

# Workers' Compensation Appeal Tribunal

## Decision # 8

**Claim No.: 94-0402**

Date of Hearing: October 24, 2000

Date of Decision: December 19, 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  
Observer from the Workers' Advocate's office - Julie Docherty  
Reporter/Recorder - Doug Ayers

**Location:** Boardroom 1B Main, 419 Range Road  
Whitehorse, Yukon Territory

## Introduction

By his Notice of Appeal dated May 16, 2000, the worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Internal Review Committee ("IRC") dated November 28, 1996.

In the decision under appeal, the IRC upheld the February 15, 1996 decision of a board adjudicator to terminate the worker's temporary total disability benefits as of January 15, 1996 (with an additional one month of re-employment assistance until February 15, 1996).

The worker and his representative, the workers' advocate, say that the adjudicator was wrong to terminate benefits because the worker continues to have a loss of earnings directly related to left buttock pain as a result of a work-related injury suffered in 1994.

The workers' advocate asks that the appeal committee find that in light of evidence prior and subsequent to the IRC decision, the worker has a loss of earnings as a result of a work-related disability which prevents him from returning to his pre-accident employment as a long haul truck driver.

The hearing was held on October 24, 2000 before an appeal committee of the tribunal 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 "*Act*").

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 attended the hearing and gave evidence under oath. No one appeared on behalf of the employer.

The appeal committee considered all of the worker's record on claim # 94-0402 provided by the board as well as board policies CS-01, entitled "Treatment", effective date February 11, 1997; Policy CS-06 (REVOKED), entitled "Chronic Pain and Chronic Pain Syndrome," effective date June 15, 1994 and revoked February 11, 1997; and, Policy CS -08, entitled "Fitness for Employment; Suitable Occupation; Deeming", effective date 94-11-09 also provided by the board, according to section 18.3 (4) of the *Act*.

During the hearing, the appeal committee accepted as Exhibit 1, "Vocational Rehabilitation Report" dated September 20, 1999 and Exhibit 2, "Medical Consultant's report", dated January 17, 2000. Both these documents are from the worker's record with respect to a work-related injury in May, 1998. However, we determined that both contained information relevant to the appeal before us. When we accepted these documents in evidence, we said we intended to request the entire 1998 claim file if we

decided it was necessary to understand these documents in context as a matter of fairness to board staff who wrote them. After the hearing, we requested and received the worker's #98-0471 record and reviewed it.

[At the outset of the hearing, the Chair explained that any new evidence submitted at the hearing would be provided to the board: the worker and his representative did not object to this.]

## **Issues**

1. What legislation and policy should be used to calculate the worker's entitlement on this appeal?
2. Has the worker experienced a loss of earnings due to a work-related disability subsequent to the date that loss of earnings benefits were terminated in 1996?

## **BACKGROUND**

- (1) On May 13, 1994, the worker was driving an 18 wheeler tractor-trailer near Muncho Lake on his way to Edmonton. As he stated in his evidence at the hearing, he was a long-haul truck driver and had worked for his employer at the time for 14 years; at the time of the accident he was hauling feed bags, weighing approximately 50 pounds each, which he had to load and unload; in addition, as a long-haul truck driver, he had to keep to a schedule which meant he would drive for many hours at a time without stopping. The worker says this work is different from short haul driving and pays substantially more. We accept this evidence.
- (2) The accident occurred in the early evening. The worker swerved to avoid some rocks on the road and one of the "pups" he was pulling whipped and rolled, causing the other pup and tractor to roll on its side. His left arm was either out the side window at the time or went out the side window during the accident and was dragged along the ground as the vehicle rolled and then came to a stop. He lost the skin over the elbow; some of the ligaments which help to attach the muscle in the elbow area were ground off. He was not wearing a seatbelt at the time and there were other injuries to the left side of his body which we shall discuss in our reasons. He was medivaced to Edmonton where he had surgery and skin grafting for the elbow. He required extensive physiotherapy to regain functioning in his arm.
- (3) After the accident, he did not return to his former employer. The worker says he did not go back to his pre-accident employer because of the heavy lifting and because he and that employer did not see eye to eye anymore. Later in the fall, he found work

at another trucking company. He began to experience buttock pain when he was required to sit for more than short periods while driving. At first he managed by working with a partner who could spell him off driving; however, once he had to drive on his own, he was unable to continue to drive longer distances because of his left buttock pain. He was off work again while this pain was being investigated. As was documented in a note to file by an adjudicator on January 30, 1997, the worker was next employed full-time with a local moving and storage company from May to September, 1996 and then was laid off but continued to work with the employer on an on-call basis. The adjudicator's notes of a conversation with the employer state: "He works as a driver for the local trips only as he is unable to do the long haul trips. . . . The employer tries very hard to keep this worker busy as he is a good worker even though he has limits."

- (4) As we will explain later, while working with this employer, the worker suffered a subsequent compensable injury requiring surgery to repair .

Instead of setting out evidence from the record and from the hearing in separate sections, we have chosen to incorporate the relevant evidence into our reasoning as part of the analysis of the issues.

## **Analysis of the Issues/Reasons**

**Issue #1:** What legislation and policy should be used to calculate the worker's entitlement in this appeal?

- (5) We find that the worker was injured arising out of and in the course of his employment as a long-haul truck driver in a serious motor vehicle accident on May 13, 1994.
- (6) 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."
- (7) Therefore, we find that the *Worker's Compensation Act*, SY 1992 as amended up to the date of the injury in 1994 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 May, 1994.

- (8) With respect to relevant policies, we note none of the policies submitted to the tribunal by the board as being relevant to this case were cited by the IRC in its decision. We also note that none of these policies were passed on or before the date of the workplace injury/disability. We think where policies are of a "rule-based character" having "statutory force", they come within the term "legislation" as used in section 90 set out in paragraph 6. On our reading of the policies submitted, we consider them to be a form of "legislation" and therefore, according to section 90 of the *Act*, we find they do not apply to the worker's case, as they were passed after the date of his disability in May 1994. In this regard, we refer specifically to CS-01, entitled "Treatment", effective date February 11, 1997; Policy CS-06, entitled "Chronic Pain and Chronic Pain Syndrome," effective date June 15, 1994 and revoked February 11, 1997; and Policy CS -08, entitled "Fitness for Employment; Suitable Occupation; Deeming", effective date 94-11-09.
- (9) However, should we be wrong in this, we find that Policy CS-06 only limits "rehabilitation" for work-related chronic pain: there is no limit on compensation for loss of earnings due to chronic pain -- which of course is the type of compensation at issue in this case. In addition, given the language of the policy, it appears that "deeming" and the application of section 23 of the *Act* are not ruled out for workers who have a diagnosis of chronic pain or chronic pain syndrome.
- (10) Section D (c) of the policy states:

There is a point at which no further intervention by the WCHSB will assist a worker. The worker's disability has stabilized and every effort has been undertaken to assist them in their recovery and return to work. At this point, a decision will be made regarding their earning capability. When a worker is deemed, appropriate consideration shall be given to the suitability of occupations and availability of work in those occupations.
- (11) We also wish to point out that as we interpret the language of Policy CS-01 [the policy which replaced CS-06] , it also does not limit entitlement to compensation in cases where persistent or chronic pain are conditions that are inextricably part of the work-related disability itself rather than conditions arising independent of the disability and which hinder a worker's recovery.

**Issue #2:** Has the worker experienced a loss of earnings due to a work-related disability subsequent to the date that loss of earnings benefits were terminated in 1996?

- (11) First, we must determine whether or not the worker has a work-related disability. Without such a disability, he is not entitled under the *Act* to compensation.
- (12) Disability is defined in section 101. (1) of the *Act* as a "work-related incapacity." It is further defined in Policy CL-40 entitled "Disability" [effective 93-11-10] as follows:

The term 'disability' is used in determining whether someone is eligible for wage loss reimbursement or retraining, and relates specifically to the worker's capacity to meet the demands of the job.

- (13) As well, the policy defines disability as "the limiting, loss or absence of the capacity for the individual to meet occupational demands." We find as a fact in this case that the worker's pre-injury employment is that of long-haul truck driving and further that this occupation requires prolonged sitting which this worker since the 1994 accident is incapable of doing because of his left buttock pain. In making this finding of a disability, we accept and rely on the following evidence:

- (a) A January 17, 2000 report by the medical consultant [Exhibit 2] which was done as part of the subsequent claim file opened when in 1998 the worker tore the attachment for his right biceps muscle as well as the rotator cuff of his right shoulder, while lifting as part of the job he obtained after the 1994 accident. However, the report by the medical consultant is the most recent examination of the worker on file and it does deal, in part, with the worker's ongoing buttock problems as they relate to his ability to perform his pre-accident employment as follows:

It is clear that he continues to have difficulty in putting any pressure on the left buttock. . . . At times he does accompany a driver [for his current employer]. [The worker] has his Class 1 driver's license and can accompany a driver with a learning permit. He also helps with loading and unloading parcels as well as completing some of the paper work. He is not able to return to his pre-accident employment. . . . He also reports he is starting to feel useless and would really like to be actively employed in order to better prepare for his retirement. . . .

I think he would benefit from returning to the work force. He is frustrated about his limited abilities. I believe he is realistic in his expectations. He has taken a computer course sponsored by the board but finds that he is unable to sit in front of a terminal for any length of

time. This of course reflects the difficulty with the pain in his left buttock rather than the right shoulder injury.

(b) A vocational rehabilitation report dated September 20, 1999 [Exhibit 1] which again was done as part of the subsequent claim but nonetheless provides a very helpful summary of claim information relating to earning capacity as follows:

- 1994 injury earning capacity was \$44,586.00. Left elbow was the primary area of injury.
- worker did not return to this employer (reason not specified).
- Aug. 1994 - discharged from POWER determined fit to return to pre-accident employment.
- Nov. 1994 - worker had returned to long haul trucking and was unable to tolerate sitting. Extensive investigations into cause were non-conclusive.
- Appeal conclusion of Nov. 28, 1996 states, "The members of the IRC find that based on the file record and the absence of evidence to the contrary, that it is reasonable to assume that the worker's subsequent symptoms of chronic pain in the left buttock area relates to the work-related disability." The same appeal decision of Nov. 28, 1996 states, "The IRC agrees the worker is employable. The reinstatement of loss of earnings benefits from Feb. 15, 1996, is not authorized. The adjudicator's decision is upheld."
- Jan. 30, 1997 - wage loss determined at \$97.90/day (\$35,733.50 annual). Wage loss based on functional status of elbow only in determining fitness for return to work. Worker is employed at [local moving and storage company] but not able to tolerate sitting for long haul trucking.
- Pain Clinic - determined worker fit to return to medium level employment based on functional status of the elbow only. No consideration is noted of sitting tolerances.
- June 1997 - Functional Capacity Evaluation - assess functional status of upper extremity but no comment about sitting tolerances.
- Nov. 1997 - wage loss review determined that the worker was fit for pre-accident employment based on status of elbow function.

**Recommendation:**

[The worker's] ability to return to pre-accident employment was consistently based on the functional status of the elbow only. There has not been consideration of his reduced sitting tolerance. It is my opinion that this worker has not been able to

return to his pre-accident earning capacity of 1994 because of buttock pain. His earning potential has been limited since he cannot tolerate sitting to do long haul trucking. This component of his claim was accepted in appeal conclusion Nov. 28, 1996 as a board responsibility. However, the decision of that same report does not authorize loss of earnings benefits. I am requesting clarification/directive of the adjudicator as to the appropriate earning capacity of the worker to use in completing the vocational plan.

- (c) The POWER [Program of Work Evaluation and Rehabilitation] assessment findings dated February 7, 1995 which state: "In client's present occupation, he is required to sit for extended lengths of time and this is difficult with present symptoms . . . . Left buttock pain presents unlike a musculoskeletal pain and may be due to non-articular lesion i.e., hematoma, bursitis, or cyst/tumour formation." This report also notes that the worker continues to report pain on flexion of the elbow.
  
- (d) Dr van Zuidan's report dated May 31, 1995 which notes that in addition to the significant injury to his elbow due to the accident, the worker also "had significant bruising and glass embedded in his left flank". [Emphasis added.] This doctor also reports on the discomfort and then pain which developed when the worker returned to long haul driving. In October 1994 [the worker] returned to work driving long distances. For the first several weeks he was driving with an associate and they were spelling off the driving. At that time he did notice some discomfort in his left buttock but when he was sharing the driving his symptoms were minimal and tolerable. In late November of 1994 he began driving by himself and began to experience significant discomfort in his buttock region.

He has continued with his symptoms since that time. Indeed, by March the symptoms were of sufficient severity that he was unable to continue working and had to go off Workmans' Compensation. [as written]

- (e) Dr. Quong's November 18, 1994 report of his examination of the worker which gives a diagnosis of "left ischial spine pain." The doctor notes "pain on sitting" and writes "should avoid prolonged sitting."
  
- (f) A referral letter dated January 18, 1995 by the worker's treating physician in which he notes:

[The worker] took several trips as a truck driver and found increasing pain in his left buttock. . . . My examination shows exquisite tenderness over the ischial tuberosity. [*We note that in plain language this anatomical term refers to the bones that we sit on*]. . . .He took

several trips as a truck driver and found increasing pain in his left buttock. He was okay if he was not sitting but after three hours the pain became unbearable. This, of course, has limited his ability to work. . . I am not sure as to the diagnosis. I assume that it is related to his accident last year, but it is hard to say that definitely when I cannot give a diagnosis. He certainly may have a contusion on the ischial tuberosity because of the accident but I would have thought would have hurt more at the time. . . .I would appreciate your assessment and suggestions regarding diagnosis, investigation and treatment. (Emphasis added.)

(g) Dr. Skinner in his October 16, 1997 letter says:

You have referred this 57 year old . . . man suffering chronic left arm and buttock pain . . .

He stated his main problem as “I have pain in my butt and I can’t sit down and I have pain in my arm and nobody believes me.” . . . [as a result of the accident he] bruised the left side of his body , including his left hip to his knee. . . . He remembers getting out of his hospital bed after the grafting and falling to the floor because 'I couldn't put weight on my left leg.' He moved around in a wheelchair and he remebers them giving him no specific diagnosis or advice about his left body injury. On returning to work in a few months as a truck driver, he noted that his left buttock hurt with prolonged sitting. This has persisted such that he must weight bear on the right buttock and get out of the truck every two hours to walk off the discomfort over a half hour period.

His arm recovered somewhat with physiotherapy but he believes he only gained 3/4 of his power. He is unable to sustain a grip or hold his arm above the waist for any length of time. He gets a shooting pain if he elevates above his shoulder, with pins and needles feeling and numbness. He is unable to carry bags because of poor grip and sometimes spontaneously loses them. The tip of his elbow over the olecranon has a nodule in it which is extremely painful on weight bearing. He rides in the truck with his left hand sitting on his thigh for most relief of the pain. Use of the steering wheel exacerbates it and his fifth finger goes numb. He states, 'I am living on painkillers, 6-8 -per day, because of this accident. . . . He locates pain in his elbow all around it.

On examination, this pleasant right-handed man . . . moved briskly on examination on and off the exam table. He stood and walked with normal posture. There was no significant decreased ROMs of his spine. Right Trendelenberg testing elicited pain in the left buttock.

Diagnostically, . . . I believe that he has had injuries to the soft tissues of the arm and left side of the body but the injuries to the sensory nerves of the elbow and left buttock have not recovered. In essence, he suffers persistent post-traumatic, non-protective pain, most likely due to persistent hypersensitive nociceptors of the sensory afferents in these areas.

Therapeutically, he is interested in trying some other form of therapy, such as trigger point deactivation by dry needling or dilute procaine. . .

- (h) Finally, we note that on December 3, 1997, *over three years after the accident*, Dr. Skinner treats the worker by removing two pieces of glass from the nodule in the worker's left elbow. He describes the glass as "windshield thickness, 3 x 4 mm. size with multiple sharp edges." Within three weeks of the removal of glass, the worker reports that he no longer has pain on weight bearing in this area of his elbow [i.e., the olecranon]. We point this out because we note, interestingly, that in (d) above, Dr. van Zuidan noted that the worker had glass imbedded in his left flank after the accident [current area of pain].
- (14) In the extensive medical investigations of this worker, the x-rays, MRI, bone scans and myelograms of the buttock area did not provide any evidence to explain the cause of the worker's buttock pain. As the worker's treating physician says in an October 10, 1995 letter "the lack of findings on the extensive investigations do call into question the relationship of the worker's pain to his injury at work." Of course being unable to find the cause of pain does not mean there isn't one: sometimes it just means one has not been found yet-- a good example of this is the glass found embedded in the worker's elbow three years after the accident. We think there is evidence right after the accident indicating that there was more extensive injury than the significant injury to the elbow (see [g] above and the report of the use of a wheelchair after the skin grafts and the worker's inability to bear weight on his left leg). This is of course very soon after the accident. In addition, Dr. Skinner is of the view that there were injuries to the nerves of the buttock as a result of the accident which have not resolved (see [g] above). As well, during physiotherapy for the left arm in the month after the accident, the worker reported an episode of low back pain. Lastly, in an independent review of the claim by VocAid in April, 1997, the consultant notes as follows in paragraph 15.

- (15) “In March, 1995, the adjudicator reviewed the medical reports and authorized entitlement for the left buttock pain giving benefit of doubt to the worker. The reasoning was that due to the severity of the trauma to the arm, perhaps an injury to the left hip had been overlooked.” (Emphasis added.)
- (16) It appears that the adjudicator terminated compensation because in her view the onset of symptoms a number of months after the accident indicated that the left buttock pain was not work-related. We do not come to this conclusion. We find that on a consideration of all the evidence, on the balance of probabilities, the left buttock pain is more likely the result of the 1994 work-related accident than not. In other words, it arose out of and in the course of the worker’s 1994 employment as a long haul truck driver. We have already found that the worker’s left buttock pain is a disability (see paragraph 13). Therefore, it is compensable.
- (17) The next question we must address is whether or not this work-related disability has resulted in a loss of earnings. To do so, we will look more closely at the IRC decision. The decision states the issue this way: “The Chair confirmed that the appellant was appealing the termination of loss of earnings benefits effective February 15, 1996.” The IRC does not discuss or mention what sections of the Act or what policy relate to its decision on the issue of loss of earnings benefits.
- (18) In its “Conclusion” the IRC says that “the medical reports after the accident indicated injury to the left side including the left arm and hip area.” Further the IRC finds “based on the file record and the absence of evidence to the contrary, that it is reasonable to assume that the worker’s subsequent symptoms of chronic pain in the left buttock area relate to the work-related disability.” The IRC also points out that there was no history prior to the accident of hip or buttock pain. The IRC says that “the worker continues to suffer from chronic pain in the left arm and left buttock” and “orders that the worker be provided with a pain management program and that benefits be reinstated for any period that the program’s activities require that the worker is unavailable for work.” The IRC “agrees” [presumably with the adjudicator] that the worker is “employable” and it would appear that this is the basis on which the IRC confirms the adjudicator’s decision not to reinstate loss of earnings benefits from February 15, 1996 onward. In this regard, the IRC makes a finding of fact that “the worker was and remains physically capable of working. Further that the worker returned to work in April 1996 and would still be working had it not been for shortage of work.”
- (19) We think that the IRC did not properly analyze the issue of *loss of earnings*. A worker can be “employable” but still experience a loss of earnings. An example would be the case of a worker who, because of a work-related disability, is unable to do his or her pre-injury work and is only capable, after the workplace injury, of

work that pays substantially less. In fact, that is what we find has happened in this case.

(20) We find that the worker's earnings [his hourly rate as well as the mileage rate which can be characterized as "piece work" as set out in the definition of earnings in section 101 of the *Act*] at the time of injury are as set out in the two reports made shortly after the accident by the worker and the employer. At the time of his workplace accident, it is clear from the worker's report of accident as well as the employer's report that "immediately before the work-related disability arose" [see section 23 of the *Act*] the worker was earning \$13.00 per hour for a 45 hour week, plus \$.35 per mile while driving. The worker provides an "average yearly earning" figure of \$46,000 and the employer reports the worker's "gross earnings for the past 12 months" as approximately \$44,000. In addition, as part of Exhibit 3, we have the worker's tax records for 1994 ( a year which he did not work throughout because of his work-related injury, surgery, recovery, etc.) We find that there is a difference between the worker's average weekly earnings, up to the maximum wage rate for the week, immediately before the work-related disability arose, and what the worker could and did earn after the disability arose and he could no longer continue in his occupation as a long haul truck driver.

(21) Lastly, we find that since the worker commenced his appeal after March 31, 2000, he is entitled to interest in accordance with section 19.4 of the current *Act*.

## **Conclusion**

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

1. The worker has suffered loss of earnings due to the work-related disability arising in May of 1994 which prevents him from continuing in his pre-injury occupation as a long-haul truck driver.
2. The board shall calculate, in accordance with sections 22 and 23 of the *Act*, and retroactively pay the worker the compensation owing as a result of our conclusion on 1 above.
3. Interest shall be paid in accordance with section 19.4 (of the current *Act*) on compensation payable as a result of our decision.

Dated this **19<sup>th</sup>** day of **December, 2000** in the City of Whitehorse, in the Yukon

Territory.

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Hank Ambrose, Member

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Heather MacFadgen, Presiding Officer

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Joseph Radwanski, Member