

## **Workers' Compensation Appeal Tribunal**

**Decision #**            **22**

**Claim No.:**            **98-1265**

Date of Hearing:        May 31, 2001

Date of Decision:     August 1, 2001

### **Appeal Committee Members**

Presiding Officer:	Janet Wood
Member representative of employers:	Jan Stick
Member representative of workers:	Joe Radwanski

**In attendance:** The Worker  
The Worker's representative – Julie Docherty  
Observer from the Workers' Advocate's office – Michael Winstanley  
Reporter/Recorder - Doug Ayers

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

## Summary for the Reader

**Decision under review:** hearing officer's decision – February 20, 2001

**Sections of *Act* considered or applied by hearing officer:** s.5, 17.(1), 19.5

**Policies considered or applied by hearing officer:** CS-01, CS-02

**Decision made by hearing officer:** The worker recovered from the low back sprain with no permanent impairment.

**Appeal Committee decision summary:** The worker was not fit to return to his pre-injury employment as a long haul truck driver when compensation benefits were terminated in July 2000. The worker remained disabled due to the work injury, and continued to have an impairment of function because of the work injury, when TTD benefits were terminated in July 2000.

**Sections of the *Act* considered or applied by appeal committee:** s.5, 17.(1), 19.4, 19.5

**Policies considered or applied by appeal committee:** CL-30, CL-47

**Issues addressed by appeal committee:**

1. What legislation and policy should be used to determine the worker's entitlement in this appeal?
2. Did the worker have any impairment of function because of the work injury when TTD benefits were terminated in July 2000?

**Decision made by appeal committee:**

1. The board must provide compensation to the worker for his loss of earnings according to section 22 of the *Act* beginning from the date in 2000 when benefits were terminated.
2. Interest shall be paid in accordance with board policy developed under section 19.4 of the current *Act* on compensation payable as a result of our decision. As this policy is not yet developed, it is unclear at this point as to how it will or will not apply to this case.

## Introduction

- 1) By his Notice of Appeal dated March 2, 2001, the worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") hearing officer dated February 20, 2001.
- 2) In the decision under appeal, the hearing officer upheld the July 7, 2000 decision of a board adjudicator to terminate the worker's temporary total disability benefits on the basis that the worker had "recovered from the effects of the injury and had no remaining measurable permanent clinical impairment assessed as a result of the progressive back injury."
- 3) The worker and his representative, the workers' advocate, say that the adjudicator was wrong to terminate benefits because the worker had not recovered from the work related injury.
- 4) The workers' advocate asks that the appeal committee find that in light of evidence prior and subsequent to the hearing officer decision, the worker has a loss of earnings as a result of a work-related disability which prevents him from returning to his pre-accident employment.
- 5) The hearing was held on May 31, 2001 before an appeal committee of the tribunal established by the tribunal chair under section 18.3 (1) of the *Workers' Compensation Act*, 1992, as amended by SY 1999. C.23, s.11 (the "*Act*").
- 6) At the outset of the hearing, the appeal committee determined that it had jurisdiction under section 18.2(a) and 90.(1) (c) of the *Act* to hear the appeal.
- 7) The worker attended the hearing and gave evidence under oath. No one appeared on behalf of the employer.
- 8) The appeal committee considered all of the worker's record on claim provided by the board as well as board policies 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*:
  - CS-01 Treatment;
  - CS-05 Rehabilitation;
  - CS-07 Vocational Rehabilitation;
  - CS-08 Fitness for Employment, Suitable Occupation, Deeming;
  - CL-30 Suspension, Reduction and Termination of Compensation;
  - CL-42 Arising Out Of and In the Course Of Employment, and;
  - CL-47 Pre-existing Conditions.

9) During the hearing, the appeal committee accepted as exhibits:

- Exhibit 1: excerpt from Workers' Compensation in Canada, (2<sup>nd</sup> ed.), Terence Ison, page 21
- Exhibit 2: excerpt from Yukon Workfutures, pp. 398-400
- Exhibit 3: excerpt from Workers' Compensation in Canada, (2<sup>nd</sup> ed.), Terence Ison, pp. 89-90
- Exhibit 4: excerpt from Workers' Compensation in Canada, (2<sup>nd</sup> ed.), Terence Ison, pp. 215-216
- Exhibit 5: excerpt from Workers' Compensation in Canada, (2<sup>nd</sup> ed.), Terence Ison, page 58
- Exhibit 6: WCB Progress note, dated May 2, 2001, by Koltun R.N.

## Issues

1. What legislation and policy should be used to calculate the worker's entitlement in this appeal?
2. Did the worker have any impairment of function because of the work injury when TTD benefits were terminated in July 2000?

## Background

- 10) The worker was employed as a long haul truck driver and injured his back when he was required to drive a truck with a broken seat for several consecutive trips over a three week period in August and September 1998.
- 11) The worker experienced increasing pain and difficulty in straightening after the end of his driving shift and required pain killers and muscle relaxants in order to continue working. In October 1998 he saw his family physician, Dr. Koltun, who diagnosed a low back sprain and related it to the faulty seat. He recommended time off work, prescribed Atasol 30 for pain and referred the worker to physiotherapy with a planned follow-up in two weeks.
- 12) The worker's condition did not improve as expected and he was admitted to the Program Of Work Evaluation and Rehabilitation (POWER) in December 1998, and then in February 1999 to the Gross Clinic in Edmonton for rehabilitation.
- 13) In June 1999 the worker accepted employment as a car salesman, a job which he held for 7 weeks. During the course of his employment as a car salesman his back pain increased progressively and eventually he was required to give up that work and return to TTD benefits.

- 14) In April 2000 the worker was referred to the Columbia Rehabilitation Centre for a 5 week Chronic Pain Program.
- 15) The worker was notified in July 2000 that, based on the medical evidence on file, he had recovered from the effects of the work related injury and did not have any remaining measurable permanent clinical impairment assessed as a result of it. He was advised that his “return to work” date was July 16, 2000 and that at the conclusion of 3 months re-employment assistance commencing on that date his claim would be terminated.

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

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

- 16) We find that the worker was injured arising out of and in the course of his employment as a long haul truck driver in August and September 1998.
- 17) Section 90 of the current *Act*, the “transitional provision”, states “where a worker is entitled to compensation as a result of a disability in . . . March 31, 2000 or earlier, the worker’s entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000.”
- 18) Therefore, we find that the *Worker’s Compensation Act*, SY 1992 as amended up to the date of the injury in 1998 is the legislation to be used to determine the issues of entitlement in this case. Specifically, section 3 of that *Act* says “a worker who suffers a work-related disability is entitled to compensation . . . .” We interpret this to mean that the right to entitlement arises at the time the worker suffers a work-related disability, and in this case it arises in September 1998.
- 19) 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 CS-01 was cited by the hearing officer in his decision. No analysis of how this or any other policies were applied is included in the decision. However, we agree with the board that Policies CL-30 (Suspension, Reduction and Termination of Compensation), and CL-47 (Pre-Existing Conditions) are also relevant to the appeal.
- 20) We will not examine the application of Policies CS-01 (Treatment), CS-05 (Rehabilitation), CS-07 (Vocational Rehabilitation), CS-08 (Fitness for Employment, Suitable Occupation and Deeming) and CL-42 (Arising Out of and

In the Course of Employment) because the issues that they address are not ones that are under appeal.

- 21) Although it was not provided to us as relevant to the appeal, the hearing officer also cited Policy CS-02 (Re-employment Assistance Allowance) in his decision. We will not examine the application of Policy CS-02 as the issue of re-employment assistance is not under appeal.

**Issue #2:** Did the worker have any impairment of function because of the work injury when TTD benefits were terminated in July 2000?

- 22) The hearing officer, in his February 20, 2001 decision concluded:

“I find that the evidence shows that the worker suffered a soft tissue injury, diagnosed by his attending physician as a low back sprain. The low back sprain was superimposed on significant pre-existing conditions. The worker had low back pain prior to the sprain. *The worker had recovered from the sprain by the time of his discharge from the Gross Clinic, March 17, 1999.* Further symptoms are not work related”. [Emphasis added]

- 23) In his analysis the hearing officer relied on the report from the Gross Rehabilitation Centre. Specifically, he stated that “the decision of the treatment team, [at Gross Rehabilitation Centre] that there were no contraindications to the worker returning to his pre-accident truck driving, is convincing evidence that the sprain had resolved”. He further relied on the worker’s return to work as a car salesman as an indication that he had recovered from the back sprain.

- 24) The discharge report from Gross Rehabilitation Clinic, under the heading “Functional tolerances at discharge” states:

“[The worker] was observed to sit for up to 27 minutes with observable shifting...complaints of discomfort following as little as 10 minutes of continuous sitting...observed to sit on a driving simulator at low intensity for up to 10 minutes with increased subjective complaint of pain or discomfort. Whole body vibration while sitting was not well tolerated...

[The worker] was employed as a truck driver at the time of his injury. His limited sitting tolerance and difficulties with tolerating whole body vibration are previously noted. These are critical job demands crucial to [the worker’s] position as a truck driver. ...

[An obus forme] may facilitate a return to work if commuting to and from work is necessary for [the worker]. ... [The worker] also purchased soft insoles which may assist with long-term weight bearing. This may also assist with a return to work if standing is a critical job demand of [the worker's] *new occupation*. *Returning to the truck driving industry may be possible, but should be considered a short-term return to work plan until [the worker] is able to secure employment external to this industry.* [The worker's] functional tolerances at discharge would indicate that he would be appropriate for work up to a medium level of function. *He should likely avoid positions which require long term sitting, whole body vibration, low level lifting and frequent low level work positions.*" [Emphasis added]

25) The discharge summary states:

"At discharge [the worker] is assessed as at a medium level of function...it is determined that there are no contraindications for [the worker] to return to his *former occupation*...*this should be a short term plan while pursuing alternate options.*"[Emphasis added]

26) The adjudicator, in her note to file dated March 18, 1999, states that she received a call from Gross Rehabilitation Centre and was advised that the worker was fit to return to *medium* work, and that "*return to trucking may not be a good long term option for the worker.*" [Emphasis added]

27) We therefore disagree with the hearing officer's finding that the Gross Rehabilitation Clinic found no contraindications to the worker returning to this pre-accident work of truck driving. It seems clear from the discharge report that there were physical limitations to this worker returning to work as a truck driver, and that such work should only be considered on a short term basis while alternate employment was pursued. This was reiterated by telephone contact on discharge.

28) The worker has testified that he accepted employment as a car salesman but found that his pain increased progressively each day. After 7 weeks of work he was no longer able to tolerate the pain, even with the use of painkillers, and was forced to give up that employment. In our view, employment which could only be tolerated for 7 weeks because of increasing pain is not convincing evidence of recovery from his injury.

29) Further, the worker was examined by Dr. D. Vincent, a pain management specialist, on June 28, 1999. Dr. Vincent reports that while the results of a CT

Scan indicate central spinal stenosis which is suspected at multiple levels, the worker's clinical presentation was *more in keeping with mechanical lower back pain*. Based on Dr. Vincent's report the adjudicator reinstated the worker's TTD benefits, which had been terminated in June 1999. It therefore appears that it was accepted by the adjudicator that in June 1999, 3 months after the discharge from the Gross Rehabilitation Clinic, the worker's injury had not fully recovered. [Emphasis added]

- 30) In his July 7, 2000 decision the adjudicator advised the worker that his file had been reviewed by him and by the medical consultant upon receipt of the discharge reports from the Columbia Rehabilitation Centre. The adjudicator went on to say that it was his decision, based on the medical information on file, that the worker had recovered from the affects of the injury and had no remaining measurable permanent clinical impairment assessed as a result of the August 1998 progressive back injury. Although not specifically stated, the inference is that he relied on the Columbia Rehabilitation Centre report in making this determination. It therefore seems apparent that it was not the Gross Rehabilitation Centre's report that was the basis of the July 2000 decision, even though this is the report relied upon by the hearing officer to confirm that decision.
- 31) When the worker was admitted to the Columbia Rehabilitation Clinic in April 2000 the report of Dr. N. Hilliard states "...it is my clinical opinion that [the worker] *presents with mechanical low back pain* with underlying facet joint hypertrophy and central spinal stenosis." [Emphasis added] Thus, it appears that upon admission to this program the affects of the injury were not completely resolved.
- 32) The June 8, 2000 discharge report from Columbia Rehabilitation Clinic states, under "Conclusions":

"From a medical standpoint, [the worker] continues to *have myofascial tension of the lumbar and pelvic muscles*. He has an underlying spinal stenosis *with mechanical back pain*. In all likelihood [the worker] will continue to have aggravation of his conditions should he return to his pre-injury occupation of truck driving. It is recommended he avoid physical activities requiring frequent bending, moderate to heavy lifting, frequent climbing of ladders or walking over irregular surfaces. ... *It is medical opinion that [the worker] is medically restricted from returning to his previous occupation as a Long Haul Truck Driver as his condition would be aggravated to the point of increasing the likelihood of permanent impairment*. [The worker] is medically fit to return to an occupational activity which avoids sustained sitting, frequent

climbing, frequent bending, moderate to heavy lifting, or walking over irregular surfaces. ... {The worker} has the functional ability to sustain work in the light category. ... *Although he improved, [the worker] continues to have adjustment difficulties with respect to pain, a lowered level of functioning, and significant vocational challenges.*” [Emphasis added]

33) We find that the worker was not fit to return to his pre-injury employment as a long haul truck driver when compensation benefits were terminated in July 2000.

34) Policy CL-47 Pre-Existing Conditions, states, in part:

**B. Entitlement To Compensation**

A pre-existing condition may not negate a worker’s entitlement to compensation benefits.

35) Mr. Ison, in his book “Workers’ Compensation in Canada” states on page 58 under the heading “multiple causes of disability”:

“Disabilities commonly result from the interaction of multiple causes....The test is: would the worker be suffering from the disability but for the employment event, exposure, or circumstance?... it is not necessary that the worker’s employment be the *most* significant factor in her ongoing condition; it is sufficient that the employment was *a* significant contributing factor. ... If the employment contributed in a material degree to the disablement or death, it is compensable.”

36) The worker has testified that he was working as a truck driver for several years with no problems, and no significant back pain. He admits to occasional back pain after a long haul, which always resolved by the following morning. He denies taking any medication or painkillers for back pain, although he has taken them for many years for pain in his finger joints. He does concede that these may also have alleviated any concurrent back pain, as they are anti-inflammatory, however reiterated that he has *never* taken any medication for his back prior to the injury in August/September 1998. Nor has he sought medical attention for his back prior to the work injury.

37) The worker refutes the statement by Dr. N. J. Witt in his report of June 14, 1999, that he reported having problems with his lower back for years. The worker testified that the appointment with Dr. Witt was extremely short and that they did not discuss when the worker’s back problems arose. He denies telling Dr. Witt that he had back problems prior to the injury in 1998. He assumes that Dr.

Witt concluded there were long term back problems from reading the March 17, 1999 medical report of Dr. Grade, from the Gross Clinic. Dr. Grade reports that the worker presented with “a history of chronic lower back pain”. The worker testified that he questioned Dr. Grade about why he reported him as having “a history” of back pain when the back pain only arose in August 1998. Dr. Grade replied that since the pain had now continued for more than 6 months, he regarded it as “a history”.

- 38) An x-ray report dated November 18, 1998 reads:

**Lumbosacral Spine**

“Comparison is made to January 7, 1997. Again noted is increased lumbar lordosis. Multiple level spurring is again noted, with some disc space narrowing at L5-S1. Spinous, transverse processes and pedicles are normal”

**Impression**

“... Long-standing degenerative disc disease at L5-S1. Increased lumbar lordosis again noted.”

- 39) An X-ray report dated February 3, 1999 shows “generalized marginal osteophytic lipping throughout the entire thoracic spine. ... *mild disc space narrowing throughout the lumbar spine with marginal osteophytic lipping at L1-L2, L3-L4, L4-L5*. Degenerative changes are present in the lower lumbar apophyseal joints. ...” [Emphasis added]
- 40) The medical consultant, in his January 20, 1999 report, notes the fact of a previous back x-ray and questions the possibility of it being due to clinical problems of back pain. The worker testified that this is not the case; the x-ray was taken to determine the extent of injury to his tailbone after he slipped on ice and fell, landing on his “butt”. The worker further testified that that he only learned of his degenerative condition after the injury at work.
- 41) Although the January 1997 x-ray report is not on file, the subsequent reports identify the worker’s pre-existing condition as “mild” and “marginal”. The worker did not experience symptoms of back pain, other than occasional stiffness at the end of a long trip, prior to his work injury. Until the injury he had no difficulty performing in his job as long haul truck driver.
- 42) We refer again to Dr. Vincent’s report of June 28, 1999, several months after the latest x-ray on file, where he says “His clinical presentation was more in keeping with mechanical low back pain”.

- 43) We refer again to the conclusions presented in the Columbia Rehabilitation Centre's June 8, 2000 discharge report, which state: "From a medical standpoint, [the worker] continues to *have myofascial tension of the lumbar and pelvic muscles*. He has an underlying spinal stenosis *with mechanical back pain*." [Emphasis added]
- 44) We therefore find that although the worker had a pre-existing condition at the time of the injury, it was asymptomatic. It is the work injury that caused the disablement and it is the effects of that injury that prevented the worker from returning to his pre-injury employment in July 2000.
- 45) Policy CL-30, Suspension, Reduction and Termination of Compensation states, in part:

**E. Termination Of Compensation**

A worker's compensation shall be terminated if it is determined that:

4. the 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 assistance benefits.

A worker's compensation may be terminated if the board determines that a worker is fit to return to either their former employment, or alternate employment

- 46) We find that the worker remained disabled due to the work injury, and that he continued to have an impairment of function because of the work injury when TTD benefits were terminated in July 2000.

## Conclusion

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

1. The board must provide compensation to the worker for his loss of earnings according to section 22 of the *Act* beginning from the date in 2000 when benefits were terminated.
2. Interest shall be paid in accordance with board policy developed under section 19.4 of the current *Act* on compensation payable as a result of our decision. As this policy is not yet developed, it is unclear at this point as to how it will or will not apply to this case.

Dated this **1 st** day of **August, 2001** in the City of Whitehorse, in the Yukon Territory.

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Jan Stick, Member representative of employers

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Janet Wood, Presiding Officer

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Joe Radwanski, Member representative of workers