

Workers' Compensation Appeal Tribunal

Decision # **24**

Claim No.: **94-0749**

Date of Hearing: August 30, 2001

Date of Decision: October 29, 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
 Reporter/Recorder - Doug Ayers

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

Summary for the Reader

Decision under review: Hearing Officer decision – July 27, 2000

Sections of Act considered or applied by Hearing Officer: s.5, 17.(1), 19.5, 30, 101.(1)

Policies considered or applied by Hearing Officer: CS-07

Decision made by Hearing Officer: The provisions of Policy CS-07 have been met.

Appeal Committee decision summary:

Sections of the Act considered or applied by appeal committee: s.5, 17.(1), 18.4, 19.4, 19.5, 22, 30, 101.(1)

Policies considered or applied by appeal committee: Policy No. 3

Issue addressed by appeal committee:

1. What legislation and policy should be used to calculate the worker's entitlement in this appeal?
2. Does the worker require vocational assistance as a result of his work injury?

Decision made by appeal committee:

1. The board shall provide literacy training to the worker.
2. The board shall authorize a functional capacity evaluation in order to determine the worker's current ability and shall provide vocational rehabilitation as appropriate based on the results of that evaluation.
3. The board must provide compensation to the worker for his loss of earnings according to section 22 of the *Act* beginning from May 2000, when benefits were terminated.
4. 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

By his Notice of Appeal dated April 3, 2001, the worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") hearing officer dated July 27, 2000.

In the decision under appeal, the hearing officer upheld the May 4, 2000 decision of a board adjudicator that the worker did not require further vocational assistance, and that the provisions of board policy CS-07 had been met.

The worker and his representative, the workers' advocate, say that the worker requires further vocational assistance because the worker is unable to return to his pre-injury employment and he does not have the literacy skills to be employable in other work.

The workers' advocate asks that the appeal committee find that in light of evidence prior and subsequent to the hearing officer's decision, the worker requires vocational assistance in order to become employable, and the requirements of policy CS-07 have not been met. She further requests that compensation benefits be paid retroactively for those periods when the worker was neither employed nor in receipt of wage loss benefits.

The hearing was held on August 30, 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*").

At the outset of the hearing, the appeal committee determined that it had jurisdiction under section 18.2(a) and 90.(1) (c) of the *Act* to hear the appeal.

The worker attended the hearing and gave evidence under oath. No one appeared on behalf of the employer.

The appeal committee considered all of the worker's record on claim provided by the board as well as board policies No. 3 Vocational Rehabilitation, No. 28 Calculation of Loss of Earning Capacity, GC-04 Illiteracy, GC-09 Transitional Clause, CS-02 Re-employment Assistance Allowance, CS-04 Training-On-The-Job, CS-05 Rehabilitation, CS-07 Vocational Rehabilitation, CL-30 Suspension, Reduction and Termination of Compensation, CL-46 Permanent Impairment, also provided by the board, according to section 18.3 (4) of the *Act*.

During the hearing, the appeal committee accepted as exhibits:

Exhibit 1: Pages 398 – 404 and pages 432 & 433, *Yukon Work Futures*
– *A Guide to Work Opportunities*

Exhibit 2: Position Description – Position No. 09-284, Labourer, C&TS Maint.,
Government of the Yukon

Issues

1. What legislation and policy should be used to calculate the worker's entitlement in this appeal?
2. Does the worker require further vocational assistance as a result of his work injury?

Background

- (1) The worker slipped and fell backward, downhill, while working as a labourer in August 1994. He was carrying a chain saw in his right hand and tools in his left hand. He landed with his left hand folded under him.
- (2) After several inconclusive examinations the worker was eventually found, in May 1995, to have sustained a significant tear of his scapholunate ligament, with residual carpal instability. Medical opinion was that only very light use of the hand was possible. A complete wrist fusion or intercarpal fusion was recommended as the only “salvage” procedures available. It was noted that this would permit some wrist movement but would not be effective for pain relief. Surgery for intercarpal fusion was performed in September 1995.
- (3) In November 1995 a Vocational Rehabilitation Counsellor with Voc Aid Disability Management Services reported that the results of vocational testing indicated that the worker’s basic skills were at a grade 1 level in reading and writing and a grade 3 level in mathematics. Literacy training to prepare the worker for a job search was recommended, as was Class 1 driver training in heavy equipment operation.
- (4) In December 1995 the worker was admitted to Program of Work Evaluation and Rehabilitation for Rom, strengthening and ultrasound, and upon discharge continued a home exercise program for mobility and strengthening.
- (5) The worker continued to experience a lot of pain and a complete wrist arthrodesis was performed in May 1997. Then bone grafting was done in March 1998.
- (6) In July 1998 a Return to Work plan was developed. The worker completed a work conditioning program in October 1998 and was released “fit for medium level employment”. Literacy training to Grade 3 level was provided. Class 1 driver training had been provided to the worker during the spring of 1996, but he had not been successful in passing the exam at that time. In October 1998 further driver training was undertaken and he successfully passed the exam in November. A

“training on the job” arrangement was made with an employer in order to provide work experience in the field.

- (7) In May 2000 the worker was advised that he required no further vocational assistance and he was considered capable of earning more than his pre-accident earnings.
- (8) In July 2001 surgery was performed to remove the wrist hardware.

Analysis of the Issues/Reasons

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

- (9) We find that the worker was injured arising out of and in the course of his employment as a labourer in August 1994.
- (10) 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.”
- (11) Therefore, we find that the *Worker’s Compensation Act*, SY 1992 as amended up to the date of the injury in 1994 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 August 1994.
- (12) 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-07 was cited by the IRC in its decision.
- (13) We will not examine the application of Policies No. 28 Calculation of Loss of Earning Capacity, GC-04 Illiteracy, GC-09 Transitional Clause, CS-02 Re-employment Assistance Allowance, CS-04 Training-On-The-Job, CS-05 Rehabilitation, CL-30 Suspension, Reduction and Termination of Compensation, or CL-46, Permanent Impairment, because the issues that they address are not ones that are under appeal.
- (14) Board policies under section 18.3(3) are “binding” on the tribunal: we therefore characterize them as having a “rule-based character with statutory force”. In other words, they are a form of “delegated legislation with statutory force” [see

Newfoundland Supreme Court decision, *DGH Construction Limited v. Newfoundland (Workers' Compensation Commission)* [1997] N.J. No. 53] which held that policies of the Newfoundland Workers' Compensation Commission were more than administrative directions: the Commission's policies were delegated legislation with statutory force. In the Newfoundland legislation considered by the court, the statute provided that the board "shall" make policy, and that the appeal body must apply those policies. These provisions, which formed the basis for the judge finding board policy to have statutory force, are very similar to those in the Yukon legislation.

- (15) Policy No. 3 and Policy CS-07 deal with entitlement to vocational rehabilitation, therefore in our view come within section 90(1)(a) of the *Act* - the transition provision. We interpret this provision to mean that such policies are to be applied as they existed at the time of the workplace injury. Policy CS-07 was not in place at the time of the worker's injury in August 1994; it came into effect in November 1994. Therefore, we have determined that Policy No. 3 is the policy that applies to this claim.

Issue #2: Does the worker require further vocational assistance as a result of his work injury?

- (16) Section 30 of the *Act* states:

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. [Emphasis added]

- (17) Policy No. 3 states, in part:

Vocational Rehabilitation

A full report is required specifying the course or courses to be taken, location, duration and itemized cost. The report should also include the following:

- a) A statement indicating how the family is involved, the financial situation of the family – specifying income and expenditures.
- b) The worker's present formal education level, what other courses have been taken and how successful the worker was.
- c) Have attempts been made to find other suitable employment, if so, what attempts and what were the results?
- d) Has retraining on the job been attempted, if so, what attempts and what results?

- e) A full description of the physical aspects of the job the worker is being trained in. How does the worker's physical disability fit in with the recommended new field of training?
- f) What is the opportunity for employment after re-training?

(18) [The worker] attended a Work Conditioning Program at Work Abilities Ltd. for 10 sessions beginning in August 1998. He was discharged in October 1998. The discharge report states:

“[The worker] ... fit for returning to medium level employment. Although this suggests that he should limit his manual handling to the 50-lb force level, he is capable of manual handling with forces in the medium/heavy range, but only on an infrequent basis...

[The worker] reported that he was going to take a course in truck driving and he is considered capable of this type of employment, providing the requirements for manual handling match his capabilities. He could have difficulty applying tire chains in some circumstances, tying down some loads (e.g. locking/unlocking boomers etc.) loading/unloading heavier objects, but if he is allowed adequate time and given appropriate work aids (e.g. long snipe for boomer operation) he should be successful.

[The worker's] capabilities are considered satisfactory for operating heavy equipment, but he will continue to be limited in performing some maintenance or service tasks associated with this job...

In summary, [The worker's] impairment ... will prevent him from performing some specific jobs as a truck driver or as a heavy equipment operator.

However, his functional capabilities will allow him to work successfully as a truck driver (e.g. gravel truck driver, rock truck driver, long haul pin truck driver, highway maintenance snow plow operator, light courier truck driver), especially if ergonomic aids are made available such as a Jib Crane for hot shot trucking etc. ... For heavy equipment operating, [the worker] could operate loaders, forklifts, packers, rollers, excavators, buggies, etc., but he may have difficulty in some jobs where equipment maintenance tasks are heavier (e.g. changing cutting edges, track pads). These jobs are in the minority as much of this work is generally done by service personnel.”

(19) Subsequent to the worker's discharge from the work conditioning program a Return to Work plan dated October 23, 1998 states as the return to work plan “The goal is for [the worker] to become employable as a class 1 truck driver. ... Functional testing indicates that jobs in truck driving and some jobs in heavy equipment operation are within [the worker's] physical abilities. His literacy skills should not be a barrier. [The worker] has completed the first level of adult literacy training. He reported that he is now considered at the grade 3 level. Further sponsorship is on hold while [the worker] completes class 1 driver training.”

- (20) Policy No. 3 is not specific as to how vocational training will be identified, but Section 30 of the *Act* clearly authorizes “vocational or academic training, deemed appropriate by the board in consultation with the worker”. [Emphasis added]
- (21) A note to file October 28, 1998 from the rehabilitation counsellor states “his limited literacy may be still a problem but there are options that do not require significant amounts of paperwork. Examples include driving truck in the forest industry, oil and gas, water truck and hauling grocery items. This has been agreed upon by the case management team and has been authorized.” No reference is made to any participation in this decision by the worker. Nor is there any record in the file of the requirements of Policy No. 3 having been met.
- (22) According to the worker’s testimony the occupation selected for him by the board is not one that he wants or feels he can safely perform in. He was not consulted on this choice. The worker testified that he did not want to become a truck driver and did so only because the board told him that was what was expected of him. He believed that he could not refuse or he would have his benefits terminated. The worker testified that although he did eventually pass the class 1 driving exam, he does not believe he can perform successfully as a truck driver. He has difficulty pulling brakes and is unable to chain trucks. When shifting gears with his right hand, his left wrist does not have the strength to hold the wheel steady. He had one accident because of this, and on a second occasion came close to driving over a bank for the same reason. He further testified that he does not know why the board chose this occupation for him. His desire was to become a heavy equipment operator. The class 1 driving training was requested in order to make him more marketable to employers, many of whom require heavy equipment operators to have a class 1 license. Furthermore, his illiteracy makes it difficult to complete trip logs, and he is unable to read maps and directions. He believes that his employment options are extremely limited without literacy training.
- (23) In December 1998 the worker entered into a “training-on-the-job” (TOJ) agreement with the board and a transportation company in Edmonton. The board continued to sponsor literacy training 2 evenings per week. The literacy training was intended to last 4 months and the worker would achieve grade 7 level of literacy if fully successful. He was unsuccessful in increasing his literacy skills, partly due to his work schedule and partly due to his need for a more intensive program.
- (24) Although the TOJ agreement was for 4 months, the arrangement ended after only three months due to the worker’s inability to handle tarping requirements, and his inability to move loads around. The worker testified that his wrist pain was constant during the period of this employment. In addition to the pain, the worker

was frustrated by his inability to read maps and by the employer's apparent lack of willingness to ensure that his schedule permitted him to get to his literacy classes.

- (25) Yukon Work Futures describes the activities of motor vehicle and transit drivers and states “ Workers who primarily transport large quantities of goods (long-haul and local truck drivers) must oversee the loading and un-loading of their cargo, and make sure it is safe and secure. They are often required to do some or all of the loading themselves, especially if they are transporting hazardous goods. Long haul driver must report to weigh scales. If they are moving between provinces or into the United States, they must make sure they have all necessary documentation and permits.” Under Education and Training, Yukon Work Futures states “Some secondary school education is a common requirement for motor vehicle drivers, and bus and transit drivers usually need grade 12 or equivalent”. The Education and Training for Heavy Equipment Operators states “There are no educational prerequisites for this type of work in the Yukon, although a high school diploma increases the applicant's chance of being hired.”
- (26) The YTG positions of Heavy Equipment Operator I and Heavy Equipment Operator II require the completion of forms and reports. The YTG position of Transport Driver requires familiarity with several pieces of legislation. These requirements support the worker's argument that his illiteracy hampers his ability to find employment in these fields. In fact, notes and references throughout the file also recognize that the worker's illiteracy will be a barrier to employment. A note to file dated October 5, 1998 states: “...appears that [the worker's] main barrier to employment is his literacy level ... He should have grade 6 to be considered functionally literate.” The appeal committee has assumed that it is this recognition that prompted the board to sponsor the literacy training that it did provide.
- (27) The appeal committee recognizes the efforts the board has made on behalf of this worker. The board has provided vocational rehabilitation benefits to enable the worker to obtain his class 1 license, and to enhance his literacy. However, it is not clear that the worker has been made “employable”. It appears from the October 1998 Work Abilities discharge report that, while the worker was found to be capable of some of the requirements of the jobs identified, there remained restrictions in many situations, and that his success would likely be dependant upon finding an employer willing to make specific accommodations for him. Both the worker and the TOJ employer identified restrictions to the driving jobs this worker can do. The worker has not returned to work as a heavy equipment operator and it is not clear that he would be able to successfully perform in that occupation. It does not appear that the board considered this a viable option for this worker and it is not one they have considered in the Return to Work plans.

- (28) The worker had surgery recently and no assessment has yet been made of the effects of that surgery on his continuing impairment.
- (29) The appeal committee agrees with the worker that his illiteracy is a barrier to employment and considers the extent of the worker's illiteracy a handicap.
- (30) The appeal committee finds that the worker does require vocational assistance to become employable. Specifically, he requires literacy training. Section 30 of the *Act* provides authority for the provision of such assistance as is required to reduce or remove the effect of a handicap.
- (31) The appeal committee also finds that the worker requires an assessment to determine his current functional capacity, and, depending on the results of that assessment, he may require further vocational assistance.

Conclusion

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

1. The board shall provide literacy training to the worker.
2. The board shall authorize a functional capacity evaluation in order to determine the worker's current ability and shall provide vocational rehabilitation as appropriate based on the results of that evaluation.
3. The board must provide compensation to the worker for his loss of earnings according to section 22 of the *Act* beginning from May 2000, when benefits were terminated.
4. 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 **29th** day of **October, 2001** in the City of Whitehorse, in the Yukon Territory.

Jan Stick, Member

Janet Wood, Presiding Officer

Joseph P. Radwanski, Member