

# **Workers' Compensation Appeal Tribunal**

## **Decision # 13 – Board Direction to Rehear**

**Claim No.: 94-0402**

Reasons for Review: Received from the Board February 19, 2001

Date of Documentary Review: March 28 and April 6, 2001

Date of Decision: May 4, 2001

### **Appeal Committee Members**

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

### **Documentary Review**

**Location:** Boardroom 2A, 419 Range Road  
Whitehorse, Yukon Territory

## Summary for the Reader

**Decision under review:** Internal Review Committee (the “IRC”) – November 28, 1996

**Sections of the Act considered or applied by IRC:** Sections 14 and 17 (but no reference to which version of the *Act* used).

**Policies considered or applied by IRC:** CL-46 “Permanent Impairment Policy” and CS-06, “Chronic Pain and Chronic Pain Syndrome Policy Statement.”

**Issues addressed by IRC:** “termination of earnings benefits effective February 15, 1996, and the assessment of a permanent impairment for his left arm.”

### **Decisions made by IRC:**

#### Findings:

1. “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.”
2. “The IRC finds 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 a shortage of work.”

#### Orders:

1. On the grounds that the worker was employable, the IRC confirmed the adjudicator’s decision not to reinstate loss of earning benefits from February 15, 1996.
2. Pursuant to Policy CS-06, “Chronic Pain and Chronic Pain Syndrome” policy statement, the IRC ordered that the worker be provided with a pain management program and that benefits be reinstated for any period that the program’s activities required the worker be unavailable for work.
3. The IRC ordered that, pursuant to section 14 of the *Act* as it was then, a psychological evaluation be conducted and based on the results, if appropriate, counselling sessions be provided to the worker to assist him in dealing with the psychological effects of the accident and that benefits be reinstated if he was therefore unavailable for work during counselling.
4. The IRC ordered, according to Policy CL-46, “Permanent Impairment Policy Statement,” that an assessment of the worker’s left arm for a permanent impairment be done and that benefits be reinstated during assessment as in #2 and #3 above.

**Sections of the Act considered or applied by the appeal committee:**

17, 18.1(8), 18.2(8), 18.2(9), 18.2 (10), 18.3(3), 18.3(4), 18.4(1), 18.4(2), 19.4, 22, 23, 90 of the *Workers' Compensation Act* (the "Act") as amended by SY 1999, c.23, s. 11.

**Policies considered or applied by appeal committee :** CS-01, entitled "Treatment", effective date February 11, 1997.

**Issues addressed by appeal committee:**

1. The Board says that the appeal tribunal reviewed the findings of the adjudicator rather than those of the IRC with respect to whether the worker's buttock pain was a work-related injury and therefore did not comply with sections 17(1) and 18.4(1) of the *Act*.
2. The Board says that the tribunal is without jurisdiction to award the worker compensation calculated in accordance with sections 22 and 23 of the *Act* for loss of earnings due to a work-related disability. The Board says the tribunal orders the board to pay the worker the difference between his pre-accident earnings in accordance with s. 23 and the "Deeming" policy [CS-08]. The Board says the worker was never "deemed" under Policy CS-08, the IRC never dealt with CS-08 or s. 23 and therefore the tribunal has dealt with an issue that never arose out of a factual finding or decision of the IRC. The Board says we appear to have accepted that the worker was deemed because at page 2 of the original decision we refer to CS-08.
3. The Board says that the tribunal ignored the clear wording of policy CS-01, which states that it applies to post-January 1, 1993 disabilities. (The worker was injured in 1994.) The Board says the tribunal made a finding that policy CS-01 did not apply and therefore did not properly apply CS-01. The board gives no reasons as to why CS-01 should apply, other than to point out the provision in this policy with respect to application to "post January 1, 1993 disabilities." It would have been helpful to have full reasons on this point so that it was clear as to why and how the members of the Board think that the rest of the policy in terms of its substantive provisions apply to the worker's case.

**Decisions made by appeal committee:**

1. Loss of earnings benefits are authorized because the worker has suffered loss of earnings due to a work related disability arising in May, 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 section 22 of the *Act* (and any other sections of the *Act* and applicable policies that are necessary) 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 board policy developed under section 19.4 of the current *Act* on compensation payable as a result of our decision. As this policy is not yet developed, it is unclear at this point as to how it will or will not apply to this case.

## Introduction

This is a rehearing of an appeal originally decided by this appeal committee on December 19, 2000. On January 30, 2001 the Yukon Workers' Compensation Health and Safety Board of Directors (the "Board") acting under section 18.2(8) of the *Workers' Compensation Act*, 1992 as amended by SY 1999, c.23, s.11 (the "Act"), directed the appeal committee to rehear the appeal because in the board's view the appeal committee had (a) failed to comply with the *Act* and (b) had not properly applied policies established by the board. At this time under s. 18.2 (10), the Board also stayed the original decision of the appeal committee (Decision #8). However, no reasons for the direction to rehear the appeal were provided, as required by section 18.2 (9). On February 19, 2001 the tribunal received a letter, dated February 13, 2001 from the Chair of the Board setting out those reasons.

On February 27, 2001 the Chair of the appeal committee wrote the workers' advocate confirming that the advocate, on behalf of the worker, was willing to proceed with the rehearing of the appeal by way of documentary review and written submissions in response to the board's written reasons. The workers' advocate provided his written submissions on March 21, 2001.

We also point out that workers' compensation adjudication/appeals are based on an inquiry model. As members of the original appeal committee for the appeal the tribunal heard in October 2000, we are aware of two documents as well as tax records which were accepted as exhibits in the original hearing. We have confirmed with the workers' advocate that he wishes these documents and tax records to be considered on this rehearing as well. Therefore, we mark them as exhibits in this hearing. Exhibit 1 is "Vocational Rehabilitation Report" dated September 20, 1999 and Exhibit 2 is "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. Nonetheless, we find that they contain the most recent medical and rehabilitative information relevant to the matter before us. Exhibit 3 is information from the worker's tax records for the years 1992, 1993, 1994, 1995, 1996, and 1997.

As this is a rehearing, the members of the appeal committee have reviewed again and considered afresh the worker's entire record.

In addition, on March 14, 2001 the board's hearing officer wrote the tribunal providing an "expanded" list of policies to be relevant to the appeal as follows:

1. CL-30, Suspension, Reduction and Termination of Compensation
2. CL-40, Disability
3. CL-42, Arising Out of and In the Course of Employment
4. CS-01, Treatment

5. CS-06, Chronic Pain and Chronic Pain Syndrome – Revoked
6. CS-05, Rehabilitation
7. CS-07, Vocational Rehabilitation
8. CS-08, Fitness for Employment, Suitable Occupation, Deeming

However, since this direction to rehear comes from the Board with respect to compliance with the *Act*, and board policies, we will confine our consideration of policies (where different from those set out by the hearing officer) to those identified by the board in its February 13, 2001 letter.

On May 16, 2000 the worker originally appealed the decision of the Yukon Workers' Compensation Health and Safety Board's ("board") Internal Review Committee ("IRC") dated November 28, 1996.

### **Jurisdiction**

- (1) The appeal committee determines that it has jurisdiction under section 18.3 (8) to rehear this appeal. This is an appeal from an IRC decision. Section 18.(1) states that a worker may appeal a decision made under section 17 to the appeal tribunal: we interpret this to mean under section 17 at the time the decision under section 17 was made - - in this case the first level appeal was decided by an IRC under s. 17 as it existed on November 28, 1996. In addition, we interpret the transition provision, [s.90] to mean that appeals of section 17 decisions commenced after March 31, 2000 (as is the case here) are to be determined according to the current (not predecessor) legislation and therefore the appeal tribunal is the appropriate body to decide this second and final level of appeal.

### **The Internal Review Committee Decision**

- (2) The IRC in its November 28, 1996 decision made these findings:
  1. "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."
  2. "The IRC finds 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 a shortage of work."
- (3) In addition, the IRC made the following decisions (orders):

1. On the grounds that the worker was employable, the IRC confirmed the adjudicator's decision not to reinstate loss of earning benefits from February 15, 1996.
  2. Pursuant to Policy CS-06, "Chronic Pain and Chronic Pain Syndrome" policy statement, the IRC ordered that the worker be provided with a pain management program and that benefits be reinstated for any period that the program's activities required the worker be unavailable for work.
  3. The IRC ordered that, pursuant to section 14 of the *Act* as it was then, a psychological evaluation be conducted and based on the results, if appropriate, counselling sessions be provided to the worker to assist him in dealing with the psychological effects of the accident and that benefits be reinstated if he was therefore unavailable for work during counselling.
  4. The IRC ordered, according to Policy CL-46, "Permanent Impairment Policy Statement," that an assessment of the worker's left arm for a permanent impairment be done and that benefits be reinstated during assessment as in #2 and #3 above.
- (4) The worker appeals only the first of the four decisions: that is, he appeals the decision not to reinstate loss of earnings benefits from the date they were terminated on February 15, 1996.

### **Fair and Reasonable Consideration**

- (5) Under section 18.3 (8), we are required to give fair and reasonable consideration to board policies and *Act* provisions as set out in the written reasons of the members of the board (the "Board").

Accordingly, we set out the Board's reasons in this regard.

### **Issue #1**

- (6) The Board says that the appeal tribunal reviewed the findings of the adjudicator rather than those of the IRC with respect to whether the worker's buttock pain was a work-related injury and therefore did not comply with sections 17(1) and 18.4(1) of the *Act*.
- (7) [Section 18.4(1) of the *Act* says that the tribunal has jurisdiction to hear an appeal from a decision of a hearing officer under subsection 17(1). Section 17(1) says a

hearing officer at the request of a worker shall review any decision made concerning a claim for compensation under section 11 which in turn is an adjudicator's decision.]

- (8) The Board says that the adjudicator terminated benefits to the worker because she found that the worker's left buttock pain did not arise out of employment.
- (9) In contrast, the IRC found that the worker's symptoms of chronic pain in the left buttock were related to the work-related disability.
- (10) The Board says that two excerpts from the tribunal's decision led it to conclude that we, as an appeal committee, reviewed the wrong decision by reviewing a finding of the adjudicator.
- (11) The two excerpts are:
  1. the sentence at page 2 where we set out that the workers' advocate says "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."
  - and
  2. page 10 at paragraph 16 where we state "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 . . . therefore, it is compensable."

## **Issue #2**

- (12) The Board says that the tribunal is without jurisdiction to award the worker compensation calculated in accordance with sections 22 and 23 of the *Act* for loss of earnings due to a work-related disability. The Board says the tribunal orders the board to pay the worker the difference between his pre-accident earnings in accordance with s. 23 and the "Deeming" policy [CS-08]. The Board says the worker was never "deemed" under Policy CS-08, the IRC never dealt with CS-08 or s. 23 and therefore the tribunal has dealt with an issue that never arose out of a factual finding or decision of the IRC. The Board says we appear to have accepted

that the worker was deemed because at page 2 of the original decision we refer to CS-08.

- (13) [We note here that the reference at page 2 of our decision is to the fact that the board hearing officer provided CS-08 to the tribunal prior to the appeal hearing according to s. 18.3(4) of the *Act*. This section also says we must “consider that information.” We note that the board provided this policy to us as “relevant” to the appeal just prior to the hearing in 2000 and now the members of the Board say instead that the tribunal should not have dealt with this policy. We also point out that we do not say at page 2 or anywhere else in the decision that the worker was “deemed”.]

### **Issue #3**

- (14) The Board says that the tribunal ignored the clear wording of policy CS-01, which states that it applies to post-January 1, 1993 disabilities. (The worker was injured in 1994.) The Board says the tribunal made a finding that policy CS-01 did not apply and therefore did not properly apply CS-01. The board gives no reasons as to why CS-01 should apply, other than to point out the provision in this policy with respect to application to “post January 1, 1993 disabilities.” It would have been helpful to have full reasons on this point so that it was clear as to why and how the members of the Board think that the rest of the policy in terms of its substantive provisions apply to the worker’s case.

## **The Position of the Workers’ Advocate on the Board’s Reasons for Directing a Rehearing**

### **Issue #1**

- (15) The workers’ advocate says that the tribunal upheld the IRC finding when the tribunal clarified that the buttock pain was related to the workplace disability; but the tribunal also clarified that the effects of the buttock pain constituted a disability under the *Act* - - that is, a “work-related incapacity.” The tribunal did so by finding that the medical information on file supported a finding of a work-related incapacity and therefore entitlement.

### **Issue #2**

- (16) The workers’ advocate says that the IRC decision - - that (a) worker is employable and that (b) no earnings loss benefits are authorized - - means that the IRC found the worker had no loss of earnings. In other words [by necessary implication], the IRC

found there was no earnings loss because the worker's pre-accident earning must have equalled his post-accident earnings. The workers' advocate also says that the plain language of sections 23 (a) and (b) makes it clear that any compensation for earnings loss is the difference between pre- and post-accident earnings – with post-accident earnings being an estimation done by the board. The workers' advocate says that under s.18.4(2) the tribunal has exclusive jurisdiction on an appeal to determine:

- (a) whether a worker's disability was work-related;
- (b) the duration and degree of a disability;
- (c) the weekly loss of earnings of a worker resulting from a work-related disability.

[Note also "(d) the average weekly earnings of a worker."]

(17) Therefore, there is no concern regarding lack of jurisdiction.

### **Issue #3**

(18) The workers' advocate says that Policy CS-01 does not properly apply to this case as the tribunal ruled in its decision using principles of statutory interpretation and applying section 90 of the *Act*. He says the Board and tribunal disagree on whether the tribunal's interpretation of policy is consistent with the *Act* and that the proper remedy would be an application to the Supreme Court for a determination under s.18.5(1) of the *Act* and this would avoid delay. He points out that the tribunal on its own could make this application.

(19) What follows is our consideration of the three issues set out in the Board's reasons in its direction to rehear.

### **Issue #1 Did the tribunal review the wrong decision and so lose jurisdiction?**

**Answer: No**

(20) It is true that in our previous decision under our 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?" - - we reviewed what the adjudicator had to say on this point. Her decision is part of the record and the *Act* at s. 18.3(4) directs that we "shall consider the information" from the record in rendering our decision.

(21) In our view, the IRC's decision does not provide adequate reasons for some of its conclusions. The IRC states that it assumes that buttock pain relates to the work-related injury in "the absence of evidence to the contrary." There is no discussion of whether onset of pain in October, six months after the accident, would not be at

least possible evidence to the contrary, as the adjudicator reasoned. As we have said, we may consider the adjudicator's reasons as part of the worker's record. That does not mean that we are reviewing her decision rather than that of the IRC.

- (22) In addition, we think the IRC did not make a clear finding of disability fairly drawn from the evidence. There is no discussion at all of the evidence on which this finding is based. There is some discussion of medical evidence but none with respect to disability. So in our original decision we thoroughly reviewed the evidence with respect to disability and we do so again in this decision to ensure that there is no question with respect to this pre-condition (i.e. work-related disability) required for entitlement to compensation as under s.3 of the *Act*. (We note that the IRC's decision did raise questions and requests for clarification from the staff - - see paragraph 23 (b) last sentence of vocational rehabilitation report on page 12 of this decision.)
- (23) For completeness, we set out the specific evidence in this regard, even though we are not reversing but rather confirming the IRC's decision with respect to 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. The workers' advocate submits this 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 problem as it relates to his ability to perform his pre-1994 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. [Emphasis added.]

(b)A vocational rehabilitation report dated September 20, 1999 [Exhibit 1] which again was done as part of the subsequent 1998 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.*" [Emphasis added.]

- (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." [Emphasis added.]
- (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 remembers 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. . . .

Psychologically he only works 2 days a week at [a] moving and storage [company]. He avoids lifting, the foreman being very understanding and having a co-worker do this.

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.

- (24) To be clear, we agree with the IRC that the buttock pain “relates to” [is part of ] the work-related disability.

**Issue #2 Did the tribunal lose jurisdiction by (a) ordering compensation under s. 23 of the *Act*? or by (b) considering the worker’s earnings before and after his workplace accident – neither of which were considered by the IRC?**

**Answer: (a) No; (b) No.**

- (25) We agree with the Board that the worker was never deemed [at least not before the IRC decision] and that the IRC never dealt with either Deeming policy CS-08 or s. 23 of the *Act*.
- (26) We do not agree that we are therefore without jurisdiction to order compensation for loss of earnings benefits in accordance with the *Act*.
- (27) As we stated earlier, it was the board which submitted “Deeming” Policy CS-08 to the tribunal under s. 18.3(4) as “relevant” to the appeal - - that is why we made brief reference to the board providing this policy at page 10 of the original decision. In addition, we did discuss the evidence with respect to the worker’s earnings before and after the workplace accident. This is necessary in order to determine whether or

not he is entitled to loss of earnings benefits - - the issue on appeal which was dealt with by the IRC.

- (28) In 1996, the worker had appealed the adjudicator's termination of his loss of earnings benefits to the IRC. The IRC confirmed the adjudicator's decision to terminate benefits. The worker then appealed the IRC decision to the tribunal. We reversed that decision on the basis that the worker had a continuing loss of earnings due to a work-related disability which prevented him from continuing his pre-injury occupation as a long-haul truck driver and only allowed him to work as a short haul driver which paid considerably less.
- (29) As we have pointed out, the IRC did not refer to any provisions of the *Act* with respect to its decision to "not authorize" loss of earnings benefits (confirming the adjudicator's decision). However, this does not mean the appeal committee loses jurisdiction by considering those parts of the *Act* that deal with "loss of earnings" benefits in order to come to our decision with respect to whether or not we confirm, reverse or vary the IRC decision. Our jurisdiction comes from the IRC decision, not the sections of the *Act* which the IRC did or did not review.
- (30) In our view, there is nothing in the *Act* that allows the IRC to deny benefits for the reason that the worker is "employable", without analysis of whether or not there is nonetheless any earnings loss. At page 91 of Terence Ison's, *Workers' Compensation in Canada*, (2<sup>nd</sup> edition), the author states: ". . . partial disability [loss of earnings] benefits are used in cases whether a worker engages in some degree of employment with earnings less than the wage rate on the claim." In other words, the worker is employable and actually employed but still experiences some, but not full, earnings loss because his workplace injury prevents him from performing his more highly paid pre-injury work.
- (31) In this case, we find on the evidence from the record that the worker's earnings at the time of his work-related injury are as set out in the two reports made to the board shortly after the accident by the worker and the employer. We find that the worker was earning \$13.00 per hour for a 45 hour week plus \$.35 per mile while driving. In other words, this worker was paid by the hour as well as for "piece work" (mileage). He worked 45 hours per week. After the accident, we find that except for a short period in which the worker attempted unsuccessfully to return to long haul driving, he was unable to return to his pre-injury work because of a work-related disability.
- (32) As section 22 of the *Act* sets out, the loss of earnings method is used for calculating compensation. It is our understanding that the Board uses s. 23 for "deeming" in conjunction with its Policy CS-08. [Deeming refers to the situation where the board

demonstrates a worker's estimated earning capacity in a suitable occupation which the worker is capable of doing and which is reasonably available to the worker. If this can be demonstrated, then the board will "deem" that the worker has earned this income (even if he or she has not earned the income) for the purposes of calculating the actual wage loss due to the workplace disability.]

- (33) However, this worker was not "deemed" by the board at the time of the 1996 IRC decision for two reasons. First, the adjudicator had determined that the worker had no wage loss due to buttock pain/reduced sitting tolerance because she decided this was not related to his workplace injury. Second, although the IRC determined the worker had a work-related disability, it decided that the worker was not entitled to loss of earnings benefits because he was "employable." As a result of both of these decisions, there was no calculation of loss of earnings and there was no "deeming".
- (34) In our view, the worker does have a loss of earnings because he is now unable to earn what he had previously earned as a long-haul truck driver immediately before the work-related disability arose. He has subsequently earned less annually. In this regard, the adjudicator on January 30, 1997 made a note to file with respect to a conversation she had with the worker's employer after the accident as follows:

He works as a driver for 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.

- (35) In addition, the adjudicator's note indicates that after the accident his hourly wage was \$14.00 per hour as an on-call employee as a driver for local trips and working as a packer and a mover, but without the mileage or 45 hour work weeks available for long haul truck driving. In an October 16, 1997 letter copied to the worker's adjudicator, Dr. Skinner reports that the worker is working two days a week. The worker's tax records for 1993 (pre-accident) indicate that he earned \$44,000 while his 1995 and 1996 records (both post-accident) indicate earnings of approximately \$3400 and \$14,800 respectively.
- (36) We think that s. 22 of the *Act* is sufficient authority to support our finding of loss of earnings alone. However, since s. 23 provides more detail on the calculation of weekly loss of earnings, we had applied it previously. The wording of section 23 says that, (a) "the average weekly earnings up to the maximum wage rate for a week immediately before the work-related disability arose" is subtracted from (b) "the estimated average weekly earnings that the worker could, in the board's opinion, earn from time to time, in a suitable occupation after the disability arose." Here we do not have an estimate the board made, but rather actual evidence. See Exhibit 3 tax records as well as the adjudicator's note to file and Dr. Skinner's October 16, 1995

letter referred to earlier in this decision. It is clear to us that long haul truck driving pays more than short haul truck driving.

- (37) In addition, section 18.4(2) gives the tribunal the power to determine on an appeal the weekly loss of earnings of a worker resulting from a work-related disability as well as the average weekly earnings of a worker.
- (38) Therefore, we find that this worker has experienced a loss of earnings since his work-related disability arising from his May 1994 accident and injury.
- (39) We will leave it to the board to calculate the actual amounts to which he is entitled under section 22 and any other provisions in the *Act* as well as applicable policies that are necessary for this calculation.

**Issue #3 Did the tribunal fail to properly apply Policy CS-01 which states that it applies to post-January 1, 1993 disabilities?**

**Answer: No**

- (40) In our view CS-01, “Treatment”, is a policy binding on the tribunal. This does not remove the tribunal’s ability to interpret that policy or to decide if it applies to the facts of a particular case. Just because a policy exists does not mean it will apply in every case or be relevant to the matter at hand on an appeal – this will depend on what the issues and facts are on a particular appeal.
- (41) Board policies under section 18.3(3) are “binding” on the tribunal: we therefore characterize them as having a “rule-based character with statutory force”. In other words, they are a form of “delegated legislation with statutory force” [see Newfoundland Supreme Court decision, *DGH Construction Limited v. Newfoundland (Workers' Compensation Commission)* [1997] N.J. No. 53] which held that policies of the Newfoundland Workers' Compensation Commission were more than administrative directions: the Commission's policies were delegated legislation with statutory force. In the Newfoundland legislation considered by the court, the statute provided that the board "shall" make policy, and that the appeal body must apply those policies. These provisions, which formed the basis for the judge finding board policy to have statutory force, are very similar to those in the Yukon legislation.
- (42) Policy CS-01 deals with entitlement to “treatment” and therefore in our view it comes within section 90(1)(a) of the *Act* - - the transition provision. We interpret this provision to mean that policies such as CS-01, dealing with entitlement, are to be applied as they existed at the time of the workplace injury. CS-01 was not in

place at the time of the worker's injury in 1994. Therefore, in our original decision at paragraph 11, we decided it should not apply.

- (43) However, on its face, this policy says that despite being passed in 1997 it applies to all post-1993 disabilities if they meet certain criteria.
- (44) It would appear, that the members of the board think "Treatment" Policy CS-01 is applicable to this case. They do not say why or how. We assume that it is not because they think the worker is entitled to further treatment – the IRC already ordered that the worker be provided with a pain management program by applying Policy CS-08, the predecessor to CS-01. The record indicates this was done at Columbia Rehabilitation Centre in 1997.
- (45) We therefore assume that the members of the board intend CS-01 to apply so as to limit compensation due to chronic pain, which the IRC found that the worker suffered. (We note that in his October, 1997 letter, Dr. Skinner reported that the worker has chronic myofascial and neuropathic pain.)
- (46) We do not interpret the provisions of Policy CS-01 as limiting entitlement for a work-related disability which involves chronic pain. We think that a decision as to whether Policy CS-01 applies to a particular case requires an analysis of the origin of a worker's chronic or persistent pain. We will explain why by looking more closely at Policy CS-01.
- (47) In our view, Policy CS-01 makes a clear distinction between "conditions" which hinder recovery and "work-related disabilities." These terms are not used interchangeably in the policy. The policy does not say that if illnesses or injuries such as alcoholism, drug addiction or chronic pain arise out of and in the course of employment and limit the capacity of the worker to meet occupational demands, treatment is limited to six weeks. [As it is not necessary to our decision in this case,

we need not determine whether or not if the policy did so, such a policy (a) would exceed the authority of the board, given the broad entitlement of section 3 of the *Act* or (b) would be unconstitutional under an analysis of the application of the *Charter's* equality guarantee in section 15 and the saving provision in section 1 of the *Canadian Charter of Rights and Freedoms* as well as (c) the ability of the tribunal to apply the *Charter*, etc.]

(48) We further note that Policy CS-01 makes no reference to section 3 of the *Act* which deals with entitlement to compensation with respect to work-related disabilities.

(49) We also note that in section D of Policy CS-01, it clearly states that treatment of a condition under the policy cannot alter entitlement for a work-related disability as follows:

Upon completion of treatment, the disabled worker shall not be eligible for any additional benefits beyond those the worker may be entitled to receive as a result of the work-related disability.

(50) In this case we have found that the worker's disability is the result of a workplace injury. Therefore it is compensable and Policy CS-01 does not alter the worker's entitlement. It does not apply because his persistent pain and other symptoms are not simply conditions which hinder recovery but rather are conditions that are inextricably part of the work-related disability itself.

## **Conclusion**

After giving fair and reasonable consideration to policies and provisions of the *Act* as set out by the members of the board in their written reasons, the appeal committee allows the appeal.

The decision of the IRC is reversed as follows.

1. Loss of earnings benefits are authorized because the worker has suffered loss of earnings due to a work related disability arising in May, 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 section 22 of the *Act* (and any other sections of the *Act* and applicable policies that are necessary) 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 board policy developed under section 19.4 of the current *Act* on compensation payable as a result of our decision. As this policy is not yet developed, it is unclear at this point as to how it will or will not apply to this case.

Dated this 4<sup>th</sup> day of **May, 2001** 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