked for bartending jobs. He went to the Taku but that employer was not hiring. However, he did get hired at the High Country Inn initially as a banquet bartender and then as a waiter and busboy at \$7.20 per hour. But this work was only part-time with less than 25 hours of work per week. He originally applied for work as a bartender in the bar but no work there was available and he was instead offered casual work as a banquet bartender for Christmas parties.

- (34) However, the worker says he could not get enough shifts to make it financially viable to rent an apartment and work in Whitehorse, given the work was part-time at or close to minimum wage. He says he was “going broke with part-time wages.” He says he was “deemed” at full-time bartending wages when there were only part-time jobs available. So he decided to return to his home community outside of Whitehorse and live with his family for support, after his benefits terminated. He says he worked for his parents in the family lumber business but he could only work 20% of the time due to “flare-ups” of his injury.

- (35) The worker says currently he is not working even though it is a “boom time” in his community because he is known in his community as an injured worker and no one wants to hire him. He says he applied in 1999 for construction jobs and seismic cutting jobs but did not get hired.
- (36) The worker says that for the last month and a half he hasn’t had any work as his family is having to sell their business. Prior to two months ago, he was averaging \$600 per month for 10 hours of work per week. He says over the last three years he has done rudimentary mechanic work, operated a skidder and some bucking work for the family business but was bedridden 50 – 70% of the time. But living at home keeps his cost of living low.
- (37) The worker says he aspires to go to school but it is difficult to save tuition money. He says he has applied to and been accepted into a 3 year program in Electronics at the British Columbia Institute of Technology.
- (38) As a context for understanding “deeming,” the Workers’ Advocate submitted Paul Weiler’s 1980 report, “Reshaping Worker’s Compensation for Ontario.” At page 62, Weiler states,

The Workers’ Compensation Board should be empowered to determine whether the disabled worker is capable of doing suitable work, whether that work is available to him, and whether he had refused to take such a job. If the response to these questions is positive, the Board will deem that the worker had earned the income payable in this job for the purposes of calculating the actual wage loss from his injury. Such a judgement by the Board would require a tangible indication that suitable work was in fact available to the worker, presumably through evidence that the employer, the Board, or some other agency had made a specific job offer to him. As well, if a worker refused to take the job, which might be a minimum wage, low paying and low status job as a night watchman, this would not cause complete loss of his compensation benefit, which may have been based on skilled construction tradesman wages. It would mean only that the claimant would have doctored from his total worker’s compensation benefits the amount of earnings by which he might have mitigated his actual wage loss.

Issues

The appeal committee has determined the issues on this appeal are as follows:

1. What legislation and policies should be used to determine the worker’s entitlement in this case?

2. In the review on the first level of appeal of the board's "deeming decision", was the IRC correct or incorrect in determining that the worker's pre-injury earnings were \$17, 038?
3. If not, what were the worker's pre-injury earnings?
4. Was the board's decision as confirmed by the IRC to "deem" the worker capable of earning full-time wages as a bartender in accordance with the applicable provisions of the *Act* and relevant policies?
5. If not, what remedy should the appeal committee provide to the worker (in terms of reversing or varying that decision)?
6. Is the worker entitled to greater loss of earnings benefits than were provided to him and if so, how should these be calculated?
7. Is the worker entitled to further rehabilitation benefits or assistance?

Analysis on Issue #1

The worker was injured on December 11, 1996. It is clear from the medical evidence in the file that the worker's disability (3 level disc herniation preventing him from continuing with his work at the time of injury, i.e., bucking logs, as well as certain other work activities involving jarring, vibration, sudden head movements, etc.) stems from that accident. Section 90 of the current *Act*, the "transitional provision", states "where a worker is entitled to compensation as a result of a disability in . . . March 31, 2000 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000."

Therefore, we find that the *Worker's Compensation Act*, SY 1992 as amended up to the date of the injury in 1996 is the legislation to be used to determine the issues of entitlement in this case. Specifically, section 3 of that *Act* says "a worker who suffers a work-related disability is entitled to compensation . . ." We interpret this to mean that the right to entitlement arises at the time the worker suffers a work-related disability, and in this case it arises in December, 1996.

It is well established as a principle of statutory interpretation that laws which are "substantive" -- that is, laws which deal with rights -- will not be given retroactive force-- that is, they will not act on cases or facts which came into existence before the substantive law was passed -- unless the law specifically says it will operate retroactively. However, laws that are "procedural" can be interpreted to act retroactively but not if they interfere with rights which have already come into existence.

In this case, policies which set out procedure -- "how to" interpret and apply provisions of the *Act* -- should not be applied if they became effective after the date of the worker's

injury and would change his right to compensation (See *Maxwell on Interpretation of Statutes*, 11th edition, pages 204-220). Therefore, Policy CL-35 does apply to the worker's case – it was passed in July, 1993 and became effective in February, 1993 and should be used to calculate the worker's "average weekly earnings" for the purposes of section 23 and 101 (1) of the *Act*. Similarly, Policy CS-07 "Fitness for Employment, Suitable Occupation, Deeming" approved and effective 94-11-09 as well as Policy CS –07 "Vocational Rehabilitation" approved and effective 94-09-13 and 94-11-09, respectively all apply to the worker's case. However, for the reasons discussed above, we find that the Application of Policy Statement CL-35 which came into effect in February 1997, in the year after the Worker's right to compensation arose in December, 1996 should not apply to this case.

Analysis on Issue #2 and #3

We find that the IRC was incorrect in determining the worker's pre-injury earnings were \$17,038 for the purpose of "deeming" the worker under Policy CS-08. It is clear from documents reviewed in paragraphs 22 and 23 of this decision, that the board determined that the worker's average weekly loss of earnings by improperly applying CL-35 to the facts of this case. We find that section B (a) of that policy applies so that the worker's average weekly earnings must be calculated by taking "the worker's hourly rate at the time of the disability times the weekly hours of work, times 52 weeks." At the time of the disability, the worker was earning \$200 per day for a 6 to 7 day week working 72-84 hours per week for his employer. This amounts to an hourly rate of approximately \$16.60 an hour times 72 hours times 52 weeks equaling at least \$61,100 per year. This amount is over the maximum wage rate and is the figure that should be used to determine the worker's weekly loss of earnings for the purposes of sections 22 and 23 of the *Act*. Therefore, there has been an underpayment of benefits to the worker.

Analysis on Issue #4

We find that it was not in accordance with section 22 and 23 of the *Act* or with Policy CS-08 to deem the worker capable of earning full time wages as a bartender which the IRC calculated to be \$17,336 (by grossing up to full-time wages, the worker's actual earnings for part-time work at only 75% of a full-time job). We find the "deeming" decision incorrect for several reasons.

"Deeming and "suitable occupation," as Policy CS-08 states, "fit within rehabilitation and come into play when considering vocational rehabilitation." Both terms must be understood within that context. Further, as Policy CS-07 states, the "goal of vocational rehabilitation is to return the worker as close as possible to their pre-injury level of employability. This includes restoration of their pre-injury earnings pattern as determined over a period or periods of time that equitably reflect the worker's pre-injury earning capacity." [Emphasis added.]

Therefore, there are 2 components to a “deeming” decision: first, the board must determine what the worker’s average weekly earnings were immediately before the work-related disability arose (as required under section 23(a) of the *Act*); second, the board must estimate the average weekly earnings the worker could earn from time to time in a suitable occupation after the disability arose (as required under section 23 (b) of the *Act*). The worker is then entitled to any difference between the two as his weekly loss of earnings.

In this case, as set out in our analysis of Issue 3, the board did not first correctly determine the worker’s pre-disability average weekly earnings. It set these earnings at an amount that was far too low. Secondly, the board did not correctly determine the worker’s post-disability estimated earnings. It set these at an amount that was too high – that is, above what the worker was actually and reasonably able to earn. We accept the worker’s evidence that he was looking for and wanted full-time work but was unable to obtain it, despite an active and thorough job search. In these circumstances, it was not “fair and just” [see section 101 of the *Act*] to deem him capable of earning full-time wages. We agree with the Workers’ Advocate that the board did not discharge its onus under Policy CS-08 to demonstrate that its estimate of the worker’s earning capacity was reasonable given current wage scales and also given what was reasonably available to the worker. In the result, the board incorrectly concluded that the worker had no wage loss.

Analysis on Issue #5 and #6

Given our analysis on Issues 3 and 4, we find that a decision to “deem” can only be properly supported under the first condition set out in section D of Policy CS-08, as follows:

“Deeming” shall occur when medical rehabilitation has progressed to the point that the worker is capable of safely performing the duties of either his/her pre-accident employment, modified employment or alternate employment.

Therefore, in this case, we find that the decision of the IRC that the worker experienced no loss of earnings must be “varied” or changed. We find that the worker is entitled to greater loss of earnings benefits than were provided to him. We find that the worker should be “deemed” as capable of earning the wages he did earn as a part-time bartender and that this “estimate” of his earning capacity should be used to calculate his actual loss of earnings by way of difference from the maximum wage rate for his pre-disability earnings as discussed under Issue 3. We also agree that section 24 of the *Act* should apply in the calculation of such benefits

Analysis of Issue #7

This case involves a young worker at the beginning of his work life. The claim was initially accepted as a soft tissue injury and benefits were terminated at 8 weeks. It is clear from the medical evidence in the file including the worker’s subjective symptoms

and reports of ongoing pain, numbness, and tingling that this diagnosis was incorrect. We accept the worker's evidence that he returned to work because he needed to support himself but that he continued to experience neurological symptoms and would work until they "flared up," then rest until they subsided, and then return to work again in the family business: this was the way the worker coped with his disability absent any ongoing compensation or rehabilitation services from the board until the "aggravation" of his injury in February, 1998.

Because the board incorrectly calculated the worker's pre-disability earnings and then incorrectly "deemed" him capable of earning more after his disability arose than before, the worker received very little in the way of rehabilitation services – only vocational testing, a referral to the Job Finding Club, and several weeks of re-employment assistance benefits during his job search.

It follows from our findings on -- what the worker's pre-injury earnings were as well as on what the estimate of post-injury earnings should have been "deemed" capable of earning -- that this worker is entitled to further rehabilitation assistance under section 30 of the *Act*, including vocational or academic training as deemed appropriate by the board in consultation with the worker. He is now precluded from earning a high-wage living as a buckler or sawmill labourer in the lumber industry and needs to find alternate employment. A job at or close to the minimum wage is not a "suitable occupation" for this worker. We note that the results of the vocational testing done by the board indicate that he is an excellent candidate for retraining with above average and superior general learning and verbal abilities. He also has above average and superior perceptual abilities and dexterity. His general learning ability score indicates that he has the potential to be successful in a 2-year college program and likely a university program. We leave it to the board to determine, in consultation with the worker, what rehabilitation assistance will be provided. However, we recommend that consideration be given to assistance in the form of payment of tuition for the vocational training in electronics for which the worker has been accepted, on his own initiative, to the British Columbia Institute of Technology for September, 2000.

Conclusion

The appeal is allowed. The decision of the IRC is reversed and varied as follows:

1. The board must recalculate the benefits owed to the worker from December 11, 1996 to November 15, 1998 using the maximum wage rate as the worker's average weekly earnings and pay the difference between this amount and the amount at which the worker was actually paid compensation for the period from December 1996 to November 15, 1998;
2. The board must pay the worker further compensation equal to the difference between the maximum wage rate and the greater of (1) the actual average weekly earnings of the worker for the approx. seven weeks of employment he obtained at the High Country Inn from December 4, 1998 to January 21, 1999 or (2) actual

average weekly earnings the worker has earned since leaving the High Country Inn job. These benefits will be paid from November 15, 1998 and continue until rehabilitation assistance is provided to the Worker; and,

3. The board must provide further rehabilitation assistance to the worker. In this regard, we recommend the board, in consultation with the worker, consider this assistance taking the form of payment of tuition for vocational training in the electronics program at the British Columbia Institute of Technology for which the worker has been accepted for September 2000.

Lastly, we note that at the end of the hearing the worker agreed to provide the appeal committee with documentation (T4's and pay slips or other suitable documentation) for amounts earned in the period from December 1996 to the present. This documentation is needed for the calculation of benefits by the board and we direct that it be provided to the board by the worker as soon as possible and no later than 14 days after the date of this decision.

Dated this 20th day of July, 2000 in the City of Whitehorse, in the Yukon Territory.

Hank Ambrose, Member

Heather MacFadgen, Presiding Officer

Joseph P. Radwanski, Member