

Workers' Compensation Appeal Tribunal

Decision # 19

Claim No.: 98-1388

Date of Hearing by appeal committee: June 12, 2001

Date of Decision: July 25, 2001

Appeal Committee Members

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Jan Stick
Member representative of workers:	Karen Waroway

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

Summary for the Reader

Decision under review: hearing officer's decision dated February 6, 2001

Sections of Act considered or applied by hearing officer: ss. 11, 17 of the *Workers' Compensation Act*, 1992, as amended by SY 1999, c.23, s.9 (the "Act")

Policies considered or applied by hearing officer: CS-07, Vocational Rehabilitation; CS-08, Fitness for Employment, Suitable Occupation, Deeming

Issues addressed by hearing officer:

"whether the worker is medically fit for a suitable occupation and whether the worker has been provided with rehabilitation service in accordance with legislation and policy"

Decision made by hearing officer:

The hearing officer denied the appeal and confirmed the adjudicator's decision. He decided that "the worker is medically fit for the occupations identified."

Sections of the Act considered or applied by appeal committee: ss. 19.4, 90

Policies considered or applied by appeal committee: CL-30, CS-07, CS-08

Issues addressed by appeal committee:

The appeal committee has determined the issues are as follows:

1. Is the hearing officer correct in determining that the worker is not entitled to further rehabilitation assistance under s.30 of the *Act* and in accordance with relevant rehabilitation assistance policies?
2. Is the hearing officer correct in determining that the worker is fit for the two occupations identified as suitable for him: retail salesperson and dispatcher?
3. Is the hearing officer correct in his decision to confirm the adjudicator's termination of benefits to the worker on August 11, 2000?

Decision made by appeal committee:

The worker's appeal is granted and the hearing officer decision is reversed and varied as follows:

1. The worker is entitled to further rehabilitation assistance under s.30 of the *Act* and in accordance with relevant rehabilitation assistance board policy.
2. Without further training and/or other rehabilitation assistance, the worker is not fit for the two occupations identified as suitable for him: retail salesperson and dispatcher.
3. The board must calculate and provide compensation for the loss of earnings the worker has experienced since benefits were incorrectly terminated on August 11, 2000.
4. Interest shall be paid in accordance with s.19.4 of the *Act* on compensation payable as a result of our decision. As there is currently no policy in effect under s.19.4, it is unclear at this point how the policy, once passed, will apply to this case.

Introduction

By his notice of appeal dated February 7, 2001, the worker appeals the decision of the hearing officer of the Workers' Compensation Health and Safety Board (the "board") dated February 6, 2001.

This appeal was originally scheduled for hearing on April 27, 2001, and then rescheduled for May 9, 2001. The hearing did not take place on either date due to requests for adjournments by the worker's advocate, which the appeal committee granted.

In the decision under appeal, the hearing officer reviewed the adjudicator's decision dated July 24, 2000, in which she terminated the worker's re-employment assistance allowance benefits as of August 11, 2000. She also decided that the worker's medical and vocational rehabilitation would be complete on the same date because no surgery was indicated, and because she found the worker had worked with the rehabilitation counsellor to identify jobs the worker was functionally capable of performing. She also found that there was no anticipated wage loss. (emphasis added)

In his decision, the hearing officer "confirms" the decision of the adjudicator. He finds that the worker is medically fit for the occupations of retail salesperson and dispatcher. He applies Policy CS-08 to find that the worker is fit for returning to work in a suitable occupation. The hearing officer also finds that the worker was provided rehabilitation services as required by the *Act* and policy. Although the hearing officer does not expressly address the issue of wage loss (deeming), since he confirms the adjudicator's decision, it appears he agrees with her decision that "there is no anticipated wage loss."

The worker and his representative disagree with the hearing officer's conclusion that the worker is medically fit for the occupations identified, and ask that entitlement under the *Act* be restored.

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

A pre-hearing conference was held May 24, 2001 to identify the issues and deal with other preliminary matters. Both the employer and the worker's representative attended.

The hearing was held on June 12. The worker attended the hearing and gave evidence under oath. The employer also attended the morning of the hearing. The hearing continued into the afternoon but the employer left due to work commitments; however, she had no objection to the hearing continuing in her absence.

The appeal committee considered all of the worker's record as provided by the board. In addition, the 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-02, Re-employment Assistance Allowance
- CS-07, Vocational Rehabilitation
- CS-08, Fitness for Employment, Suitable Occupation, Deeming
- CS-09, Return to Work Programs

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.

One exhibit consisting of a number of documents was entered in evidence at the hearing, with the consent of all parties, as follows:

Exhibit 1 -

- Affidavit of Tracey Volpatti, A/Corporate Records Manager, WCHSB - May 30/01
- Affidavit of Liza Jansen-Gelok, Rehabilitation Counsellor, WCHSB - May 30/01
- Affidavit of Dr. Allon Reddoch, Board medical consultant, WCHSB - May 31/01
- Affidavit of David Brown, hearing officer, WCHSB - May 31/01
- Affidavit of Sue Ryan, Vice-President of Operations, WCHSB - May 31/01

We note here that these affidavits deal with the assignment and preparation of a surveillance videotape. The videotape is discussed at page 21 in this decision.

Lastly, the appeal committee was assisted by independent counsel, Tracy-Anne McPhee. Worker advocates Michael Travill and Mike Winstanley represented the worker. The appeal committee heard sworn testimony from two witnesses: the worker and the board's medical consultant.

Both the worker's advocate and the independent counsel also provided written submissions to the appeal committee after the close of the hearing, on June 26 and 27, 2001, respectively.

Applicable Legislation and Policy

At the outset, the appeal committee agreed that the *Act* and relevant policies as they existed on November 1, 1998 must be used to determine the worker's "entitlement", according to s. 90(1)(a) of the *Act*. This is so because November 1, 1998 is the date of the work-related injury for which the board subsequently accepted a claim for compensation as a work-related disability.

Issues

The appeal committee has determined the issues are as follows:

1. Is the hearing officer correct in determining that the worker is not entitled to further rehabilitation assistance under s.30 of the *Act* and in accordance with relevant rehabilitation assistance policies?
2. Is the hearing officer correct in determining that the worker is fit for the two occupations identified as suitable for him: retail salesperson and dispatcher?
3. Is the hearing officer correct in his decision to confirm the adjudicator's termination of benefits to the worker on August 11, 2000?

Background and Findings of Fact

- 1) The worker experiences a work-related back injury on November 1, 1998, while working as a cook. His report says he twisted his back putting away groceries with "instant pain." He does not initially report his injury to his employer or the board. However, there is a report on record from a physiotherapist he sees on December 17, 1998 for treatment of back and leg pain. She advises him to work with care and receive help with lifting (in other words, "modified work"). The worker reports the injury to the board on March 23, 1999 (after a re-injury). The employer reports the initial injury on December 23, 1998.
- 2) The worker's report states that his annual salary is \$28,000 to 30,000 and that he had worked as a chef in the employer's restaurant for 3 to 4 years. The employer reports his earnings as \$15/hr for 32.5 hours per week plus tips (not quantified). The current employer had just recently purchased the business a few months earlier. We calculate the annual earnings, before tips, on the employer's figures as \$ 25,350.
- 3) The worker returns to work a few days after the November accident and is able to continue working.
- 4) On March 17, 1999, the worker re-injures his back at work. The attending physician's report of March 23, 1999 diagnoses musculo-skeletal strain and left sciatica muscle spasm.
- 5) The medical consultant examines the worker on April 20, 1999 and reports there are "classical signs and symptoms of nerve root impingement" in the worker's back.

- 6) The worker undergoes several medical assessments and treatments. An initial MRI and orthopaedic consultation done in April 1999 result in a recommendation for back surgery to correct for lumbosacral disc herniation. But subsequently surgery is not performed because of reduction in herniation seen on a second MRI done on September 30, 1999.
- 7) The board refers the worker to the Columbia Rehabilitation Centre in Vancouver and he attends for one day on December 6, 1999 but is discharged from the occupational rehabilitation program the next day due to a “family emergency” in Whitehorse.
- 8) Although there is no time to implement a treatment plan, the discharge report notes barriers for return to work include general deconditioning and decreased strength and flexibility in the worker’s trunk and thoracolumbar area and lower left extremity. The discharge report also recommends specific, progressive strengthening and flexibility exercises; cardiovascular endurance training; and physiotherapy treatment at a clinic in Whitehorse.
- 9) On two occasions, first in June 1999 and then in February to March 2000, the worker attempts a graduated return to his pre-injury work. Neither is successful, and he is terminated from his employment on April 17, 2000, due to his inability to carry out his job duties as a cook.
- 10) On March 31, 2000, the worker contacts his adjudicator to inquire about retraining.
- 11) In the Vocational Rehabilitation Plan/Report (VRP), dated April 5, 2000, the board rehabilitation counsellor states that although the worker is unable to return to his pre-accident employment, he is capable of “sedentary to light level” work. Three Yukon jobs are identified from “Yukon Workfutures” based on the worker’s educational level and interests. The VRP says they are: (1) retail salesperson at an annual salary of \$25,300; (2) gas station attendant at \$21,100; and (3) dispatcher at \$37,500. The rehabilitation counsellor averages the salaries for the three jobs identified. Because she calculates an average of \$27,633, she states there is “no wage loss anticipated” because she finds his pre-accident earnings are \$25,350 annually. She states the worker is able to approximate or surpass his pre-accident earnings.
- 12) The VRP also states that the worker must begin a job search on April 3 and if he is unsuccessful in obtaining employment by May 20, “he will be deemed capable of working in the identified occupations and deeming will occur with no wage loss.” [*This is the first “deeming” decision and we note it is made (and jobs have*

been identified) before an evaluation of the worker's functional capacities ("FCE") is undertaken in May of 2000. The FCE concludes that the worker does not have the functional capacity to do his pre-injury work or a gas station attendant job but that he does demonstrate the ability to perform retail sales and dispatcher work. His functional limitations are for frequent lifts from floor to thigh of 20 pounds, overhead lifts of 20 pounds; whereas occasional lifts from floor are up to 33 pounds and overhead to 20 pounds. Bending, stooping and low-level work can be done on an occasional basis only. In the two days of his FCE testing, his computer-recorded time for duration standing is 45 minutes, for sitting one hour and for standing and walking one hour and 48 minutes.]

- 13) Lastly, the April vocational rehabilitation report states aptitude testing is not done and no retraining is indicated (although a limited time for on-the-job training is considered an option "if it guarantees employment".) The worker is given a booklet on searching for a job and a current resume.
- 14) Dr. S sees the worker on a referral from the board for assessment of the worker's back pain, and reports in May 2000. He recommends further MRI investigations (in a standing rather than lying down position) due to "persistent symptoms, functional disabilities, and objective neurological abnormalities". He also recommends a return to the Columbia Rehabilitation Centre (even if an MRI rules out nerve impingement) for pain management and recovery.
- 15) After review of Dr. S's report, the board's alternate medical consultant advises that it is his "impression" that the worker "has a surgical condition" due to low back pain and left-sided sciatica present for over a year. He says it is possible that a "sequestered fragment of disc is moving around in the disc space" and recommends reassessment by the orthopaedic specialist the worker saw previously. With respect to surgery (already deferred once), the medical consultant says "the time from the initial injury is now approaching 1 _ year. The longer surgery is delayed in these cases, the less the likelihood for a successful result. This is well known, and may be explained by scarring and degenerative changes that occur around the nerve root with time. The MRI findings show evidence of tears or bulges at other levels [of the spine] as well as the clinically involved level. This would suggest to me the potential for ongoing problems and pain despite a successful surgery at the S-1 level." [emphasis added]
- 16) Dr. M, the orthopaedic surgeon, reassesses the worker on June 21, 2000 and recommends against surgery at that point because he finds the worker's symptoms are still improving. (Interestingly, he does say that he thinks that when patients stand up rather than lie down, the load on the spinal discs increases and this could lead to disc deformity and impingement that would not be detected by an MRI done while the patient is lying down – however, no "standing" MRI

- services are available.) He also states that whether a disc herniation is “out or in”, it still leaves significant damage to the disc space and this worker appears to have “mechanical discogenic pain.” In our view this means that the initial disc herniation [found by the board to be work-related and confirmed on the first MRI] led to ongoing physical “damage” which accounts for what the orthopaedic specialist diagnoses as “mechanical discogenic pain. (We interpret this to mean pain originating in the disc elicited by motion/movement.) Dr. M also reports that if the pain continues, “fusion surgery” for the discs could be considered in the future. Lastly, and most importantly in our view, Dr. M recommends that the worker “carry on with rehab, even on a home and personally supervised level and then consider light duty employment as an alternative for the time being while waiting for his symptoms to further settle”. [emphasis added]
- 17) In our view, the rehabilitation counsellor misinterprets the orthopaedic surgeon’s report – on July 14, 2000 she reports that “Dr. M suggests that the worker be directed towards a light duty job giving residual symptoms time to continue to resolve.” [emphasis added. To “direct” is not the same as to “consider”.] What she overlooks is that the orthopaedic surgeon recommends more rehabilitation and then consideration of light duty employment. In addition, we find that given the results of the previous graduated returns to work, such a two-phase approach should have been considered. Instead, the worker is directed to search for work in July and early August with no further job search support other than that which he received in April (a booklet and resume). It is also clear from the “deeming” decision in April, confirmed by the adjudicator in July, that he is expected to look for full-time work because he is “deemed” capable of earning full-time wages. In our view, this is unrealistic for a worker who has been out of the workforce for over 1 _ years and is de-conditioned, who is expected to change occupations with minimal assistance from the board (booklet and resume), at a time when the unemployment rate in the territory is high. He is also still suffering from discogenic back pain according to the specialists who have examined him.
- 18) The adjudicator’s decision of July 24, 2000 makes it clear that benefits will be terminated on August 11, 2000 because “both medical and vocational rehabilitation will be complete.” In our view, there is nothing in the orthopaedic surgeon’s report that indicates the worker’s medical rehabilitation will be complete in several weeks.
- 19) On the day of the adjudicator’s decision, Dr. S reports that the worker “remains severely vocationally disabled” with respect to his pre-accident work and he has weak spinal muscles, despite self-directed pool therapy [muscle weakness is consistent with the Columbia Rehabilitation Centre findings of deconditioning at paragraph 8 above]. He also notes that the orthopaedic surgeon has diagnosed mechanical discogenic pain as a result of damage from the previously herniated

disc even though on the MRI it has retracted. Finally he notes that “fusion surgery” might be advisable in the future if pain continues.

- 20) It is also important to note that Dr. S reports that the worker says he has applied to 35 different employers without success: “for example, working as a store retail clerk [at a local entertainment equipment store] would involve unpacking cases of electronic equipment, including televisions and taking them out to purchasers’ vehicles. . . it is certainly not light level work.” Dr. S. also concurs with the orthopaedic surgeon’s exercise activity recommendation but disagrees that there are “very soft findings” and “only slight leg pain.” Most importantly, Dr. S. recommends the worker “continue to do his best to obtain even a few hours per week at almost any form of light employment as it will at least be a boost for his self-esteem.” We note that a “few hours per week”, even when qualified by “at least” is still not a recommendation for full-time work.
- 21) On August 2, 2000, the worker sees his family physician, Dr. W, who says “things haven’t really improved all that much” and recommends continuing physiotherapy and aquatherapy as well as a work hardening program. He also says the worker should be reviewed by the board’s medical consultant because his “signs and symptoms are real and this man is certainly not ready to get back to work involving any significant amount of physical activity.”
- 22) In a second report of a visit on August 10, 2000, the family doctor says “the plan was to get him back to a graduated program of working and [the worker] is unhappy with that idea and feels that there is little he can do at that point because of pain.” This of course is written a day before the worker’s benefits are to be terminated. [emphasis added]
- 23) The worker is unable to find work and in a note to file dated August 14, 2000 (after a discussion with the family doctor), the rehabilitation counselor characterizes this as an “economic issue - not a WCB issue”. We disagree. Policy CS-08 requires the board to “demonstrate” that the “occupation[s] for which a work is deemed capable is[are]reasonably available to the worker.” [emphasis added]
- 24) On October 19, 2000, Dr. S writes the rehabilitation counselor and reports that the worker continues “to follow a multidisciplinary rehabilitation program insofar as he can afford any of the public services available. As you know, you have deemed him and since he is now on social assistance he cannot afford necessary physiotherapy and medication for his pain disorder.” [emphasis added here by appeal committee] He also states, in boldface type, “this man is not fit for sedentary or light employment.” He explains this comment by noting that although the FCE indicated otherwise, the worker took more than his usual pain

medication just prior to testing, did whatever he was told, and spent the three days afterward lying down due to severe pain. The doctor says that as a result although the two-day FCE led to an evaluation that the worker could perform jobs in retail sales and dispatching, it was missing the vital information of what the effects of doing the FCE were for the worker – incapacity and pain. We also note here that there are numerous references in the FCE report itself of signs of physical discomfort in the worker during testing including massaging left leg, shifting in chair, stretching, etc... Dr. S recommends that adjudicator's deeming decision be reconsidered and that increased rehabilitation services be provided.

- 25) On November 7, 2000, the medical consultant reviews Dr. S's reports (of July 24 and October 19) and says "these reports suggest more of an advocacy role than a clinician role by the physician." We agree that Dr. S is advocating certain treatment and services on behalf of the worker and that he definitely disagrees with the deeming decision (and explains why with reasons and analysis). There is also some frustration evident in the second report but we find there is merit to his analysis of the worker's condition, supported as it is by reference to the orthopaedic surgeon's findings and the difficulties the worker reported after participating in the FCE.
- 26) We think that the distinction between Dr. S's July report in which he recommends at least a few hours of light duty work per week and his October report in which he states the worker is not fit for sedentary or light duty can be explained by his knowledge of the intervening deeming decision which concludes that the worker is capable of earning full-time wages doing light duty work on a full-time basis.
- 27) We note that the medical consultant has pointed out that that the family physician, Dr. W, had recommended a graduated return to work (presumably because immediate return to full-time hours would be medically inadvisable.) We also point out that in his testimony at the hearing, the medical consultant says that his reports in November and December, 2000, on the worker's functional capabilities were based on information dating back to the spring and not current to December 2000.
- 28) Subsequent to his November report, the medical consultant reviews a surveillance videotape of the worker obtained from a private investigator hired by the board and concludes that it "confirms the functional abilities described in the FCE": that is, that the worker is capable of working at a sedentary to light level job. He says the video "suggests" that the worker's FCE was not an isolated two days of normal functioning but is instead consistent with his abilities at that time. He also says that having reviewed the video, he continues to hold the opinion that the worker may well be capable of working at higher activity levels. This report seems to indicate the medical consultant believes that the videotape information confirms

his view that the worker might have greater functional capacities as time progresses, but he does not explain why the video supports a view on future capabilities. In any event, a statement on future capabilities is best understood as indicating that the worker has not reached maximum improvement.

- 29) Most importantly in our view, the medical consultant states the “long-term unemployment post-injury is itself a health problem because it is detrimental to physical, mental and social well-being.” We point this out because after the FCE in May, the worker continues to be unemployed for seven more months (and to this day) so we interpret the medical consultant’s remarks to mean this unemployment would have ongoing negative health effects. We also point out that there is nothing in the medical consultant’s report that indicates that the worker should return to work full-time rather than on a graduated return to work, as he notes that the family doctor recommended.
- 30) We will deal with the videotape evidence at page 21. However, we note here that we give it no weight because in our view it is not reliable or relevant to the issue before us with respect to what constitutes the worker’s fitness for “suitable work”, as we will explain.

Worker’s testimony at the hearing

- 31) The worker says that for the last 10 years he has worked as a cook full-time.
- 32) He is 33 years old and has sole custody of his 5-year-old daughter, whom he supports. He says his goal is to support himself and his daughter, and believes he needs retraining.
- 33) He has a grade 11 education with no formal training. He was a baggage handler with CP Air shortly after high school.
- 34) He says in his previous job as chef he would unload large grocery orders from the delivery truck. And it was while doing this unloading work that he injured himself.
- 35) He says he took a few pain killers before his FCE. He says after the FCE in May 2000, he was “flat on his back for three days.”
- 36) He says due to pain he has trouble sleeping and takes pain medication at least once a day.
- 37) He says that the board told him he had “transferable skills” as a result of being a chef and he accepted the FCE results which said he could be a salesperson or

dispatcher. He said after the FCE he met at the board for an hour where the rehabilitation counsellor told him “here are the job possibilities – go for it”.

- 38) The worker says he handed out 35 resumes and visited many places, talking to the staff, while searching for a job. He said many jobs (such as selling computers, for example) involve “lifting, unloading and moving stuff”. He says following the FCE, the board did not offer to help him with a graduated return to work program.
- 39) He says he was very discouraged by the results of his job search. We point out here that job searches which involve constant rejection do not improve self-esteem and are not therefore therapeutic for a worker with a disability. He says he was primarily looking for full-time work (as his daughter’s sole custodian, he is entirely responsible for her support). He said many employers asked him why he had a break in employment, and he told them the truth about his injury and limitations: as a result, many potential employers told him he doesn’t have what they need, because he has to be able to load and unload. He says that no one at the board told him how to approach a potential employer about his disability.
- 40) He says he is on social assistance now, and gets some help from family members (mostly financial, and some help with childcare).
- 41) He says he would still like to try a multidisciplinary program like the one at Columbia Rehabilitation Centre, where he only spent a day due to a family emergency. He says he would like more physiotherapy than he is able to afford (he currently receives only 20 minutes a week at the hospital under the Yukon health care insurance plan).
- 42) He says he is still interested in cooking but has a hard time sitting or standing for long periods of time. He says he would be interested in working as a teaching assistant for children in the school system, but would need retraining.
- 43) He says he didn’t know what a “dispatcher” job was, but figured it was work with cab companies so he phoned two of them, looking for work. He did not find employment.
- 44) He says that each time he saw the orthopaedic surgeon it was only for a few minutes; however, Dr. S spends more time with him trying various techniques. He says that the medical consultant was the one who explained his condition to him and told him what the options were.
- 45) He says the resume prepared by the board for him was one page with no references on it.

- 46) We accept the worker's evidence.

Analysis/Reasons

Issue 1: Is the hearing officer correct in determining that the worker is not entitled to further rehabilitation assistance under s.30 of the *Act* and in accordance with relevant rehabilitation assistance policies?

Answer: No. The worker continues to require assistance and rehabilitation, and such benefits were not terminated in accordance with applicable legislation and policy.

- 47) Section 30 of the *Act* provides:

Rehabilitation assistance

30. If a worker, as a result of a work-related disability, requires assistance to reduce or remove the effect of a handicap, or experiences a long term disability or requires assistance in the activities of daily living, the board shall pay the cost of rehabilitation assistance, including vocational or academic training, deemed appropriate by the board in consultation with the worker.

- 48) We note the use of the word "shall" in this section. It is clear that the board has correctly determined that this worker has a work-related disability and cannot return to his pre-injury work as a cook. As the rehabilitation counsellor notes in April 2000, "most restaurants within Whitehorse are small operations and the jobs of kitchen help, cook, etc... are often combined and involve heavy lifting of pots, pans, etc..." We note that the 2000 NOC (National Occupation Classification), often relied upon for FCE's, lists "cook" as light duty but as the rehabilitation counsellor correctly points out, this classification is inaccurate for Whitehorse "cook" jobs.

- 49) In our view, the worker does require assistance to reduce or remove the effect of his handicap (functional limitations that are due to damage and pain from work-related disc herniation). He has experienced a long-term disability (for close to 3 years now, since November 1998).

- 50) In coming to this conclusion, we rely on the reports of:

- Columbia Rehabilitation Centre discharge report of December 1999, which states the worker is “not meeting the demands for a full return to work at this time” as well as reporting “general deconditioning” and decreased strength and flexibility as barriers to return to work and requires treatment.
 - The alternate medical consultant’s report of May, 2000, which states “potential for ongoing problems and pain” even with successful surgery and recommends if no surgery is done that aggressive rehabilitation program at Columbia Rehabilitation Centre be considered.
 - Dr. S’s recommendation in May, 2000 of a return to the Columbia Rehabilitation Centre for this worker’s recovery from “debilitated state”. [that is, deconditioning and for pain management]
 - Dr. M’s (the orthopaedic surgeon) report of June 2000, which diagnoses “mechanical discogenic pain” and recommends further rehabilitation.
 - The May, 2000 FCE report that findings “may indicate a need for further assistance with pain management” and a need for “appropriate ergonomic design for occupation or tasks involving prolonged sitting.” (as well as documented indications of physical discomfort)
 - Dr. S’s July, 2000 report calling for “continued, regular, self-directed stretching and active exercise for reconditioning”.
 - The family doctor’s August, 2000, report that the worker needs continuing physiotherapy and a graduated return to work program.
 - Dr. S’s October, 2000, report that the worker is not yet “fit for sedentary or light employment”.
- 51) We also find the worker needs more assistance in finding employment, that is, vocational rehabilitation assistance, in all likelihood involving a work-conditioning program, possible retraining or on-the-job training, graduated return to work program and/or modified work. He also requires vocational counselling with respect to being out of work for almost 3 years plus help on how to deal with his work history and disability when applying to potential employers. In fact, we think that the board needs to be more directly involved in any job search the worker undertakes after or as a part of further rehabilitation assistance.
- 52) It is unrealistic to think that someone who has been a chef for 10 years would know how to explain to an employer – for sales or dispatcher work, with no prior experience in either field – how he would have transferable skills. In addition, as

was clearly considered earlier by the rehabilitation counsellor, on-the-job training may be useful here. It will be up to the board in meaningful consultation with the worker to determine what rehabilitation assistance will work best here. We think, as well, that s.30's requirement for "consultation with the worker" as part of the provision of rehabilitation assistance is a recognition that effective rehabilitation assistance begins with trying to understand the needs and aspirations of the client.

- 53) We do not think it is necessary to review CS-02 – it is currently under review and deals with re-employment assistance allowance. We leave this up to the board to consider whether this should be re-instated in this case, or if instead temporary total disability benefits are more appropriate.
- 54) It is clear that policy CS-07 entitled "Vocational Rehabilitation", effective 94-11-09, is the policy that gives effect to s.30 of the *Act*, set out earlier.
- 55) This policy says the purpose of vocational rehabilitation is "to reintegrate the worker back into the workforce". That purpose has not yet been fulfilled in this case with this worker. In addition, this policy states that "the goal of vocational rehabilitation is to return a worker as close as possible to their pre-injury level of employability. This includes restoration of their pre-injury earnings pattern... that equitably reflects the worker's pre-injury earning capacity." In this case, we find this capacity to be in the range of approximately \$26,000 to \$28,000 annually, based on the information at paragraph 2.
- 56) Again, we find this goal has not been met. The issue of earning capacity will also be addressed in Issue #3.
- 57) Lastly, Policy CS-07 states that a vocational rehabilitation plan is terminated when any one of the following three conditions is met:
 - a) the goals of vocational rehabilitation are achieved and the worker is clearly employable and the plan is complete;
 - b) the worker fails to co-operate with the vocational rehabilitation plan; or
 - c) the worker is not going to benefit from continued vocational rehabilitation (such as assistance with the job search, work assessment, training on the job, or re-education).
- 58) We find that none of these conditions are met on the facts of this case. In other words, the termination of vocational rehabilitation by the board did not comply with policy CS-07.

- 59) As we noted earlier, s.30 requires “consultation” with the worker – in our view, this must be done adequately and meaningfully – with respect to specific jobs as identified as part of the plan. Here it is clear that the worker did not understand either the job duties of dispatcher or the type of employers who hire them (for example, he testified that he did not consider RCMP, 911, trucking companies, etc..., as potential employers, only cab companies). Therefore, we do not find that the “consultation” aspect of s.30 was fulfilled in this case.
- 60) Therefore, it is not necessary that we review Policy CS-09 entitled “Return-to-work program”, effective 95-03-08, although it may very well be relevant to the board’s further vocational rehabilitation assistance for the worker. We leave that to the board in consultation with the worker as is set out in s.30.

Issue 2: Is the hearing officer correct in determining that the worker is fit for the two occupations identified as suitable for him: retail salesperson and dispatcher?

Answer: No.

- 61) The hearing officer states that the balance of the medical evidence supports the contention that the worker “was” medically capable of returning to work in a suitable occupation. We have already reviewed medical evidence on issue #1 and have found that this worker is not medically fit for a return to work without further assistance (see paragraph 51).
- 62) In addition, there is other evidence that the jobs identified are not “suitable”, at least without further investigation, assessment and assistance, including possible retraining.
- 63) The FCE relies on the NOCS [National Occupational Classifications] for comparing the results of the worker’s assessed functional capacities to those required for the three jobs identified by the rehabilitation counsellor. The FCE finds a match for two of three – that is, the sales and dispatching jobs.
- 64) Our problem with this method is that it may not match the realities of these jobs in the Yukon. The rehabilitation counsellor had already noted (see paragraph # 49) that cook is classified as “light” in the NOC but in small Whitehorse restaurants, cooks do more lifting, etc..., than would be the case in larger establishments. There is evidence from Dr. S and the worker himself that at least some retail sales jobs in the Yukon also require more lifting, etc..., than the worker is functionally capable of doing (see paragraphs 20 and 40) . We have no evidence with respect to dispatching jobs in the Yukon but have questioned (see paragraph 69) whether

prolonged sitting, given the worker's FCE assessment of only one hour demonstrated continuous sitting tolerance, may be a problem for this worker in doing the job of dispatcher.

- 65) After the hearing, the worker's advocate provided post-hearing the NOCS information for retail salesperson and sales clerk, which states that "completion of secondary school may be required". As noted earlier, the worker did not complete high school. Also, although the NOCS rates the required physical activities strength as "light", this is not in keeping with what at least 4 employers told the worker about the lifting requirements for particular sales jobs. In addition, the Yukon Workfutures information on retail sales jobs says "completion of secondary school is generally necessary".
- 66) Unfortunately, the FCE provided does not compare the worker's functional abilities to the job demands of specific retail sales or dispatching jobs (although it does clearly set out the job demands for his previous employment as a cook).
- 67) The worker's advocate submitted that NOC 1475.1 "Dispatcher" states that "completion of secondary school is usually required for police and emergency dispatchers and may be required for other dispatchers". It would have been preferable to have this document actually provided to us rather than quoted in a written submission; however, we are prepared to accept this evidence at face value. As stated earlier, the worker has not completed secondary school.
- 68) In addition, we think it is likely that dispatcher jobs would often involve prolonged sitting in some settings. The FCE notes the worker only "demonstrated the ability to sustain sitting for 60 minutes" and that based on the nature his injury, it would be wise that "an appropriate ergonomic desk is considered for occupations or tasking involving prolonged sitting."
- 69) In our view, based on the above alone, there is insufficient evidence to indicate that without further training (high school completion) or job modification (regarding sitting, lifting, etc...) and work assessment, that this worker is fit for the two jobs identified as suitable for him.
- 70) As policy CS-08 sets out, "suitable occupation" means an occupation that worker has the skills, education and physical ability to undertake, and that is reasonably available to the worker.
- 71) Therefore, we disagree with the hearing officer's determination that the worker is medically fit for the occupations identified as suitable based on the evidence before us.

- 72) We are also concerned that consulting generic information in Workfutures, as the adjudicator did here, or making reference to NOCS as the FCE did, is not always sufficient to determine whether a worker has the functional capacity to meet job demands in specific work settings. (see our comments re: “cook” as light, for instance, or Dr. S’s comments on lifting requirements of certain retail sales jobs.)

Issue #3: Is the hearing officer correct in his decision to confirm the adjudicator’s termination of benefits to the worker on August 11, 2000?

Answer: No. Benefits were terminated prematurely.

- 73) The hearing officer “confirmed” the decision of the adjudicator to terminate benefits. In our view, the correctness of terminating benefits is reviewable by the appeal committee.
- 74) The termination of benefits occurred for two reasons: first, a determination that medical and vocational rehabilitation was complete. We have determined as a result of our analysis of the evidence in issue #1, that this is an error. The worker’s medical and vocational rehabilitation is not complete. Second, benefits were terminated because there was “no anticipated wage loss” – a determination by the adjudicator that is “confirmed” by the hearing officer.
- 75) This brings us to Policy CS-08 – a policy provided to us by the board as relevant to this appeal and also dealt with by the hearing officer.
- 76) Policy CS-08 says the board shall demonstrate that a worker’s estimated earning capacity in a suitable occupation is reasonable given current wage scales, and that the occupation for which a worker is deemed capable is reasonably available to the worker.
- 77) We think that the board has not demonstrated that a worker with no previous retail experience, no high school diploma, a prolonged absence from the workforce, and limits for lifting, carrying, and prolonged sitting and standing, could earn a full-time wage of \$25,000 or more in a retail sales job. There is ample evidence that this worker would require a graduated return to work program, perhaps with some job modifications. Given both of these considerations, as well as his lack of experience, etc..., it is unlikely he would be one of a third of retail sales workers who find full-time employment. According to Yukon Workfutures, the other two thirds of retail salespeople work part-time. Deciding that this worker would earn full-time wages of \$25,000 was not “reasonable” given that (1) current wage scales (many minimum wage entry-level positions are quite at odds with his former \$15/hour wage rate); and (2) what is reasonably available (high unemployment

rate, as well as the fact that the overwhelming majority of jobs – two thirds of them – are part-time).

- 78) Also, as noted earlier, we find that the board has not demonstrated that the occupation of dispatcher is reasonably available to a worker without a high school diploma. In addition, the worker’s evidence, which we accept, is that he could not obtain employment as a dispatcher with two cab companies.
- 79) Therefore, we find that the worker was improperly terminated from benefits and he should therefore be re-assessed for any wage loss he has experienced and may continue to experience since the termination of his benefits on August 11, 2000.
- 80) Policy CS-08, provided to us as relevant by the board, also says “deeming” shall occur in three different situations. First, “when medical rehabilitation has progressed to the point that the worker is capable of safely performing the duties of either his/her pre-accident employment [clearly not applicable here], modified employment [not considered by the board in its decision here] or alternate employment.”
- 81) As stated earlier there is insufficient evidence at this point to make this determination –the evidence instead indicates that the worker may not be able to do the alternate employment identified as suitable occupations (see our analysis earlier).
- 82) Secondly, ““deeming" shall also occur when no further medical or vocational rehabilitation plan is necessary or feasible.” As we explained in the analysis of Issue #1, further rehabilitation assistance is required or “necessary” in this case. Therefore, we find this situation is not applicable either.
- 83) Thirdly, “deeming” can occur “when all of the following criteria are met:
1. no further intervention by the Workers' Compensation Health and Safety Board will assist a worker;
 1. the worker's disability has stabilized;
 2. every reasonable effort has been undertaken to assist a worker in his/her recovery and return to work;
 3. the worker is assessed fit for employment;
 4. an assessment has been considered to determine a worker's functional and/or vocational abilities;
 5. suitable occupations have been identified;
 6. the vocational rehabilitation plan is terminated; and
 - i. the worker has a decreased earning capacity; or
 - ii. has failed to return to work; or

- iii. is underemployed; or
- iv. has a non-compensable illness which keeps the worker off work.”

- 84) In our view, not even criterion 1 is met here because as discussed earlier, further intervention by the board will assist the worker.
- 85) Finally, we turn to Policy CL-30, provided by the board as relevant to this appeal. This policy deals with “Suspension, Reduction, and Termination of Compensation”. Here the worker’s benefits were terminated in August, 2000 (a decision “confirmed” by the hearing officer.)
- 86) Section E of that policy sets out seven criteria that require termination of benefits, as follows:
- 1 - there is no disability;
 - 2 - the disability is not work-related;
 - 3 - the injured party was not a worker at the time of injury;
 - 4 - a worker is no longer disabled due to the work-related injury and does not require any further assistance from the board such as retraining or re-employment benefits;
 - 5 - a worker has returned to work and no further benefits are payable;
 - 6 - the disability was intentionally caused by a worker in order to claim compensation benefits; or
 - 7 - a worker has died.

According to our previous analysis and findings, none of these criteria are met on the facts of this case.

- 87) In addition, Section E says benefits “may be terminated if the board determines that a worker is fit to return to either their former employment, or alternate employment”. Again, this determination cannot be made on the facts of this case.
- 88) Lastly, section states termination of benefits shall occur when the worker reaches 65 years of age – this is not applicable here.
- 89) Therefore, we find as stated earlier that there was an improper termination of compensation.

The videotape

- 90) First we note that nowhere in the record is there any explanation or rationale for why surveillance of this worker was conducted. Given such surveillance would be

regarded by most people as an invasion of their privacy, an explanation should be documented for its use before it is undertaken. It also appears the board has no policy in place regarding the use of surveillance. Again, without a policy, there are no guidelines for staff in the use of what can be a very intrusive tool. The affidavit evidence also indicates there was no written contract between the board and the private investigator who undertook the surveillance.

- 91) We think it is important that if this type of surveillance is used that the videotape provide a clear and understandable representation of events, that it be presented fairly in a way that does not mislead a viewer, and that the authenticity of the tape can be verified.
- 92) In wrongful dismissal court cases, courts generally require proof of how the camera was set up and operated, who had access to both the camera and tape, and proof there has been no interference with either the camera or tape. None of this information is available as part of the record here.
- 93) Also, as we shall explain, there are other problems with the videotape evidence. The videotape contains footage of the worker in the following activities:
 - getting in and out of his vehicle on several different days
 - carrying bags of groceries from his vehicle on one occasion for 6 minutes from vehicle to his house
 - carrying his daughter in a parking lot in one arm with a bag of groceries in another, then helping her into the vehicle
 - seated at a picnic table with a woman when his daughter briefly climbs onto his back (he quickly gets her off and then appears to stretch)
 - polishing his truck with a small handheld buffer for 31 minutes one day with an unexplained break (unable to tell for how long by the timer index notation on the tape); however, the written report by the investigator indicates the break was 13 minutes
 - polishing his motorcycle the next day for approximately 14 minutes with some stooping and bending.
- 94) As the worker advocate points out, the video contains a number of unexplained portions and sequences; for example, there is at least one short sequence of what appears to be a young woman in a long gown with a crown on her head. This appears to be completely unrelated to the surveillance of the worker. In addition, some identical sequences are on the tape twice – potentially misleading the viewer into thinking they are successive, repeated activities. This repetition also means the tape provided is not the original footage but rather copied from another tape.

- 95) In addition, some sequences are not recorded in their entirety. For instance, the tape is stopped for 13 minutes and then restarted during the 31 minute (total) segment of the worker polishing the truck. It is impossible to know from the video or accompanying notes what the worker did in those thirteen minutes – he could have stretched, taken pain medication, or simply rested. Therefore, it does not provide a clear and fair representation of these events.
- 96) Also, the motorcycle sequence follows the truck polishing sequence without a clear break, which as the worker advocate points out, could mislead a viewer into believing that the two sequences took place consecutively rather than on two separate days. One would only realize these were events on two separate days by paying particular attention to the date/time index. In his testimony, the medical consultant said he did not pay any particular attention to the date/time index when reviewing the tape.
- 97) Our comments above relate to the reliability of this evidence. It is clearly not the original tape. In our view, it is not reliable and for this reason alone should be given little or no weight.
- 98) However, it is also not useful (i.e., relevant) information for us in determining the issues in this case. The record shows the surveillance commenced on March 21, 2000, and ceased on May 19, 2000. The record indicates the surveillance was conducted on 23 separate days (sometimes without any glimpse of the worker) for a total time of recorded activity of approximately 115 minutes, the longest in one day being an interrupted portion for only 31 minutes.
- 99) As the medical consultant stated in his testimony, it is impossible to tell the weight of whatever was in the bags briefly carried, nor the weight of the handheld buffer (the worker said in his testimony it is a four inch buffer that weighs maybe a pound and a half), nor how much pressure the worker exerted. In addition, the medical consultant said in his testimony that the videotape is not a valuable tool for evaluating physical impairment. We agree with him.
- 100) Given the brief amounts of time recorded, the videotape is of no relevance in determining the worker's fitness for suitable employment, nor his functional capacity for full-time or even part-time work in the identified occupations.
- 101) We give no weight to it.
- 102) However, the hearing officer did say it "corroborates the evidence suggesting the worker is capable of light workplace activities". We are not prepared to make that inference.

- 103) The hearing officer also says “it shows the worker is indeed capable of activities involving some physical exertion”. That is probably the most that could be said. But the record already indicates the worker is capable of some physical exertion. That is not the issue. The issue is whether or not he is capable of full-time work as a retail salesperson or as a dispatcher.
- 104) Lastly, we note that the rehabilitation counsellor states the videotape is “evidence” that the worker “is more functionally capable than he reports to his family physician, Dr. W and Dr. S who is treating him for chronic pain”. In other words, the counsellor is saying that the videotape is evidence that the worker has not been truthful with his doctors. We do not think that is a reasonable inference to make, for the reasons discussed earlier.
- 105) We found the worker’s advocate’s written submissions, particularly with regard to the videotape surveillance information, to be helpful. We encourage more written submissions by the worker’s advocate on appeals.

Conclusions

The worker's appeal is granted and the hearing officer's decision is reversed and varied as follows:

1. The worker is entitled to further rehabilitation assistance under s.30 of the *Act* and in accordance with relevant rehabilitation assistance board policy.
2. Without further training and/or other rehabilitation assistance, the worker is not fit for the two occupations identified as suitable for him: retail salesperson and dispatcher.
3. The board must calculate and provide compensation for the loss of earnings the worker has experienced since benefits were incorrectly terminated on August 11, 2000.
4. Interest shall be paid in accordance with s.19.4 of the Act on compensation payable as a result of our decision. As there is currently no policy in effect under s.19.4, it is unclear at this point how the policy, once passed, will apply to this case.

Dated this **30th day of July, 2001** in the City of Whitehorse, in the Yukon Territory.

Karen Waroway, Member

Heather MacFadgen, Presiding Officer

Jan Stick, Member