

Workers' Compensation Appeal Tribunal

Decision # 16

Claim No.: 95-1119

Date of Hearing: May 15 & 17, 2001

Date of Decision: June 18, 2001

Appeal Committee Members

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Jan Stick
Member representative of workers:	Joseph Radwanski

In attendance: The Worker
The Worker's representative – Julie Docherty
Reporter/Recorder - Doug Ayers & Grey Mountain Sound

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

Introduction

By his Notice of Appeal dated May 1, 2001, the worker appeals the decision of the Workers' Compensation Health and Safety Board (the "board") adjudicator dated November 27, 2000.

The adjudicator states in a letter dated November 27, 2000 to the worker:

Due to the lack of communication and co-operation relating to the proposed surgery or Return to Worker Plan, your compensation benefits will be suspended effective December 1, 2000.

The adjudicator also refers to s. 7 of the *Workers' Compensation Act*, 1992, as amended by SY 1999, C.23. s. 11 (the "Act") which states:

- 7.(1)The board may suspend or reduce compensation payable to or in respect of a worker if the worker,
- (a) following consultation with the worker and the worker's medical practitioner unreasonably refuses to submit to treatment or rehabilitation the board considers essential to the worker's recovery or rehabilitation . . . [Emphasis added.]

The workers' advocate asks the appeal committee to determine that the worker was not being unreasonable and that benefits be paid to the worker for the time period of December 1, 2000 to March 15, 2001.

Under section 18.3(1) of the *Act*, the chair of the tribunal established an appeal committee of the tribunal to hear this matter, consisting of Heather MacFadgen, presiding chair, Joe Radwanski, member representative of workers, and Jan Stick, member representative of employers.

The hearing was held on May 15, 2001 and continued on May 17, 2001. The worker was represented by the workers' advocate. The worker did not appear the first day of the hearing as his truck broke down on his way to Whitehorse. The hearing was adjourned on May 15, and reconvened on May 17, 2001 so that the worker could participate and answer questions from the appeal committee. The worker attended the hearing on May 17, 2001 and gave evidence under oath. No one appeared on behalf of the employer, though the employer was notified. The proceedings were recorded.

The appeal committee considered all of the worker's record as provided by the board. In addition, the board's hearing officer provided the following policies as relevant to the matter under appeal according to section 18.3(4) of the *Act*:

- CL-30 – Suspension, Reduction and Termination of Compensation
- CS-05 – Rehabilitation
- CS-07 – Vocational Rehabilitation

CS-08 – Fitness for Employment, Suitable Occupation, Deeming.

At the outset of the hearing, the appeal committee determined that it had jurisdiction under section 18.4(1) of the *Act* to hear the appeal.

The following exhibits were entered in evidence at the hearing.

Exhibit 1 – page 137 – *Workers' Compensation Law in Canada, 2nd Edition*, T. G. Ison

Exhibit 2 – page 19 – *Yukon Workers' Compensation Act Review (1999) – Task Force Recommendations*

Exhibit 3 – pages 656 and 657 – *Black's Law Dictionary (Abridged 5th Edition)*

Exhibit 4 – pages 666 - *Black's Law Dictionary (Abridged 5th Edition)*

Background

- (1) We have decided to review in some detail some of the many of the procedures, consultations, operations and treatments that this worker has undergone in the almost six years since his 1995 injury. We think this background is necessary as a context to understanding the worker's efforts to actively participate in his treatment and recovery as well as his relationship with the board throughout. It also is necessary to properly understand the more recent events leading up to the suspension of benefits under appeal and the "reasonableness" of the worker's not attending for surgery in October 2000 (more specifically, the seven operations without successful outcome (i.e., enabling him to return to his pre-injury work of guiding); the lack of any vocational testing other than awaiting medical opinion after surgery and the lack of any active planning for meaningful reintegration and rehabilitation, and the five suspensions of benefits and seven warnings that benefits would be suspended, etc.)
- (2) The worker's dominant hand was severely injured on August 18, 1995 when he was kicked by a horse while he was guiding with an outfitter. He rode nine hours on horseback to the nearest community; from there, he was medivaced to the nearest nursing station where the nurse diagnosed a fractured right wrist and dislocation of the right third digit with deformity in the PIP joint. Then the worker was transferred to Whitehorse for treatment.
- (3) He had surgery the next day - - the first operation - - in Whitehorse, but only the wrist was dealt with by the use of "external fixators" (pins through bones extending outside of the wrist requiring eventual removal). The surgeon described the wrist as "mushed."

- (3) It appears that the initial Whitehorse x-rays were not interpreted to reveal the significant injury to the finger so only the wrist injury was treated in August.
- (4) He was referred in September to a Calgary orthopaedic surgeon, Dr. Van Z. as well as a plastic surgeon, Dr. H. who performed the second surgery that month. X-rays were done in September in Edmonton and showed the injuries to the third finger (previously diagnosed by the nurse in her report on the day of the injury). Both treating Alberta specialist physicians comment on the length of time (4 weeks) between injury to finger and surgery for this injury. The surgeon says “unfortunately [the finger injury] is one month old . . . the month old scar tissue made reduction difficult. He will end up with a significant step deformity which will produce a post-traumatic arthritis in his knuckle limiting its motion and producing pain.” We point out the delay in treating the finger (as the treating doctors did) because it appears to us to be the beginning of the worker’s concerns about the effectiveness of his treatment. (See September 25/95 memo to file noting the worker’s “dismay” that finger injury not detected initially in Whitehorse x-rays.)
- (5) During the next month (October), there were follow-up consultations, post surgery, with specialists in Calgary and the worker began physiotherapy. The worker’s parents live in Calgary. Throughout the end of August and in September there are memos to file from the worker’s adjudicator indicating her telephone discussions with him. She states the worker intends to return to Whitehorse. He initially stays with friends in Calgary rather than his parents who also live there but are elderly. Payment of a small accommodation and subsistence allowance is authorized for the worker who is also on temporary disability benefits.
- (6) On November 3, 1995 there is a change in the entitlement decisions made on the claim when the worker’s adjudicator asks the senior adjudicator (S.A.) to review the file. The S.A. says the worker does not have a residence in Yukon because as an outfitting guide he was living in a camp with no fixed address and therefore his residence was instead Calgary. Accordingly, the S.A. tells the adjudicator to immediately suspend subsistence and accommodation payments to the worker with no notice required. (S.A. states, “if [WCB] were a bank who made an overpayment, the client would not be given a further grace period; that payment would cease immediately”). It should go without saying that injured workers are not like bank clients and suspending benefits in this way for a worker still in pain and coming to terms with a significant injury, still in the acute phase, would not be therapeutic (promote recovery, wellness, etc.). To her credit, the adjudicator nevertheless makes attempts to contact the injured worker and notify him. Her memo says that when she explains “her mistake” and the suspension of these benefits to the worker, he is “very upset”; he says he will have to move right away. She says he insists he is a Yukon resident who was referred to Calgary for treatment and therefore entitled to the subsistence and accommodation benefits. The worker continues to have physiotherapy in November in Calgary (payment

accepted by WCB) and also sees the orthopaedic specialist) for follow-up and x-rays on November 23, 1995: the specialist reports that the finger joint has “ankylosed”[fused] and will require further surgery. He also says further osteotomy surgery for the arm may be required to improve power and function. He recommends that he reassess the worker in three weeks. The worker continues with physiotherapy in Calgary (paid for by the board) throughout December and January and there are detailed progress reports.

- (7) The suspension of benefits above is not before us on this appeal but is highlighted to provide a context for subsequent interactions between the worker and the board.
- (8) It appears that it is in January 1996 that Dr. H. advises that amputation is one of three surgical options for the worker’s finger. The worker asks WCB for authorization to obtain a second opinion but this is refused because he has already consulted two specialists (Dr. Van Z. and Dr. H.). It should go without saying that (as subsequent doctors recognized) amputation for a visible and dominant appendage would be a big step for most people; all the more so for a person making a living with his hands. In the circumstances, wanting a second opinion is understandable.
- (9) It appears that in January 1996 when the worker inquires about moving to British Columbia for possible work, the Acting Director of Benefits and Entitlement tells the adjudicator that benefits should be suspended immediately if the worker removes himself from the care and treatment of specialists in Calgary. There is more back and forth on this and it appears the worker does go to B.C. at his own cost and without disrupting any scheduled appointments. The file shows that up to this point the worker attends all appointments.
- (10) At the end of January 1996 the worker tells the board he is moving from friend to friend and therefore cannot provide a phone number or address where he can be reached. (We point out that it appears the worker starts staying with friends when the board cuts off his accommodation and subsistence benefits.)
- (11) On April 16, 1996 the worker has his third surgery - - this time an arthodesis to the PIP joint of the third finger but at the end of May when the pins are removed, the finger is still swollen and stiff.
- (12) In July 1996, Dr. H. diagnoses the development of a bony exotosis at the fusion site and recommends surgical excision. [This is done - - fourth surgery - - on September 18, 1996.] Meanwhile, Dr. H. inquires about shortening the worker’s ulna (bone in the arm) to deal with ongoing problems from the wrist fracture. The wrist has been identified as the limiting factor for return to work by Dr. H. in July 1996. The worker sees four more doctors and then is referred to an orthopaedic surgeon, Dr. F., in November 1996 who specializes in the type of wrist problem

the worker has. This specialist appointment occurs over a year since the work accident.

- (13) Dr. F., the specialist, receives MRI findings in January 1997 and recommends surgery. He does the arthroscopic debridement of the right distal radicular joint on February 12, 1997 - - the fifth surgery. He then recommends further surgery, a distal radial osteotomy and realignment of the articular surface.
- (14) Meanwhile, shortly before the fifth operation, a note to file [new adjudicator] indicates that the worker refuses to provide an address and telephone number and says WCB does not require this information, he is compliant, keeps his medical appointments and WCB has been using the same address for him for the past 15 months. Again, the adjudicator discusses the file with the senior adjudicator with respect to the worker being “evasive” and states “one must determine whether worker is incarcerated”. This is a few days before the fourth operation.
- (15) On February 10, two days before the February 12th surgery, the worker calls the adjudicator [returning her phone message to him of February 7, 1996 to a Calgary phone number on file]. The adjudicator reiterates her request for an address and a local (Whitehorse) phone number. This same day the senior adjudicator calls him and reiterates the request for address and phone number or benefits will be suspended immediately. The worker argues with him and the senior adjudicator terminates the call and suspends benefits. (We note the worker had never talked to the senior adjudicator before.) The S.A.’s notes to file say, “the fact the worker will not divulge his address is very suspicious in itself . . . He may not be in Calgary. He could be working or incarcerated . . . I have not spoken to this worker before; worker sounded very strange and in fact I thought he was impaired in some manner but maybe he always sounds like that . . . worker did not provide me with address, he said he has phone number that we have and we can always contact him and he sees no reason why we need his address. He said he has been staying with friends but his welcome is being worn out . . . ” Again we note that suspension of benefits two days before surgery would not be therapeutic.
- (16) The day before surgery on February 11, 1997 (and one day after the phone call suspending benefits), the adjudicator writes the worker a letter noting he is a seasonal worker and asking that he provide his 1995 and 1996 tax returns no later than February 27, 1997.
- (17) On February 12, 1997 the worker authorizes Mike Travill to represent him and Mr. Travill contacts the adjudicator whose note to file states that she points out an error in calculation of the worker’s benefits (presumably because he is “seasonal”); the worker’s representative says the worker has met all WCB requirements, “appears to be angry and is having a rather difficult time accepting his injury.” [Emphasis added: any system focussed on the goal of rehabilitation should have considered this report as indicating a need to consider “adjustment counselling”.]

- (18) On June 24, 1997 the worker undergoes his sixth operation - corrective osteotomy with iliac bone graft and application of distal radial plate. The orthopaedic surgeon says there will be approximately 12 weeks of healing and then 3 – 4 months of therapy to restore function and strength. The doctor also states that if this surgery and therapy are successful the worker should be able to return to work as an outfitter.
- (19) Earlier on March 27, 1997 a WCB rehabilitation counsellor provides the orthopaedic specialist and the worker's representative with a "Return to Work Plan" with a time frame for return to work, after surgery, depending on medical opinion.
- (20) Approximately two weeks after his sixth operation the worker is advised that his claim is being transferred to another adjudicator (third in less than two years on this complex case - - not including the senior adjudicator's involvement.)
- (21) The physiotherapist reports in October 1997 that the worker has increased cold sensitivity and constant pain and states that if the worker's "hypersensitivity to cold and wrist range of motion do not improve significantly . . . it is unlikely he will be able to perform his duties as a guide in the North."
- (22) In November 1997, approximately a half a year after the sixth surgery, the surgeon says the worker needs continuing therapy; he's not fit to return to pre-injury employment and "in some ways appears to back sliding as far as his functional capability . . . need[s] to be substantially encouraged." It is understandable that an injured worker would be discouraged after five operations and extensive physiotherapy, including a home exercise program, yet no return to work and an unstable wrist, pain, inability to make a fist with his dominant hand, etc. (Before the sixth operation, the surgeon had been optimistic that the worker might be able to resume outfitting work.) [Emphasis added.]
- (23) At this point, a private claims consultant is retained to do an independent review of the worker's claim in November 1997. Among her findings are the following:
- Initial treatment missed the dislocation to the third right finger. The Admission/Discharge reports from the Whitehorse General Hospital were not submitted to file, nor were the x-rays taken in Haines Junction. Had these initial reports been on file the adjudicator may have questioned the lack of treatment to the right third finger . . .
 - On 31 January 1996, the Acting Director of Benefits and Entitlement advised the adjudicator that benefits were to be suspended if the worker moved to B.C and removed himself from the care of Dr. Van Zuiden and Dr. Hagrud. The Adjudicator then communicated this information

to the worker. It appears the worker was not advised that benefits would only be suspended until he was under the active care of a new physician. In fact, [the Medical Consultant] . . . provided the names of physicians that could take on the worker's care in B.C. while this activity complied with Policy CL-30, it was somewhat heavy handed and did little to foster good relations between the worker and the Board, particularly with the worker indicating that he was not satisfied with the care he was receiving from his attending physicians. The worker must have been left with the impression that he had no control over this personal life or his treatment . . . [Emphasis added.]

- _ The worker has been in receipt of compensation benefits for 28 months.
- _ The worker has not yet had a Vocational Assessment.
- _ It appears that benefits were suspended on 10 February 1997, as the worker would not provide an address for file. It then appears that benefits were re-instated on 27 February 1997 even though the worker did not provide an address for file.

(This report also discusses other issues such as overcompensation recovery, the possibility that worker was working while recovering, implications to benefit rate as seasonal worker, etc.)

- (24) On December 29, 1997 the Rehabilitation Counsellor forwards to the worker an updated return to work plan which states that the worker "had a successful result from surgery." He is expected to recover sufficiently to allow him to return to his accident job as an outfitter's guide. The estimated return to work dated remains "undetermined" [but see paragraphs 21 and 22, earlier].
- (25) On January 31, 1998 the physiotherapist reports the worker is being discharged because he has plateaued and is consistent with a home exercise program. She says "he has clicking/grinding on the radioulnar joint and his range of motion has not changed in over 2 months: due to his poor endurance and possible instability at the radioulnar joint, I feel [the worker] would be unable to return to his position as a guide but should be able to tolerate a position, ideally indoors, with light to moderate duties."
- (26) In the surgeon's reporting letter to the board on January 15, 1998 he states the worker is opposed to attending a work conditioning program at the Columbia Rehabilitation Centre and instead wants to do home therapy (chopping wood and other outdoor activities). The surgeon supports this and reports that the worker says he will eventually do a guiding job with his own company. We point out that it is unclear as to whether or not the surgeon is aware of the specific job duties for a guide (e.g. lifting up to 90 lbs., etc.).

- (27) On January 27, 1998 a different rehabilitation counsellor advises the worker by letter that the Rehabilitation Centre in Calgary has been unable to contact him and also that the counsellor had called the worker the day before asking for a return call on the 27th of January. She states “Policy states that you must maintain active participation and cooperation in your rehabilitation process. Therefore, if I have not heard from you by February 4, 1998, your benefits will be suspended.”
- (28) The workers’ advocate replies by letter February 3, 1998 pointing out that the worker will discuss the need for an FCE with the treating surgeon, Dr. F., during his appointment in February and will contact Columbia Rehabilitation Centre (Vancouver) in person immediately afterward if the surgeon agrees he do so at his scheduled February 20 appointment.
- (29) By this point in the worker’s claim, the board has asked him several times for earnings information and he has not provided it. On February 11, 1998, a new claims adjudicator writes advising that his benefits will be suspended (no date) if this information is not forthcoming. Further, benefits will be suspended on February 24, 1998 if the worker does not provide a Calgary address and phone number, citing Policy CL-30: “benefits may be suspended if the worker moves and his whereabouts are no longer known.” This letter also says “the Whitehorse post office box is not your home address.” Finally the letter says that benefits can also be suspended if the worker refuses to undergo or attend medical treatment or rehabilitation.
- (30) After a second March 10, 1998 letter from the adjudicator noting that the earnings information has not been provided, benefits are suspended April 1, 1998.
- (31) The earnings information is provided through the worker’s representative on April 16, 1998 and his benefit rate is adjusted from \$88 per day to \$24 per day: he is also advised by April 20, 1998 letter that he owes the board over \$71,000 which will be recovered by deducting 10% from his new reduced weekly compensation.
- (32) The worker’s functional capacity evaluation from Columbia Rehabilitation Centre in Calgary (February 1998) concludes he can “medium” category work but not “heavy” category work, which guiding requires. In April 1998 based on the above, as well as the recently received earnings information, a vocational rehabilitation plan recommends he is fit for light/medium work paid at minimum wage. Then on May 6, 1998 the adjudicator writes to the worker saying that ongoing benefits “are not appropriate” because there is no evidence of a decreased earning capacity due to his injury and he will be given re-employment assistance until June 15, 1998 under Policy CS-02; then benefits will cease. Overpayment recovery continues.
- (33) On March 20, 1998 the medical consultant finds that the worker is at maximum medical improvement and no further treatment can be offered. In addition, he

assesses permanent impairment due to the finger and wrist injury at 13% of the whole person.

- (34) On June 3, 1998 the worker is advised by letter of his Permanent Impairment award (\$12,555.74) which will be applied to the overpayment debt unless he provides evidence of undue financial hardship by July 6, 1998. There is no response and the amount of the PPI is applied to the overpayment debt on July 14, 1998.
- (35) Then in August 1998 the worker sees a Whitehorse locum (temporary) doctor who says the worker requests amputation and refers him to the two previous Calgary specialists, Dr. F. and Dr. H., each of whom had performed previous surgery on the worker. This same month the worker sees a Whitehorse GP, Dr. K. and asks many (36) written detailed medical treatment questions, including whether he would be able to make a fist if his finger is amputated and whether things should have been done differently from the outset. The worker reports stopping medication for pain because it makes his mind foggy and has important decisions to make.
- (36) WCB eventually authorizes the referrals including surgery for plate removal (apparently to help with cold sensitivity) for October 19, 1998. Meanwhile Dr. K. in Whitehorse asks for clarification from WCB on how much he can direct the patient's care as WCB is making referrals.
- (37) Meanwhile an October 2, 1998 IRC appeal decision finds that the two previous reductions to the worker's benefit rate (including the one due to the Policy Application Statement [1997] were to correct adjudicator's errors: the IRC confirms the current lower rate as correct but reverses the decision to recover the overpayment because it was created by administrative error.
- (38) On October 15, 1998 several days before the surgery appointment, the adjudicator writes the worker stating she understands he is now living in Whitehorse and if he does not provide a Whitehorse residential address by October 31, 1998 any benefits, including travel, will not be paid.
- (39) On October 19, 1998, Dr. F. the Calgary orthopaedic surgeon reports on his examination and consultation with the worker - - a case he describes as a "challenge". He says the worker is convinced that removing the wrist plate and changing the finger joint position would allow him to re-enter the work world. The surgeon says he explained that surgery benefits are limited with no great change to functional capacity; and, that there are three options for the finger - - do nothing, amputate, or replace the joint with silastic arthroplasty, which may not be reliable or durable. He says the worker wants the last option. A handwritten P.S. says that due to discussion with the medical consultant, there will be no surgery

without a second medical opinion. [But it appears to us that the worker would now be expecting surgery based his consultation with the surgeon.]

- (40) The surgery is cancelled after the Rehabilitation Counsellor calls the worker; she reschedules it for November 25, 1998.
- (41) The Medical Consultant on October 23, 1998 reports on his conversation with Dr. F. including arrangements for a second opinion. He says Dr. F. noted “the emotional state of the worker and the unrealistic expectations.” [Emphasis added.]
- (42) Dr. L., in Calgary, is booked to give a consult/second opinion on November 19, 1998 with surgery for plate removal by Dr. F. on November 25, 1998.
- (43) In a November 17, 1998 letter the adjudicator advises the worker’s representative that if there is no Whitehorse residential address by November 30, 1998 all benefits will be suspended.
- (44) On November 26, 1998, after the second opinion by Dr. L. said that finger joint surgery may be of value, Dr. F. surgically removed the wrist plate and the one finger was resectioned and an elastic implant done at the joint. This is the worker’s seventh operation in a little over three years.
- (45) The worker returns to Whitehorse and contacts a physiotherapist for a home program because he was planning to drive to Calgary for a couple of weeks. This physiotherapist refers him to POWER for a new splint; POWER advises that the worker does not plan to go back to Whitehorse Dr. K. The board calls the workers’ advocate to say the worker must see Dr. K. the following week.
- (46) The physiotherapist reports on the worker’s two post-surgery visits which show improvement with home exercises. She notes telling him that WCB wants him to have daily phsyio and to see his family doctor. She also notes she had previously told him he could manage the exercises on his own.
- (47) The worker sees another Whitehorse physiotherapist on January 11, 1999 for assessment: findings are pain, swelling and deviation in the joint with hypersensitivity to cold and heat. WCB records show she treats him three times per week and reports he had driven to Calgary to visit his parents for Christmas. The worker for some time now has requested all communication with him be through the workers’ advocate office.
- (48) On January 20, 1999 the worker sees Dr. K. apparently because the board has directed him to do so. The doctor says “I feel I have not been of much use to him

and he seems to have said that himself.” The doctor discharges him from his practice.

- (49) An adjudicator’s note to file dated January 22, 1999 documents a meeting with the worker, his representative and board staff and clearly indicates the worker no longer trusts the board. The meeting is to address issues that the worker identifies as board interference in his medical treatment with respect to the second opinion, the cancellation of the appointment with Dr. H., interference with physiotherapy arrangements and the requirement that the worker see Dr. K.
- (50) The worker sees the Calgary surgeon January 28, 1999 who asks the worker to continue with physiotherapy three times per week for eight weeks and then reassessment in Calgary. He prescribes taping and splinting for the finger curvature.
- (51) The March 1999 physiotherapist report shows the worker’s finger continues to deviate laterally, restricting active range of motion.
- (52) The rehabilitation counsellor’s March 25, 1999 note of her meeting with the worker says he reports new pain areas post-surgery and they discuss pain clinics. Also she says the worker thinks more surgery may be necessary.
- (53) The worker’s reassessment with the surgeon is rescheduled (no reason indicated) and goes ahead on April 22, 1999. The surgeon reports he has nothing to offer in the way of surgery – only splinting and continued therapy for the deviated finger and a prescription for pain. He describes the case as “a source of frustration to all concerned.”
- (54) On April 20, 1999 an appeal panel reverses the IRC decision on the appropriate benefit rate and directs that compensation benefits be increased.
- (55) In May 1999 the worker and his representative meet with the rehabilitation counsellor/physiotherapist and adjudicator. The rehabilitation counsellor proposes the option of therapy incorporated into a modified return to work with an outfitter [no details indicated]. The worker and his representative want to discuss it before responding. The note seems to indicate the worker is discouraged: “he explained how this procedure has happened before and each time come to an end with another surgery. He feels this is where is headed again - - another long therapy plan that will change direction several times.” [As it turns out, the worker is right.]
- (56) There is no contact from the board again until an August 4, 1999 letter which says that the worker was supposed to respond to the May meeting’s modified return to outfitting work proposal within a month [June] and had not done so. The letter says if there is no contact, the worker will be “deemed” and his benefit cheques held at the board.

- (57) On August 20, 1999 the rehabilitation counsellor reports a request for travel arrangements from the workers' advocate on the 18th for Dr. F. reassessment in Calgary on the 19th [one day; the workers' advocate has misplaced the travel information].
- (58) The rehabilitation counsellor cannot make the arrangements on such short notice so the appointment does not go ahead, apparently through no fault of the worker. When the board tries to rebook, Dr. F. advises he is moving to the United States and the worker will have to see a new doctor, Dr. P.
- (59) Entered on the file by fax September 7, 1999 is an assessment of the worker by a United States hand surgeon/specialist at UCSF done January 20, 1996. It recommends further non-surgical and surgical intervention as opposed to amputation. [This consult occurs several months after the Calgary specialist first advises that finger amputation is one option.] It would appear the worker sought this second opinion on his own. Also entered in September 1999 is another December 11, 1995 report from another California doctor who states: "it is my professional opinion that there has been gross negligence in the care of [this worker's] fractured hand." Lastly, this same doctor writes the workers' advocate on April 31, 1999 after another examination, [apparently (?) in the Yukon, during the physician's visit on a hunt.] He states: "I can honestly say I do not see a lot of progress but more deterioration despite his multiple surgeries since I saw him here in the States and referred him to the University of California . . . hand service. I do not feel that the prolonged immobilization, physical therapy, multiple surgeries has really helped [his] condition." He then says his pain should be addressed and additional surgery will be required to free up adhesions, improve finger mobility, and correct joint laxity.
- (60) We can only speculate on the worker's response to the above, including the prospect of more surgery (eighth).
- (61) This same month, another adjudicator is assigned to the worker [the senior adjudicator]. He apparently suspends benefits on September 1, 1999. In a September 17, 1999 letter to the worker, this adjudicator explains that the most recent medical report is from the Calgary surgeon, Dr. F., who recommended no further surgery and says, "I am puzzled as to why we continued to pay time loss benefits to you from May to August without supporting evidence of disability." [Clearly this letter does not take into account the more recent medical report from the California doctor who recommends further surgery and documents evidence of disability.] He then suspends benefits under s. 7 of the *Act* citing the lack of address, contact, need to see a family doctor on a regular basis and the rehabilitation counsellor every two weeks.
- (62) In our view it is understandable that the worker is frustrated and angry in August 1999, particularly given the information in paragraph 59. His hand is still significantly disabled, he might need more surgery, he still has pain, he has never

had much in the way of effective reintegration/rehabilitation assistance from the board and a doctor he consulted on his own has criticized the medical care to date, calling it at one point “gross negligence.” The latest adjudicator in a succession of board personnel he has dealt with does not address these issues and the worker’s understandable emotional response to his four year ordeal other than to say he should not get angry and leave meetings where decisions are being made about his life. The *Act* says the worker must be treated with compassion. In our view, this means with some understanding and acknowledgement of his psychological and emotional response to adjusting to an ongoing disability, to the many setbacks he has faced in the course of treatment and the lack of reintegration into the workforce he has experienced.

- (63) At the request of the workers’ advocate, Dr. Skinner sees the worker twice, once in September and once in early October before agreeing to become his family physician. On October 5, 1999, the rehabilitation counsellor confirms this by letter and requests (1) his direction for further medical management and (2) an indication of the worker’s “fitness for work.”
- (64) Dr. Skinner’s report on October 7, 1999 on the worker’s symptoms and the results of the physical examination is lengthy. Pain is daily but not constant (few hours relief when limb resting); the worker has hand “tremors” and “falls asleep”; cold stiffens the hand. These symptoms don’t prevent activities of daily living but make his previous work guiding with horses impossible. He notes that the worker did not go to an appointment with Dr. P. because he did not trust the board’s choice.
- (65) He reports the worker has “considerable anger” toward the board and many physicians but says that social assistance staff have been kind to him. He says the worker believes if his injury was treated properly at the outset, he would not still be seeing doctors. The worker admits to problems with authority figures. Before the accident he was in good health and had not seen a doctor in 15 –20 years. He took work as a guide to remove himself from the stresses of society.
- (66) The worker reports headaches, trouble sleeping, chest tightness and “pain the gut” which he “admits” is likely due to pain, his disability and disagreements with the board.
- (67) Dr. Skinner concludes the worker has chronic pain and “adverse psychosocial reactions” to it and to his disability. He describes the workers’ attitude is “angry” and “negative” and “understandable” (due to case management difficulties, pain and dysfunction). Dr. Skinner says he needs counselling which Skinner will address.
- (68) He recommends (1) an assessment by hand surgeon Dr. P. in Vancouver regarding further surgery (2) consult with a Vancouver neurologist on whether or not the worker has complex regional pain syndrome.

- (69) Dr. Skinner and the worker agree he is fit for light duty in a number of vocations, “none of which understandably satisfy his needs, not only financially but in regards to respect.” The primary problem is the finger dysfunction; pain can be managed; the doctor expects the worker’s mental stress will continue for some time but he supports a return to light duty work for psychosocial benefit.
- (70) Accordingly, the board books appointments with Dr. P. and Dr. C. (neurologist) in Vancouver for November 9, 1999. The neurologist is asked if he would recommend a pain clinic.
- (71) In subsequent reports, the neurologist says that neither he nor the orthopaedic surgeon think that reflex sympathetic dystrophy (RSD) is prominent cause of pain but that a stellate ganglion block could be done to further investigate this. The surgeon recommends revision arthroplasty to correct ulnar angulation and repair or reconstruct the radial collateral ligament and also a flexor tenolysis. However, he says further surgery could further compromise his condition and finger amputation may be the best recourse. The doctor also says carpal tunnel syndrome may be present and will be investigated.
- (72) The adjudicator’s note the rehabilitation counsellor dated December 14, 1999 after reviewing the reports is “this worker has been on full TTD benefits way too long and he either has surgery ASAP or medical treatment is **long at finality** and worker should be **deemed**. Please contact workers’ advocate and see what this worker’s wishes are.” [Emphasis by adjudicator.]
- (73) Dr. Skinner writes the rehabilitation counsellor on January 12, 2000 as a follow-up to specialist’s reports and asks that surgery be booked as recommended (8th) and as the worker is in Calgary, a referral to a Calgary pain clinic.
- (74) It appears that there is no response from the workers’ advocate or worker until February 15, 2000 regarding further surgery and benefits are suspended, then retroactively paid.
- (75) The rehabilitation counsellor responds on February 23, 2000 to Dr. Skinner’s request on January 12, 2000 for referrals authorizing them with no bookings, and proposed dates for nerve blocks in Calgary in March and then surgery in Vancouver in April. The counsellor says that the over month and a half delay in responding is due to staffing/workload issues.
- (76) On the same day, the rehabilitation counsellor’s note to file indicates that he called the worker’s Calgary phone number (provided by Dr. Skinner) on February 14, 2000 to explain arrangements would be made for surgery, etc., with apologies for delay. He says the worker “expressed concern that he had been cut off benefits with no explanation.” The counsellor explains this was done because the worker had not provided contact information for Calgary and the worker replies that his

mailing address has not changed. [This appears correct as there is no letter of notification on file.]

- (77) Surgery in Vancouver is scheduled for March 29, 2000 but the surgeon reports only a consultation on this date with the worker in which the surgeon tells him the surgery will not reduce pain and he cannot guarantee a satisfactory outcome. He says the worker will consider this and contact him with a decision. In April 2000 the worker is transferred to another adjudicator.
- (78) Almost a month after the March 29, 2000 consultation, the rehabilitation counsellor writes the worker (April 26, 2000) giving him until May 15, 2000 to make the decision on surgery. He says if the worker does not opt for surgery, then the vocational rehabilitation process will “restart”. [We note that very little vocational rehabilitation was ever started, other than short written plans, awaiting recovery from earlier surgery.] The counsellor faxes the workers’ advocate about the letter above on May 1, 2000 and he responds (on May 30, 2000?) that the worker made arrangements with the surgeon for surgery for a date in October 2000. The counsellor writes Dr. Skinner to advise surgery can be expected at a private clinic in 4 –6 weeks and is being arranged. A return to work plan is forwarded to the outfitter employer May 30, 2000(almost 5 years since employment) stating “return to work as an outfitter guide will be evaluated following the outcome of surgery.”
- (79) Meanwhile, Dr. Skinner’s report to WCB after the worker’s June 6, 2000 visit notes the worker is “apprehensive” about upcoming surgery given previous problems with surgery and he is “upset” it is booked for July not September/October as he wanted time to prepare for it. [We note that this report should have indicated some counselling and follow-up was needed, given the prolonged treatment and numerous surgeries to date.]
- (80) An adjudicator’s note to file on July 13, 2000 indicates that the surgeon’s office sent consent forms to the worker in mid-June but no response. The surgeon’s office advises that the July 26 surgery will be cancelled if the forms are not received by July 17, 2000. The adjudicator notes “section 7 may be considered pending contact from worker” and he will be advised by letter.
- (81) The rehabilitation counsellor’s July 18, 2000 note to file reports he talked to Karen at the surgeon’s office and she reported that the worker called her to say he had not received the forms. The forms will be faxed to the worker’s advocate office so surgery can proceed.
- (82) Here is where some critical problems arise. Despite the earlier surgical consults about flexor tenolysis surgery and repair to the radial collateral ligaments to correct ulnar angulation, the forms arrive with a consent to what appears to be a *different procedure*: no one at WCB appears to notice this, and the rehabilitation

counsellor write the worker July 21, 2000 care of the workers' advocate office, asking that the forms be completed.

- (83) The next file entry is August 2, 2000 by the rehabilitation counsellor noting his contact with Karen at the surgeon's office who tells him the forms were not sent by the worker. The counsellor reports he spoke with the worker who said "he is having some difficulty mentally accepting the procedure . . . he is not a trusting person . . . asked for a bit more time to decide so he can clarify the procedure with the surgeon" and also deal with some urgent family matters. The counsellor notes that the worker has "questions about the procedure that he would like answered first, not because he is being difficult or uncooperative."
- (84) Surgery is rescheduled for October 24, 2000 and the worker is informed by August 9, 2000 letter which states "the forms seem a bit vague and I encourage you to call . . . Dr. P's office to clear up any understanding." We note that WCB staff do not offer in any way to facilitate clarification on the procedure and leave this totally up to a worker who it had been noted previously is "apprehensive, not trusting", etc. On September 14, 2000 the rehabilitation counsellor sends care of the workers' advocate office a copy of Dr. P's report to the worker and notes he speaks with the worker who says he want to speak with the advocate who is on holiday. The next note to file is October 16, 2000 [very close to the surgery date] which says a conference call with the workers' advocate will be arranged "this week or next" [which would be extremely close to the surgery date] but there is no indication this occurs. The next note to file November 2, 2000 by the rehabilitation counsellor indicates that the surgeon's office cancelled the October 24 surgery because no consent forms arrived. This note also indicates a call to the worker's advocate office October 25 [day before surgery] indicating they had not yet connected with the worker but had left unreturned messages. Lastly, the note says the counsellor left a phone message for the worker on November 2 saying if there was contact by November 3, the counsellor will recommend suspension of benefits.
- (85) The rehabilitation counsellor's November 8, 2000 note to file says the surgeon's office says the worker did not contact that office to discuss his concerns. The note also says there has been no contact to WCB or the workers' advocate office since October 16th leading to a delay in vocational rehabilitation.
- (86) On November 27, 2000 the adjudicator writes the worker advising of her decision to suspend benefits. She says "benefits" can be "activated" if there is a confirmed surgical date; pre-op forms are provided to Dr. P. two weeks prior to surgery; the worker agrees to the proposed surgery; and surgery is completed. She continues that if the worker does not go through with surgery he must cooperate with a definite restart date and communicate with the rehabilitation counsellor every two weeks. If he does not comply with the above, benefits will be suspended indefinitely.

- (87) However, on December 19, 2000 Dr. P.'s office advises he will not perform surgery nor see the worker. Clearly this makes it impossible for the worker to comply with the above. Another specialist hand surgeon is eventually found to replace Dr. P. but this appointment does not occur until March 21, 2000 and benefits are not reinstated until March 15 and are not retroactive. The worker signs a new return to work plan March 14, 2000.

Evidence from the Worker's Testimony at the Hearing

- (88) The worker says that in August after surgery was cancelled the first time [July 26] he was "requesting what was going on . . . when I left the surgeon [in March] he said two procedures would be done . . ." The worker said he called twice to the surgeon's office [not sure of dates] but he was not available. He says in August he was offered a "compassionate extension" by the rehabilitation counsellor and he fully expected that the paperwork would be corrected but it "never happened." When he received the second set of consent forms and they were the same as the first set (joint replacement, not flexor tenolysis, etc.) he called back to the surgeon. He said the workers' advocate tried to clarify the situation he believes with the rehabilitation counsellor. He says he would have been satisfied if the first set of consent forms had contained a clerical error but not when the second set showed up the same. He says this shook his confidence and he felt the surgeon should have had the courtesy to explain himself. He says that after the second surgery cancellation he spoke to the surgeon's office: "Karen" was very polite and said she would talk to the surgeon. There was no promise she would get back but the worker thought the intent was that the situation would be clarified "and we'd be off and running again". The worker says the board should have taken steps to clarify the situation [difference between the surgery proposed in March and the later consent forms with different procedure.]
- (89) We accept the worker's testimony about his attempts to have his questions answered. We find that his concerns and attempts to clarify were reasonable [and acknowledged as so, by the rehabilitation counsellor in August note to file]. In the circumstances, we are of the view that this was not a refusal to undergo surgery.

Submissions by the Workers' Representative

- (90) The workers' advocate says the worker is seeking retroactive payment of benefits which were suspended from December 1, 2000 to March 15, 2001.
- (91) She submits that the worker does not meet the criteria in s. 7 of the *Act* for suspension of benefits because he never "unreasonably refused to submit to treatment or rehabilitation". In addition she submits that the criteria for suspension in policy CL-30 are not met because the worker did not "refuse to

undergo or attend medical treatment or rehabilitation which the board considers necessary to the recovery or rehabilitation of the worker.” [Essentially the same language as the *Act*.] She also points out that the adjudicator’s letter states “due to the lack of communication and cooperation relating to the proposed surgery or Return to Work Plan, your benefits will be suspended.” The advocate says that s. 7 and policy CL-30 do not specify “lack of cooperation” as criteria for suspension.

- (92) The advocate points out that the file indicates (adjudicator’s note dated December 13, 2000) that the surgeon’s office was contacted by the worker who had requested to see the surgeon prior to arranging a surgical date [after October 24 cancellation] and the response was “if Dr. P. feels he must see the worker prior to surgery, he will let [WCB] know.” Then on December 19, 2000 the surgeon’s office advises he will not perform surgery because “the worker has procrastinated, he has been irresponsible, other surgeries have been delayed to accommodate this worker.” The advocate points out that it is the surgeon who refuses treatment, not the worker. She says that in normal circumstances not showing up for surgery would be a problem but here there are extenuating circumstances due to the problem with the forms, which the surgeon’s office does not seem to acknowledge, despite the worker’s effort to clarify and get further information. She says the board could have facilitated clarification but did not.
- (93) The workers’ advocate provided a definition of the term “refusal “ and “reasonable” from *Black’s Law Dictionary*. “Refusal” is defined as a “positive denial” which she submits did not occur in this case.

Issues:

1. What legislation and policy should be used to determine the worker’s entitlement in this appeal?
2. Were the worker’s benefits suspended in accordance with the *Act* and relevant policies?

Analysis of Issues/Reasons

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

- (94) The worker was injured arising out of and in the course of his employment as an outfitter’s guide on October 18, 1995.

- (95) Section 90(1)(c) 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.”
- (96) Therefore, we find that the *Workers’ Compensation Act*, SY 1992 as amended up to the date of the injury in 1995 is the legislation to be used to determine the issues of entitlement in this case. Specifically, section 3 of the *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 October 1995.
- (97) With respect to relevant policies, we note that of the policies submitted to the tribunal by the board as being relevant to this case, only CL-30 was cited by the adjudicator in her decision. However, we agree with the board that policies CS-07 (Vocational Rehabilitation) and CS-08 (Fitness for Employment, Suitable Occupation and Deeming) are also relevant to the appeal and relate directly to the issues under appeal.

Issue #2: Were the worker’s TTD benefits suspended in accordance with legislation and policies?

- (98) The relevant section of the *Act*, 7(1) states:

The board may suspend or reduce compensation payable to or in respect of a worker, if the worker

- (a) following consultation with the worker and the worker’s medical practitioner unreasonably refuses to submit to treatment or rehabilitation the board considers essential to the worker’s recovery or rehabilitation

- (99) Policy CL-30 section A(c) states:

Reduction of compensation means that the board may reduce the amount of compensation payable to a worker and/or services provided to a worker during the identified period of reduction.

- (100) Section B provides:

Suspension or Reduction of Compensation

The decision to suspend or reduce compensation that is payable to a worker or is/her dependents rests with the Claim Adjudicator and/or the Director of Claims. Suspension or reduction decisions are made on a case-by-case basis.

When a claim is being case managed, the staff of Client Services and Claims Branch shall consult. The authority to suspend or reduce compensation shall remain with the Claims Adjudicator and/or the Director of Claims.

The Claims Adjudicator may suspend or reduce compensation if any of the following circumstances exist:

1. if a worker refuses to undergo or attend medical treatment or rehabilitation which the board considers necessary to the recovery or rehabilitation of the worker . . .

The Claims Adjudicator may, in addition, suspend compensation if the following circumstances exist:

1. a worker refuses to accept compensation benefits; or
2. a worker moves and his/her whereabouts are no longer known.

(101) Section D provides:

Reinstatement of Suspended or Reduced Compensation

Compensation may be reinstated if circumstances change and a worker ceases the activity that originally resulted in compensation benefits being suspended or reduced. Benefits may be reinstated on a retroactive basis.

(102) We have extensively reviewed the long and complicated course of this worker's treatment in the background section of this decision.

(103) In our view, the relevant criteria for suspension of benefits in section 7 of the *Act* and Policy CL-30 - - that is, where a worker unreasonably refuses to submit to treatment or rehabilitation the board considers essential [or necessary] to his recovery or rehabilitation - - has not been met in this case.

(104) We find there was no "unreasonable refusal" on the worker's part but rather a reasonable and understandable attempt to clarify why the forms for "consent to surgery" were not consistent with the surgery recommended at the worker's March 2000 consultation with the specialist. The worker's attempts may not have been effective but there was no facilitation in terms of clarification by the board staff which might have made all the difference.

- (105) There was no outright refusal by the worker and in fact the surgeon was the one who eventually refused treatment after the second cancellation in October 2000. Moreover, “reasonableness” must be interpreted taking into account the merits and justice of the case. In this case, there are numerous references in the file to the worker’s “apprehension” about surgery, his “disappointment” and “frustration” with the results of the previous seven surgeries, his concern with respect to the lack of timely treatment of the finger at the outset, and his “anger” at and “difficulty” with adjustment to his injuries. None of these are ever addressed with an opportunity for counselling or support.
- (106) Therefore, without an “unreasonable refusal”, we find that benefits should not have been suspended by the adjudicator.
- (107) Board Policy CS-08 deals with “Fitness for Employment” and “Suitable Occupation”. Although the adjudicator did not identify this policy as relevant to her decision, the board has provided it to the appeal tribunal as relevant to this appeal.
- (108) Policy CS-08 requires the Rehabilitation Counsellor to “evaluate and assess a worker for suitable occupations” and states that “Suitable occupations shall be based on the assessment of a worker’s abilities in consultation with the worker.” We find that the “evaluation and assessment for suitable occupations” required by Policy CS-08 was neither adequate nor satisfactory in this case. We think it is unrealistic in the face of mounting medical evidence to continue to base Return to Work Plans on the worker performing his pre-injury work as a guide for the worker who is right hand dominant. Moreover, the worker’s employer had explained that the worker would be required to lift up to 90 lbs. with his hands and Dr. C. reported in November 18, 1999 that the worker tried to fire a rifle and found the recoil excruciating to his hand.
- (109) We also think that the purpose of vocational rehabilitation as stated in Policy CS-07 was not fulfilled in this worker’s case: specifically, the purpose of vocational rehabilitation is to reintegrate a worker back into the workforce.

Conclusion

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

1. The worker is entitled to benefits from December 1, 2000 to March 15, 2001.

2. The board shall retroactively pay these benefits to the worker.
3. Interest shall be paid in accordance with section 19.4 (of the current *Act*) on compensation payable as a result of our decision. As there is currently no policy in effect under section 19.4, it is unclear at this point how the policy, once passed, will apply to this case.

Dated this **18th** day of **June, 2001** in the City of Whitehorse, in the Yukon Territory.

Jan Stick, Member

Heather MacFadgen, Presiding Officer

Joseph Radwanski, Member

Summary for the Reader

Decision under review: Adjudicator decision – November 27, 2001

Sections of Act considered or applied by adjudicator: s. 7(1), 17.(1)

Policies considered or applied by adjudicator: CL-30

Decision made by adjudicator: To suspend compensation benefits effective December 1, 2000 due to the lack of communication and co-operation relating to the proposed surgery or Return to Work Plan.

Appeal Committee decision summary: Suspension of benefits was not in compliance with s. 7 of the *Act* or Policy CL-30 because the worker did not unreasonably refuse to submit to treatment or rehabilitation essential to his recovery or rehabilitation. Therefore, the adjudicator's decision is reversed and the board must pay benefits for the period December 1, 2000 to March 15, 2001, retroactively with interest in accordance with s. 19.4.

Sections of the Act considered or applied by appeal committee: s. 7(1) and 18 and 90(1.2)

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Policies considered or applied by appeal committee: CL-30

Issue addressed by appeal committee:

1. What legislation and policy should be used to determine the worker's entitlement in this appeal?
2. Were the worker's benefits suspended in accordance with the *Act* and relevant policies?

Decision made by appeal committee:

1. The worker is entitled to benefits from December 1, 2000 to March 15, 2001.
2. The board shall retroactively pay these benefits to the worker.
3. Interest shall be paid in accordance with section 19.4 (of the current *Act*) on compensation payable as a result of our decision.