

Workers' Compensation Appeal Tribunal

Decision # 9

Claim No.: 97-0309

Date of Hearing: December 15, 2000

Date of Decision: February 06, 2001

Appeal Committee Members

Presiding Officer:	Janet Wood
Member representative of employers:	Hank Ambrose
Member representative of workers:	Karen Waroway

In attendance: The Worker
The Worker's representative – Michael Travill
Reporter/Recorder – Doug Ayers

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

Table of Contents

Introduction	3 - 4
Issues	4
Evidence from the Worker’s Record	4 – 15
(Paragraphs 1 – 42)	
Evidence and Argument from the Hearing	15 – 17
<i>The Worker’s Testimony</i>	15- 16
<i>The Workers’ Advocate Submissions</i>	16 - 17
Analysis on Issue #1	17 - 19
Analysis on Issue #2	19
Conclusion	19

Introduction

The worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Internal Review Committee ("IRC") dated March 18, 1999.

In its decision, the IRC upheld the adjudicator's April 20, 1998 decision that "worker was and is fit for pre-accident employment." They directed that the worker be offered counselling "to help him reconcile with the amputations and overcome the reported residual fears."

The worker requests that the appeal committee find that requirements with respect to "Treatment" under Policy CS-01, effective date February 11, 1997 and Policy CS-08, "Fitness for Employment, Suitable Occupation, Deeming", effective date 94-11-09 are met, and that he is entitled to compensation benefits and services for a disability that arose out of and in the course of employment.

On April 1, 2000, the Workers' Compensation appeal tribunal came into existence under amendments to the *Act* known as Bill 83. On May 16, 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 scheduled and heard on December 15, 2000 in Boardroom 1B Main, 419 Range Road, Whitehorse, Yukon.

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 was connected via speaker telephone and gave evidence by affirmation. 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 policy CS-01, entitled "Treatment", and Policy CS-08, "Fitness for Employment, Suitable Occupation, Deeming", effective date 94-11-09, 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: Covering page and pages 388 – 391, Yukon Work Futures, Guide to Work Opportunities.

Exhibit 2: Pages 439 – 441, Yukon Work Futures, Guide to Work Opportunities.

Exhibit 3: Pages 432 and 433, Yukon Work Futures, Guide to Work Opportunities.

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.

At the outset of the hearing, the chair stated that new evidence submitted at the hearing would be provided to the board, unless the worker or his representative raised an objection to doing so. Neither objected.

Issues

The appeal committee has determined the issues are as follows:

1. Is the worker able to return to his pre-injury occupation?
2. Is treatment required to assist in the worker's recovery?

Evidence from the Worker's Record

1. The Internal Review Committee (IRC) in their March 18, 1999 decision supported the adjudicator's decision that the "worker was and is fit for pre-accident employment" and directed that the worker be offered counselling "to help him reconcile with the amputations and overcome the reported residual fears."
2. The Worker's Notice of Appeal dated 9-21-2000 (received in the Tribunal office on November 14, 2000) asks that the Tribunal find that the worker is entitled to "full entitlement" in accordance with the *Act* and with board policy CS-01. The worker and his representative reject the IRC's conclusions that the worker is fit for his pre-accident employment.
3. The Worker's Report of Injury/Illness dated March 20, 1997 states that the worker was "adjusting the lead on head saw (sawmill) – tightening lock nut – [when the] wrench slipped – hand caught blade". The report states that the worker injured his left hand, specifically the index and middle fingers. The accident occurred on March 20, 1997.

This report states the worker earned \$23.00 per hour for a 50-hour workweek and that he was employed as a sawyer on a permanent basis. The worker reports that he received \$700.00 per month for room and board in addition to wages.

4. The Employer's Report of Injury dated March 25, 1997 and signed by the Mill Manager states that the worker injured his left hand, specifically the middle 3 fingers when the "worker had been working near the head saw adjusting guides – turn (ed) and the worker's hand caught the saw blade with was turning at full r.p.m."

The report states that the worker began working for the company on February 1, 1997 and he was paid \$23.00 per hour for a 40-hour work week and that he was employed as a sawyer on a permanent basis. The employer reports that the worker received \$700.00 per month for room and board in addition to wages.

5. The Doctor's First Report completed at [Hospital] and dated March 20, 1997 states, "PAIN! PAIN! PAIN! . . . Bleeding; crush injury to left hand with injuries to index, middle and ring fingers".

The worker was transferred to Vancouver Hospital where he underwent a "revision amputation of the left, second and third fingers through the proximal phalanges".

Following the surgery the worker attended for treatment at Leslie R. Peterson Rehabilitation Centre, WCB of BC.

He was subsequently referred to the POWER program by Dr. Galloway on April 2, 1997, for rehabilitation and determination of capacity for work. Dr. Galloway expressed an expectation that the worker "likely will be able to return to his pre-injury occupation".

6. The Initial Assessment Findings report, by an Occupational Therapist and Physical Therapist, POWER program dated April 3, 1997 states, under "Special Considerations/Concerns, "[The worker] reports that he is having flashbacks, which bother him both psychologically and physically. He is not sure how this accident occurred and needs to know why and how the blade came into contact with his hand."

7. Notes to file by the rehabilitation counsellor dated May 2 and May 6, 1997 state:
"[The worker] generally doing well on program. A relationship is building between [the worker] and the therapists. It is hoped that this will facilitate recovery. A concern was noted regarding [the worker's] impression as it relates to work.

Met with [the worker]. He had no concerns with the RTW (return to work) plan. He did have some concerns regarding uncertainty surrounding his work status with his employer. I informed him that these are beyond our control and labour/contract issues that he should discuss with the employer. I informed him that he should return to his family doctor for an update. I also informed him that we expected him to RTW with his accident employer as they mentioned they

have a position available and the medical supports return to his accident occupation. Estimated RTW date is sometime in June.”

8. In a letter dated May 7, 1997 the rehabilitation counsellor requested psychological testing. He states:

“This is to confirm my request for psychological assessment and treatment services for our client.

Psychologically, [the worker] reports flashbacks and nightmares of the accident. He states that he has accepted the loss and feels he is not dwelling on it and is coping fairly well with the situation.

[The worker] has some concerns about the uncertainties related to returning to work. Most concerns are related to uncertainty about the stability of the company and possible loss of verbally agreed coverage for accommodations . . . He also feels that he may not have sufficient finger dexterity to complete the job demands.

[The worker] appears to be coping and functioning very well considering his traumatic loss. I am concerned about the flashbacks/nightmares and inability to recall how the incident occurred. I also want to ensure that he is really coping well or burying his feelings about his loss. There may also be some anger or resentment focused towards the employer. If this is the case, return to his pre-accident employer might be difficult. The reason for the referral is to assess those issues and recommend treatment, if required.”

9. A Progress report from the POWER Program dated June 16, 1997 states:

“[The worker] has been working as carpenter since June 4 . . . reports some difficulty handling small objects like nails, screws and picking up boards. Tasks are slower but still independent. [The worker] has chosen not to buy leather gloves for hand protection from hypersensitivity and general scrapes and cuts. We have made available the services of adapting the gloves to properly fit his hand.”

10. Progress Report by Dr. Galloway dated July 3, 1997 states:

“[The worker] is back to work, recently went from working 4 hour to 8 hour days, and after 2 weeks of this increase in work time, he has noted marked deterioration in his hand symptoms.

. . . It is quite clear from his symptoms that the hand is not tolerating more than 4 hours of construction work a day at this time. But overworking the hand at this point would only be detrimental to the healing/rehabilitation process.”

11. Progress Report dated July 11, 1997 states.

A worksite assessment was completed on June 18. It was observed that the client was able to perform all activities at the worksite. It is the opinion of the supervisor and [the worker] that he is working at 70% speed and quality of what he was doing prior to his injury. [The worker] has the ability to perform in light and medium work activities. Have no impairment with reaching, but impairment with respect to handling, fingering and feeling with non-dominant (left) hand.

12. Discharge Report from the POWER Program dated July 29, 1997 states:

“Functional limitations are reported in the progress note dated July 11. The mill he was working at is reopening in the fall. We would support a return to this line of work based on the July 11 progress report.”[Emphasis added]

13. The Return to Work Plan dated August 6, 1997 states:

“Entitlement – total temporary disability benefits until maximum medical improvement is reached. Permanent partial impairment assessment approximately one year following maximum medical improvement.

Return to Work - . . . [The worker] anticipates that he will be returning to his pre-accident work as a sawyer in 1 – 2 weeks when the company re-opens after a long shutdown. Based on his progress, I expect that he will be fit for full duties as of August 15, 1997.”

14. A Progress Report by Dr. Galloway dated August 19, 1997 states, “Improvement continues. The hand looks good, healing well. Anticipate gradual resumption of ability for fulltime work over the next month or so.”

15. A letter from the rehabilitation counsellor to the worker dated August 27, 1997states:

“I am writing in response to your call yesterday. You left me with the impression that you are unable to work as a sawyer, a welder or a construction carpenter as a result of your hand injury . . .

The first step is for me to do a more detailed analysis of your job as a sawyer is. To do this I will visit [your employer]. I will also be speaking to the employer

to determine your exact job duties. I will also be requesting that you provide me with the same information. .

The second step is to determine if you have the physical abilities. To complete the job demands. I will forward the results of my detailed work site assessment to the POWER program for their opinion in comparison to your performance while on program.

“ If it is determined that you are fit to return work as a sawyer, you will be expected to do so, even if there is no job for you to return. In this case, you will have no further entitlement under this claim for wage loss benefits and you will not be considered for any assistance with re-employment or re-training.”

16. In a Work Site Assessment dated September 11, 1997 the rehabilitation counsellor reports:

“A work site assessment of [the worker’s] job as a sawyer with [the employer] was conducted . . . The assessment was conducted because [the worker] reported that he is unable to complete the full job duties as a sawyer and the employer was unable to provide a formal job description or confirm [the worker’s] statement. [The worker] described the controls as being two levers, each having 6 finger-operated buttons. The purpose of this assessment is to identify and document the physical demands of [the worker’s] job as a sawyer for comparison with his current functional abilities and limitations.”

The assessment was conducted through observation of the work site, review of the National Occupational Classification (NOC), Canadian Classification and Dictionary of Occupations (CCDO) and Dictionary of Occupational Titles (DOT) job classification systems as well as consultations with [worker] and the employer. The assessment focused primarily on the sawmill’s hand controls.

Conclusion – The results of this work site assessment indicate that [the worker’s] estimation of the number of buttons on each hand control is incorrect. The hand controls of both sawmills observed have only 2-4 buttons on each hand control, all of which are thumb-operated. The information from this report will be compared to [the worker’s] current functional abilities and limitations as measured by the FCE on September 12th to determine if he is fit to return to work as a sawyer with [the employer].”

17. The Functional Capacities Evaluations Summary Reports completed by the Occupational Therapist and Physical Therapist, POWER program, dated September 15, 1997 indicate that the worker’s functional abilities “would put him into a heavy to very heavy classification, with the work of sawyer being classified as light to medium in physical demands.”

18. A letter from the worker's employer dated September 22, 1997 states, "In regards to our employee . . . who we hired in the spring of this year. We hired him to be our millwright and fabricator. His job consisted of equipment setup, welding, fabrication and millwright work. He also worked as a sawyer when we needed one . . ."

19. A memorandum to the adjudicator from the rehabilitation counsellor dated September 23, 1997 states:

"I have reviewed the FCE report from POWER and a note from [the worker's] employer regarding his job duties.

I have compared his functional abilities to those of a millwright and welder. [The worker's] functional abilities appear to meet or exceed all the job demands. . . . It should be noted that [the worker] is now fit to work as a sawyer. A sawyer is a skilled labour job that would earn the same as a tradesman in another field, e.g. welder, millwright or carpenter. He is now capable of earning as much now as he did before his injury, regardless of whether the millwright or welding components are considered suitable."

20. On September 23, 1997 the rehabilitation counsellor requested that the medical consultant review the information and provide an opinion on whether or not the worker was fit to return to his pre-accident job. He also asked for the medical consultant's comments on the worker's level of permanent impairment and when a PPI assessment would be appropriate.

The medical consultant's report, dated October 3, 1997 states:

"... Normally I would prefer to wait at least one year following the injury in order [to] ensure that the worker has achieved maximum medical improvement following the injury. This would also give time to identify problems with such things as cold and vibration.

The functional capacity report dated September 12, 1997 shows that the worker is fit to return to his pre-injury employment and also confirms that the worker has a permanent impairment of function as a result of the injuries.

I would certainly be prepared to examine the worker in the Board office for a preliminary PPI assessment."

22. A letter from the claims adjudicator to the worker, dated October 16, 1997 states: "Based on the available information it has been decided you are fit to return to your pre-accident employment. Therefore, total temporary disability benefits beyond September 30, 1997, will not be authorized.

“The medical consultant has reviewed your claim. He has stated that he would prefer to wait for one-year post injury before assessing a permanent partial impairment. Therefore, arrangements will be made for you to be examined by the medical consultant in March 1998.”

23. The medical consultant’s report dated January 8, 1998 states,
“The worker has advised the Board that he will be moving and has asked for his level of permanent of impairment be assessed now rather than delaying it until March In summary this worker has a 17% of total permanent partial impairment of function as a result of the amputations suffered at work.”

In a letter from the claims adjudicator to the worker, dated January 12, 1998, she notifies the worker that he is entitled to 17% of total permanent as a result of his amputations and states his award is \$20,343.55, which the worker agreed to accept as a lump sum payment.

24. A memorandum by the claims adjudicator (note to file) dated January 12, 1998 refers to a meeting with the worker and the worker’s stepmother. The worker’s stepmother believes the worker would benefit from counselling and requests that the board assumes the cost of that as well as assist him in returning to school. The claims adjudicator states that the worker would need a medical report to support the board assuming costs for counselling and that the worker was not entitled to further “schooling”.

25. Dr. Avery, in his February 11, 1998 letter, expresses concern about the worker having flashbacks and a phobia of saws, and stated “I do not think it would be unreasonable to pursue appropriate counselling in regards to these problems. I also feel there are some anger issues around the management of his case that should be readdressed.”

26. A note to file by the claims adjudicator dated April 14, 1998 states, “Call from, psychologist. He stated he spoke with [the worker] on the phone a little bit, but [the worker] declined counselling. No appointment was kept.”

27. A memorandum to the medical consultant from the claims adjudicator dated April 14, 1998 lists the issues as:
1. Workers’ fitness to do pre-accident employment.
 2. Psychological impact of the injury – request for counselling.
 3. Possible revision surgery.
 4. Entitlement for prosthetic.

She makes the following “recommendations”:

1. Despite [the worker’s] contention he is unable to do his pre-accident work, the medical information supports that he is fit to return to his pre-accident work without restrictions. Additional rehabilitation assistance in the form of retraining and reinstatement of benefits is not appropriate.
2. There is little evidence that the worker suffered psychological problems because of the amputation. He never attended counselling although it was arranged shortly after the accident. I would appreciate a medical opinion on whether psychological counselling to deal solely with the trauma of the amputation is appropriate at this time.
3. Is there any evidence that revision surgery is required?
4. Please comment on the worker’s inquiries concerning a prosthetic for his hand. Is this appropriate noting the amputation?

The medical consultant’s report dated April 14, 1998 states:

“This has been reviewed extensively. It is clear that the amputations do result in some functional limitations but in many instances these limitations can be accommodated. The reports do suggest the worker is fit for suitable employment.

Counseling was arranged for the worker but he did not keep the appointment.

From the medical reports, there is no evidence that revision surgery is necessary. I must admit that I am not aware of the need for a prosthesis. This type of amputation is not generally amenable to a prosthetic. However, at the present time there is no evidence that additional medical treatment is required.

28. In a letter from the claims adjudicator to the worker dated April 20, 1998 she states: “I received a report from Dr. Avery outlining some of your concerns regarding your compensable injury. The issues you raised were your fitness to do pre-accident employment; the psychological impact of the injury; possible revision surgery; and entitlement for prosthetics.

It was determined that you could do you could meet the entire job demands in the work outlined by your employer. Therefore, despite your contention you are unable to do your pre-accident work, the medical information continues to support that you are fit to return to your pre-accident work without restrictions.

Based on the available information there is little evidence that you suffered psychological problems because of the amputation. Counselling had been arranged shortly after the accident but you did not attend. I will not consider authorizing counselling to deal with anger management.

Based on the available information, there is no evidence to indicate that revision surgery is required.

It is noted that you were inquiring about a prosthesis. Your type of amputation is not generally amenable to a prosthetic but the board will review any requests for medical treatment.”

29. In a memorandum from the claims adjudicator to the medical consultant dated October 15, 1998 she lists the issue as “medical request for physiotherapy to desensitize amputation sites” and says, “I would appreciate a medical opinion as to whether or not an additional course of desensitization is appropriate.”

The medical consultant’s report dated October 20, 1998 states,

“In terms of desensitization, home programs may need to be continued. As the winter is just starting, it may be reasonable to offer him one or two refresher sessions but is unlikely that a full course of desensitization would be of much benefit.”

30. A Doctor’s Progress report from Dr. Avery dated October 19, 1998 states that the worker complains “nothing has changed, left hand hurts in the cold”.
31. In response to receipt of the October 19, 1998 Doctor’s Progress report, the adjudicator wrote the worker on October 23, 1998 reaffirming her decision of April 20, 1998 and stating that no new information had been provided that would cause her to reconsider her earlier decisions about wage loss, phobia of saws, prosthetics for the amputated fingers, and therapy for cold sensitivity.
32. The worker appealed to the Internal Review Committee (IRC) on November 10, 1998, disagreeing with the decisions of April 20, 1998 and October 23, 1998.
33. A Doctor’s Progress report from Dr. Avery dated November 23, 1998 states that the worker complains that he “can’t work.. My fingers are too cold.”
34. In notes to file from the rehabilitation counsellor dated November 27, 1998 she states:

“Worker was in yesterday to discuss his continued frustration with his described inability to work outdoors in the winter because of cold sensitivity to his injured fingers . . . It was suggested that a sheared sheep skin adapted gauntlet that he could wear under a mitt or glove might resolve the problem. The worker agreed to trying this.”

35. A letter from the employer, dated November 26, 1998 states:
“I wish to clarify a matter respecting [the worker’s] role with our company at the time of his accident.
1. [The worker] was our senior person in our sawmilling operation
 2. [The worker’s] role was that of millwright. He was responsible for set-up, welding, fabricating, calibration of the saws, etc.
- During the hospital confusion [the worker’s] position on the WCB form was sawyer. I have discussed this matter with staff on site at the time of this accident. We have reflected upon this matter and in fact have concluded that “sawyer” does not accurately state [the worker’s] position at the time - millwright does.”
36. In the Initial Assessment Findings from the POWER Program dated December 7, 1998 the Occupational Therapist states:
[The worker] “Reports that exposure to cold air irritates the finger stumps and eventually makes the whole arm ache. Notes that 4 hours of outside activity leads to between 1-4 hours of aching for the hand and arm.” [Emphasis added]. He reports that there have been no changes in the hand status for the past 18 months. ... [The worker] feels that he is at a loss on how to deal with the cold temperatures. The pain he has is too much for him to be able to work with on a daily basis. He reports that he uses a thinsulate fleece glove. He reports that mitts exacerbate his symptoms more than gloves and are more difficult to work with. He also reports that chemical heat packs are a nuisance and do not help control his symptoms.
- Cold hypersensitivity is difficult to be thoroughly assessed. On assessment, there were no signs of trophic changes such as vasoconstriction or skin colour changes. We will initiate a daily program of dry temperature and vibration desensitization and monitor for any trophic changes. We will also initiate a search for heat supplement products that may create a better temperature environment inside the hand coverings.”
37. In notes to file by the claims adjudicator, dated December 14, 1998 she states:
“Entitlement will be authorized for [the worker’s] desensitization treatment only. There is no medical to support that he is totally disabled from work, so full TTD is not appropriate . . . It was decided that after this week of TX an at home program would be the most practical and would not cause [the worker] to miss any more work. ... It was determined that the program of desensitizing that the worker is doing could easily be done as a home program, but in the past the worker has had difficulty maintaining consistency on a home program. ... He will be discharged from daily attendance in PWR to a home program this Friday. Wade at PWR was informed of this decision.”

38. The medical consultant reviewed the file again in response to a request from the adjudicator on December 8, 1998, when she states the issue as, “Worker’s claim to be disabled from employment because of the cold sensitivity at this amputation sites.” And asks “Is there any medical evidence that [the worker’s] cold sensitivity prevents him from working as a millwright?” She notes that the environment conditions to which a millwright is exposed do not include exposure to weather, or to extreme cold or heat.

The medical consultant’s report dated December 18, 1998 states:

“According to a comprehensive functional capacity evaluation, he is fit to return to his pre-accident work. He reports being intolerant of cold, but from the reports has not shown up for an appointment for desensitization or for fitting of a sheep skin adapted gauntlet.

The employer has confirmed that the worker’s pre-accident employment was as a millwright. According to the job description attached to the file, there is no exposure to extreme cold. [Note: Appears to refer to the “Typical Occupational Characteristics” report on the file – there is no job description on the file covering the worker’s actual pre-accident job] Based on that information there is no medical evidence to suggest that the cold sensitivity prevents him from working as a millwright.”

39. In a letter to the worker from the claims adjudicator dated December 22, 1998 she states:

“You claimed that the cold sensitivity at the amputation sites prevented you from being employed in an outdoor environment. Because of this, you felt you were entitled to wage loss benefits.”

Because you were employed as a millwright at the time of the accident, the issue of whether or not you can work outdoors is irrelevant. [Emphasis added] Based on all documentation you are fit to return to full pre-accident employment. There is no medical evidence that the cold sensitivity prevents you from working as a millwright. Therefore, there is no entitlement to wage loss benefits.”

40. The worker’s November 10, 1998 appeal was heard March 18, 1999. The IRC concurred with the adjudicator’s decision that the worker was fit for pre-accident employment, however directed that the board’s medical consultant be asked to recommend an individual to provide appropriate counselling to the worker, and that counselling be offered in accordance with Policy CS-01.

41. The medical consultant’s report dated April 22, 1999 states:

“ . . . I now have had the opportunity of reviewing the IRC decision of March 18, 1999.

Counselling was offered in May of 1997 to help the worker deal with the effects of the accident. Unfortunately the worker did not accept counselling at that time.

Effective counseling requires the active participation of the patient. Without that, there is a potential to exacerbate the problem rather than improve the situation.

In order to better involve the worker in the process, it may be helpful to have [the worker] discuss potential counsellors with his attending physician.”

42. A letter from Marilyn Smith, psychologist, dated October 19, 1999 states “The worker was seen on 9/9/99; 15/9/99; 20/9/99; 28/9/99; and 19/10/99, and 5/10/99 is listed as (no show)”.

She states:

Presenting symptoms – [the worker] expressed frustration at his inability to continue in his trade of sawyer. He reports that working outside is a requirement of his well being and is unwilling to consider indoor work. At the same time he realizes that the cold climate makes this outdoor work impossible for him in the Yukon.

Treatment – Assessment was completed, however, treatment was not initiated due to the client’s failure to attend the last session ... I suspect [the worker] has left the territory to seek employment in the south.

Summary – In conclusion, [the worker] was seen for assessment and adjustments to his disability, with little treatment done, due to client unavailability.”

Evidence and Argument from the Hearing

The Worker’s Testimony

The worker says that at the time of the accident he was employed as a millwright. His job involved “keeping the mill going”, setting up and calibrating, etc. Working conditions were “seasonal”, varying with the logging seasons.

The worker objects to the adjudicator’s decision that he was fit for the pre-injury employment and would like that decision overturned. He thinks the adjudicator was mistaken as to the relevance of cold to the job. He submits that, in fact, exposure to cold and sensitivity to cold are very relevant. The adjudicator’s stated assumption was that

cold was not relevant because the work was primarily indoors. The worker submits that this is not so – the job involves working outside in cold weather. The worker believes he may be able to perform as a millwright if not for the extreme temperature conditions involved.

The worker is currently working as a carpenter in the summers but hasn't been working in the winters.

The worker says that after the accident he “had a chip on his shoulder” and was not dealing with the psychological issues, however he realized he had to get over that and move on. He did not initially attend the counselling sessions arranged by the board because “crazy people get counselling”. He did not feel he was crazy and was not comfortable with the idea of counselling. He now realizes that it is not only “crazy people” that get counselling and is currently attending counselling to deal with the injury and related issues. He feels that this is helping him. He did not continue his counselling with Marilyn Smith only because he moved from the territory.

The Workers' Advocate Submissions

The workers' advocate submits that the issue in this case is whether the worker is fit for pre-accident work.

The workers' advocate requests that the appeal committee overturn the decision that the worker was fit for pre-accident work, and that benefits be re-instated retroactive to their termination, less any income received. He further requests vocational assistance and counselling to assist the worker to deal with the psychological issues he has as a result of the accident.

The workers' advocate notes that the EXDOT Reports of typical occupational characteristics of a millwright, a welder, and a sawyer, which were relied upon by the board, all require “average” finger dexterity and involve “frequent” reaching, handling, and fingering.

The reports, which he states are from BC, say that exposure to extreme cold is not present in those occupations. The workers' advocate submits that these Occupational Characteristic Reports do not accurately reflect working conditions for these occupations in the Yukon, where exposure to extreme cold is common.

He cites the “Yukon Work Futures” as a more accurate occupational description for the working conditions in the Yukon. Yukon Work Futures describes the working conditions for millwrights as involving a variety of conditions. “Some will work mainly indoors, in repair shops, plants and other buildings, but many will work outside.” It states that 57% of welders work outside Whitehorse because the mining industry is currently the largest

employer of welders. The workers' advocate submits that most of the welding work at the mines is required to be performed outside.

The workers' advocate submits that the pictures in the file make it clear that the sawmill that the worker worked in at the time of the accident was outside. He further submits that the temperature on the day of the injury was -38 degrees and the worker was working outside that day.

He submits that the decisions that the worker is fit to return to pre-accident employment have all been based on the stated assumption that there is no exposure to weather, but that the facts are that there is exposure to extreme cold, and the worker's cold sensitivity is well documented. He adds that even if gloves and other aids are successful, the worker is required to remove them for some activities. He refers to reports that the worker "can't pick up nails".

He goes on to say that although the board says the worker would not be exposed to vibration because he had been provided with an anti-vibration glove that is not the case – such a glove was never provided.

The worker's advocate also made submissions with regard to the provision of benefits under Policy CS-01. In her April 20, 1998 letter the adjudicator mentions the worker's psychological problems, but then goes on to say that there is little evidence that he suffered psychological problems, and states that if his doctor thinks counselling is appropriate then he [doctor] should arrange counselling.

In reference to the adjudicator's memo to file January 12, 1998, the worker's advocate submits that the adjudicator's requirement for a medical report to "link trauma to need for counselling" is counter to the reasons for Policy CS-01, and that the adjudicator prejudices the outcome of any counselling when she states "it would appear reasonable that he could return to pre-accident employment after counselling."

The worker's advocate further submits that the adjudicator contradicts the doctors' reports on file in her April 14, 1998 memo to the medical consultant when she states "There is little evidence that the worker suffered psychological problems because of the amputation.". He notes that the subsequent Medical Consultant's Report does not comment on the psychological impact, the benefits of counselling or whether or not there is psychological damage.

It is the worker's advocate's position that wages loss benefits should have been reinstated when the counselling was authorized by the IRC.

Analysis on Issue #1 Is the worker able to return to his pre-injury occupation?

The worker was injured on March 20, 1997. 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 *Workers' Compensation Act*, SY 1992 as amended up to the date of the injury in 1997 is the legislation to be used to determine the issues of entitlement in this case.

Board Policy CS-08 deals with "Fitness for Employment" and "Suitable Occupation", and lists sections 12, 16 and 23 and states, in part:

A. DEFINITIONS

1. FITNESS FOR EMPLOYMENT

Fitness for employment means a worker is medically capable of returning to work in a suitable occupation.

2. SUITABLE OCCUPATION

Suitable occupation means an occupation that a worker has the skills, education and physical ability to undertake, and which is reasonably available to the worker.

B. FITNESS FOR EMPLOYMENT

Fitness for employment shall be based on the medical evidence provided by the attending physicians. The Claims Adjudicator shall assess the medical evidence to determine if a worker is fit for employment.

The assessment conducted to determine fitness for employment should be tailored to the individual requirements of a worker.

We find that the board's decision that the worker was fit to return to pre-accident employment was based largely on the assumption that exposure to cold was not a factor in that employment. We note that there are several references throughout the file where board staff state that exposure to extreme cold is not a factor in the worker's job. The medical consultant's report dated December 18, 1998 states that "... there is no medical evidence to suggest that the cold sensitivity prevents him from working as a millwright."

In addition the IRC states, in its March 18, 1999 decision that "There was no indication at the time the worker was found fit to return to pre-accident work that a sensitivity to cold would limit his capabilities." Since the worker's cold sensitivity is well documented throughout the file we take this to mean that the exposure to cold was not expected to be present in the pre-accident job.

We find that the assumption is erroneous, and that exposure to cold is a factor in the worker's pre-accident employment. The worker was working outside in a temperature of -38 degrees Celsius at the time of the accident. The Yukon Work Futures publication clearly states that, in the Yukon, many individuals in the worker's occupation work outside, at least part of the time. We accept the worker's statement that his work as millwright required him to work outside.

We find that the worker's sensitivity to cold was identified very early on and persisted throughout the duration of his claim, with references still made to it, and treatment being provided for it, as late as December 1998. On December 7, 1998 the Occupational Therapist reported that the worker "reports that exposure to cold air irritates the finger stumps and eventually makes the whole arm ache. Notes that 4 hours of outside activity leads to between 1-4 hours of aching for the hand and arm".

Finally, we find that, given the worker's sensitivity to cold, and the fact that his pre-accident employment required him to work outside in conditions of extreme cold, he is not fit to return to that employment.

In summary, medical evidence supports that the worker has cold sensitivity as a result of the workplace accident. The demands of the pre-accident employment require that he work in conditions of extreme cold. Therefore, the pre-accident employment is not "suitable" for this worker. Further, the assessment of his fitness to return to pre-accident employment has not been "tailored to the individual requirements" of this worker, as required by Policy #CS-08.

Analysis on Issue #2 Is treatment required to assist in the worker's recovery?

We find that the IRC, in its March 18, 1999 decision, has already accepted the worker's request for counselling. That benefit was being provided when the worker left the territory to seek employment, thus ending the counselling sessions.

The worker has commenced counselling in his current location and we find that it is consistent with the IRC decision that the board reinstates counseling benefits under Policy CS-01, with the current counsellor.

Conclusion

The appeal is allowed.

The decision of the IRC with respect to Policy CS-08 is reversed and varied as follows:

1. The board must provide compensation to the worker for loss of earnings since September 30, 1997, when his benefits were terminated.
2. The board must provide such services as are necessary to assist the worker to become employable in a suitable occupation that does not require exposure to cold.
3. Interest is awarded under section 19.4 of the *Act*.

The decision of the IRC with respect to Policy CS-01 is confirmed:

4. The board must provide counselling services to the worker to assist him in dealing with psychological issues arising from the accident.

Dated this **6th day of February, 2001** in the City of Whitehorse, in the Yukon Territory.

Karen Waroway, Member

Janet Wood, Presiding Officer

Hank Ambrose, Member