

# Workers' Compensation Appeal Tribunal

## Decision # 27

**Claim No.: 96-0576**

Date of Hearing: November 23, 2001

Date of Further Medical Report Received: November 26, 2001

Hearing closed: November 30, 2001

Date of Decision: February 6, 2002

### **Appeal Committee Members appointed under s. 18.3(1) of the *Workers' Compensation Act***

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Donald Inverarity
Member representative of workers:	Karen Waroway

**In attendance:** The Worker  
The Worker's representative – Julie Docherty  
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 dated June 18, 2001.

**Sections of Act considered or applied by hearing officer:** s. 3, 101.(1), 30 of the *Workers' Compensation Act* S.Y. 1992 and ss. 11, 17.(1) of the current *Act*; ss. 22, 23 and 30 of the *Workers' Compensation Act* S.Y. 1992 as amended to July 15, 1996.

**Policies considered or applied by the hearing officer:** none

### **Issues addressed by the hearing officer:**

(1) Whether or not the worker has disability remaining from the work-related neck injury of July 15, 1996, and or the subsequent motor vehicle accident.

### **Decisions made by the hearing officer:**

- (1) The Board is directed to ask the Nova Scotia Workers' Compensation Board to perform a complete medical and vocational assessment of the worker.
- (2) If it is found to be required, the board shall provide appropriate rehabilitation assistance and loss of earning capacity should be considered.
- (3) The worker shall be paid full wage loss benefits from the date the board received Dr. Mahar's report on December 21, 2000.
- (4) Benefits shall continue until such time as the board determines what rehabilitation assistance is appropriate for the worker and provides it to him.
- (5) The board shall pay interest, as a result of the hearing officer's review, if board policy permits.

**Sections of the Act considered or applied by appeal committee:** ss. 22, 23, and 30 of the *Workers' Compensation Act* SY 1992, as amended to July 15, 1996; and s. 18.3, 90.(1)(1.2) of the *Workers' Compensation Act*, as amended by SY 1999, c. 23, s. 11.

**Policies applied or considered by appeal committee:** Policy CS-08, "Fitness for Employment, Suitable Occupation, Deeming" (effective date 94-11-09); Policy CS-07, "Vocational Rehabilitation (effective date 94-11-09); Policy GC-09, "Transitional Clause", effective date 95-03-07; Policy CL-30, "Suspension, Reduction and Termination of Compensation", effective date May 10, 1994; Policy CL-40, "Disability", effective date 93-11-10; and, Policy CL-47, "Pre-existing Conditions", effective date 94-04-01.

### **Issues addressed by appeal committee:**

1. What is the appropriate legislation for review of this appeal?
2. What is the appropriate legislation to use to determine the issues of entitlement in this case?
- 3.(a) Did the hearing officer make an error of fact when he found that the worker was fit for suitable employment when discharged from the Columbia Rehabilitation Centre on December 11, 1998?

- (b) Did the hearing officer err in deciding that benefits should only be reinstated from the date that the board received Dr. M.'s report only?
- (c) If so, is the worker entitled to further compensation?

**Decisions made by the appeal committee:**

1. The worker has suffered and continues to suffer work-related disability as a result of injuries received at work on July 15, 1996 while operating a Euclid ore truck and also on August 26, 1996 in the subsequent car accident.
2. The board must retroactively provide the worker with compensation for loss of earnings in accordance with sections 22 and 23 of the *Act* (as it was in force in July 1996) from the date such benefits were terminated (and excluding any period of time benefits were temporarily resumed while the worker received treatment).
3. The board must ensure, through arrangements with the Nova Scotia Workers' Compensation Board or such other service provider as the board sees fit, that the worker receives a vocational assessment as soon as possible.
4. The board must also provide appropriate rehabilitation assistance to the worker in accordance with section 30 of the *Act*, taking into consideration the results of the vocational assessment.

## Introduction

This is an appeal by a worker injured in two work-related accidents - - one in July of 1996 and a subsequent motor vehicle accident in August 1996. At the time of the first accident, he was driving a "Euclid" 170-ton truck, hauling ore at a mine site. In the second accident, he was a passenger in car driven by his wife while in Whitehorse undergoing physiotherapy treatments for his first injury.

By his notice of appeal dated September 21, 2001 (received in the tribunal office October 1, 2001) the worker appeals the decision of the Workers' Compensation Health and Safety Board (the "board") hearing officer dated June 18, 2001.

The hearing officer varied the adjudicator's decision to terminate benefits by retroactively reinstating benefits from December 21, 2000 to the present. The workers' advocate seeks further retroactive benefits from January 1, 1998 to December 21, 2000 except for a brief period when the worker attended a six-week chronic pain treatment in November and December of 1998. (During this treatment, benefits were temporarily reinstated.)

The worker attended the oral hearing and gave evidence under oath. He was represented by the deputy workers' advocate. The accident employer is no longer operational and did not attend or participate. The proceedings were recorded.

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

- GC-09, Transitional Clause, effective date 95-03-07;
- CS- 08, Fitness for Employment, effective date 94-11-09;
- CL-30, Suspension, Reduction and Termination of Compensation, effective date May 10, 1994;
- CL-40, Disability, effective date 93-11-10; and,
- CL-47, Pre-existing Conditions, effective date 94-04-01.

We point out that none of these policies were considered by the hearing officer in his June 2001 decision. At the outset of the hearing, the appeal committee determined that it had jurisdiction under section 18.4(1) of the *Act* to hear the appeal.

The following exhibits were entered in evidence at the hearing.

Exhibit A – 6 photographs provided and identified by the worker as photographs of Euclid trucks he operated as well as of his personal vehicle after the 1996 car accident.

Exhibit B - Dr. Mahar's report dated 04 May 2001

## **Evidence from the Record and Hearing**

The appeal committee has added some comments in square brackets in this review of the evidence, where we felt it would be helpful to the reader. Detailed analysis of this evidence is in the subsequent “issues” section of these reasons.

### *The Earlier Accidents on September 8, 1995 and January 2, 1996*

- (1) The worker’s record contains the employer’s occurrence reports. These are internal company safety reports, different from an employer’s report of injury to the board. These reports provide details on a September 8, 1995 accident in which an overhang at the workplace of the mine broke off and landed in the tailbox of the worker’s truck, while the shovel operator was loading. It reports the worker’s injuries as bruising/abrasion/stiffness and says that on impact the worker “was severely bounced around inside” the cab of his truck. It also reports damage to the truck as follows: box cracked, engine mount failed; hydraulic pump valve split; strut broke, engine damage.
- (2) The second occurrence report is of an accident dated January 2, 1996. It says the worker’s truck was “side loaded” [load not balanced] which caused the truck to travel across the winter haul road to a berm [a ledge or shoulder made of earth]. It says the operator had to “exert himself to keep the truck in line”. It says the worker finished hauling the load, hauled another load and then reported to his shifter [supervisor] that he needed medical attention because his “left clavicle, in the area of a previous injury, was swelling and sore”. Lastly, the report notes that Dr. F. recorded this accident as a “re-injury” and the worker returned to work on modified duty. [Emphasis added.]
- (3) These accidents are not the subject of the claim giving rise to this appeal. However, we note here that the record of them in this claim file indicates reports of prior injury to the area of the worker’s body injured in the first accidents giving rise to this appeal.

### *The July 1996 Accident at the Mine Site*

- (4) In the Worker’s Report of Injury/Illness dated July 25, 1996, he states he injured his left clavicle and neck on July 15, 1996 while operating a Euclid – haul truck. The report states the worker was “driving in rev[erse] when rear tires hit soft ground, [he] made [a] quick move to put in forward [and] aggravated left shoulder.” The worker states that he “obtained [an] ice pack to use for [the] remainder of the shift.” The report states the worker earned \$19.28 per hour for four 12-hour shifts (4 off) and that he was employed as a truck driver on a permanent basis. Under “Additional Information” the worker has checked “yes” in answer to the question, “Have you had a similar injury before?” [Emphasis added.]

- (5) The Employer's Report of Injury dated July 25, 1996 is signed by the safety clerk. It states that the worker injured his left clavicle and neck on July 15, 1996, while operating a "Euclid – 170T truck". He was "driving in reverse when rear tires hit soft ground, pt. made quick moves to put in forward and aggravated left shoulder."
- (6) The first Doctor's Progress Report by Dr. F. is dated July 16, 1996. He states: "neck range of motion good except left rotation and left lateral flexion; tender left scalenes and left sternomastoid. Diagnosis is "exacerbation of cervical muscular strain" with a treatment plan that the worker should "consider lighter job for 1-2 months". [Emphasis added.]
- (7) On July 25, 1996 Dr. F. reports that the worker complains of "continuing pain left neck, despite rest and light duty at work in 'modified' work program." There is no change "since exam of 96 Jul 16." The doctor suggests that the worker see Dr. S.
- (8) The adjudicator writes a letter to the worker on July 26, 1996 under a different claim number which states, "It is noted that you suffered another injury similar to the above [on January 2, 1996], as we discussed on the telephone [July 1996 workplace injury] this is being treated as a new claim." [Emphasis added; no written explanation of why the injury is treated as a new claim rather than a recurrence claim.]
- (9) Dr. F. reports on August 1, 1996 that the worker complains of "continuing pain [in his] neck and left shoulder". The worker has had two acupuncture treatments from Dr. S. with "good result" and two more are planned. Dr. F. advises that the worker should "continue on light duty until mid-October" and reports he counselled him on "future occupational abilities". [Emphasis added.]
- (10) Dr. F's Progress Report dated July 30, 1996 states that the worker is unlikely to return to his pre-accident job and has physical limitations for lifting up to 5 to 10 pounds with his left arm and for any strain on left neck and shoulder girdle. Dr. F. also writes the worker's employer on August 4, 1996. He states, "Realistically, the probability is low that [the worker] will ever return to driving large trucks without periodic recurrence of his disability. . . . Specifically, any activity where he might be shaken violently, or that involves hard straining with either arm is likely to give him trouble. . . ." Dr. F. recommends giving the worker alternate work and offers to comment on "suitability" if the employer provides a detailed job description for alternate work. [Emphasis added.]
- (11) On August 6, 1996, Dr. S. reports on reduced range of motion with less "swelling" with particular emphasis on the *scalene* muscles. [We note: the posterior triangle of the neck is crossed by important vessels/nerves to the upper limb. Its posterior border is the trapezius muscle; its anterior border is the

sternocleidomastoid muscle; and its base is the clavicle. Muscles of this region arise from the skull and cervical vertebrae and head for the ribs (scalenes), scapula (omohyoid, levator scapulae) and the cervical/thoracic vertebral spines from *The Anatomy Colouring Book*, 1997 by Kapit, W. and Elson, L.M., 1997]. Dr. S. suggests the worker would benefit from physiotherapy and a program of home stretching.

- (12) On August 8, 1996, Dr. F. reports “neck pain improved since acupuncture and physiotherapy . . . continue with home physio regime . . . fit for light work only”. He also says, “at present it seems unlikely he will ever return to his former work, a haul-truck driver”. [Emphasis added.]
- (13) On August 14, 1996, Dr. F. reports, “now pain free; ‘just stiffness’ . . no further dry needling required . . .”
- (14) On August 15, 1996, Dr. C. reports, “no longer has left neck pain but notes ongoing stiffness and muscle spasms left neck; full range of motion . . . to see Dr. S. for acupuncture Aug 27/96 physiotherapist Aug 26, 27; continue with light duty”. Under “specify physical limitations”, Dr. C. reports, “left arm weak and possible long term damage to left neck muscles”. [Emphasis added.]
- (15) On August 23, 1996 a physiotherapist reports on four treatments beginning August 6, 1996 with “good pain relief and improved function”.
- (16) The final physiotherapy report for the August 26, 1996 session says under “objective findings” that there is still slightly decreased range of motion with pain reproduced and ongoing articular restriction.

#### *The August 1996 Motor Vehicle Accident*

- (17) On August 26, 1996, the worker is involved in a motor vehicle accident just minutes after he attends a physiotherapy session in Whitehorse. Eventually, in decisions not under review here, the board accepts this accident as work-related due to an application of policy and law which also need not be reviewed here.
- (18) The board receives x-ray reports [in August of 1998] dated August/September of 1996 which relate to the motor vehicle accident. The worker was admitted to the hospital on the afternoon of August 26, 1996, the day of the accident, complaining of mid-back pain. The worker is discharged on September 8, 1996 with a discharge diagnosis of multiple contusions secondary to the motor vehicle accident and secondary diagnosis of rib fractures and a small pleural [lung] effusion. The discharge report notes the worker sustained a neck injury “almost 1 year ago in an industrial related accident while driving a large ore truck”.

- (19) In x-ray reports dated August 26 and 28, 1996 of the lumbosacral spine – multiple views, chest – single AP portable supine view, dorsal spine – two views, and dorsal spine tomograms; and chest and ribs – multiple views there is marked generalized lipping of the upper lumbar vertebral bodies and some degenerative change present in the lumbosacral spine. Chest x-ray does not show a defined fracture in the visualized parts of the rib cage. X-ray of the dorsal spine shows mid dorsal kyphosis with degenerative lipping with no fracture or compression. The chest and rib x-ray reports say “clearly defined fractures of the left sixth and seventh ribs posteriorly.” The ribs below are not seen but there is a “probable right-sided fracture at this level”.
- (20) The adjudicator’s notes to file dated August 30, 1996 say that the worker’s wife came to the board office and explained that the worker had good results from his treatment (presumably this means the physiotherapy for the mine accident injury). She also said that the worker would be in the hospital until at least September 3, 1996. She said she was concerned about him as he had success with the treatment and his shoulder seems to be “swollen” again. [Emphasis added.]
- (21) On October 16, 1996 the adjudicator writes the worker saying that the worker’s claim is at finality and has been closed because [at this point] the motor vehicle accident injuries are not considered arising out of and in the course of employment. Initial accident x-ray reports indicate numerous rib fractures.
- (22) A note to file dated January 8, 1997 says the worker reports his shoulder is swollen and he can’t work. The note also states he was prevented from training as a drill operator because of injuries from the non-compensable motor vehicle accident in August 1996.
- (23) A report on x-rays done January 12, 1997 (received January 30, 1997) says that some of the rib fractures from the car accident have not healed completely but a delayed healing of rib fractures is not unusual when they are so widespread. (The report says that all ribs from the second to the 11<sup>th</sup> are fractured – some on both sides.)
- (24) On January 17, 1997 the worker’s union writes the board requesting his claim be reopened as he “appears to have permanent injuries which will not allow him to return to his job as a production truck driver”.
- (25) On January 20, 1997 the rehabilitation counsellor asks the medical consultant to review the file and answer these questions: Does medical reporting indicate that [the worker] had recovered from his muscle strain. There are other types of equipment that are not as jarring to operate as the large rock trucks. Would another type of equipment be more suitable? Would a functional capacity evaluation be necessary to determine if there are limitations with regard to driving abilities?

- (26) An x-ray report, almost five months after the car accident, dated January 21, 1997 states that the ribs are still healing but some fractures persist.
- (27) A January 27, 1997 note to file says the adjudicator wants Client Services to comment on the worker's employability and the medical consultant to comment on "outcome" had the worker not been involved in the car accident. The note reports that the worker says he has recovered from the car accident injuries and is ready to return to work but feels he cannot drive the truck anymore.
- (28) On January 31, 1997 Dr. F. reports that the worker suffers from right posterior chest pain and there is poor healing in two right rib fractures. He also remarks that although healing of rib fractures is delayed, when healing does occur, there should be no permanent disability due to this injury. Lastly, he specifies the worker's functional capacities preclude lifting, carrying and bending and he lists as "restrictions" that the worker has "chest pain on light exertion".
- (29) On February 7, 1997, Dr. F. reports the worker still complains of pain in his left neck, shoulder and upper arm as well as pain and swelling on the left side of his neck after 30 minutes of driving. Dr. F. on examination states there is a "full range of motion [in the neck and shoulder]; no objective motor or sensory or reflex deficit; tender scalene muscles left neck- no objective swelling." The doctor reports that "[the worker's] neck and left shoulder condition is stable, and unlikely to improve. He is fit for sedentary employment only." [Emphasis added.] [Note: this report is received by the board February 26, 1997 after the medical consultant's report February 18, 1997 set out at para. 31 below.]
- (30) On February 13, 1997 the employer calls the board to advise there are alternative work possibilities such as bus driver and pit utility worker.
- (31) On February 18, 1997 the medical consultant reports on his review of the worker's file as follows. He says the worker has been a truck driver for 25 years. He notes that a September 12, 1995 x-ray shows degenerative changes in the worker's cervical spine. He reviews the September 11, 1995 accident injuries and notes the worker was fit to return to work on October 2, 1995. The medical consultant notes the worker continues to work but in November 1995 his doctor reported some difficulty with rotation of his neck which was improving. Dr. F. then reports on July 2, 1996 that the worker had no further symptoms and was fit for full duties with no physical limitations. That same month (July 14, 1996) the worker turned his neck suddenly to the left and then had difficulty with rotation to the left in his neck which Dr. F. diagnosed as a strain. The worker did modified work and received acupuncture from Dr. S. and physiotherapy treatment. The last two treating physicians noted that it was unlikely the worker could return to his pre-accident work of haul truck driving. The medical consultant reviews the x-ray reports from the car accident in August 1996. He then states as his impression that the worker received two soft tissue injuries at work which were superimposed on underlying osteoarthritis of the cervical spine [neck area] facet joints. He says

the underlying condition “typically” results in decreased range of motion in the cervical spine and that resultant stiffness makes it difficult for someone to turn their head quickly. He says this predisposes to acute muscle spasm and that is what occurred in the July 1996 accident. He says the claim should be considered an exacerbation of a pre-existing condition. [Note: There is no evidence in the file of reduced range of motion and stiffness prior to the September 1995 work-related injury and the evidence of Dr. F. is that on recovery from these injuries and by July 2, 1996 there is full range of motion which indicates no symptoms from the underlying condition just before the July 26, 1996 accident.]

- (32) In addition, he agrees with the worker’s physician that the worker should avoid the bouncing and twisting that occurs as a haul truck driver. However, he believes that the major problem is the underlying osteoarthritic changes in the facet joints. He says degenerative changes in the spine are quite common and do not always lead to pain. However osteoarthritis changes in the facet joints generally limit rotation and this produces difficulties for drivers particularly when they need to do a shoulder check for backing up. [Note: the medical consultant writes his report after reviewing the file, without examining the worker. Osteoarthritic changes have not been identified as the cause of the worker’s disability/restrictions by other doctors.]
- (33) The medical consultant says, based on the medical information available, it appears that the worker had recovered to the pre-incident state, recognizing that there is a pre-existing osteoarthritis of the facet joints in the cervical spine. He says this can produce a permanent impairment but he cannot relate it to either of the two incidents that occurred at work. The medical consultant also says he cannot comment on the worker’s ability to return to work as this would primarily be related to his motor vehicle accident. [Note: at this time the board did not recognize the car accident as compensable - - this decision changed later in the claim.]
- (34) A note to file dated February 27, 1997 documents a mine shut down (no date) and says that based on the medical consultant’s report the worker’s claim will not be reopened. A letter to the worker the same day advises him of this decision and explains that medical opinion says he has recovered from the compensable muscle strain and any ongoing impairment is due to pre-existing osteoarthritis.
- (35) Dr. F.’s next report is dated August 14, 1997. It states that the worker continues to have persistent pain in his left neck and shoulder and advises that the worker should “avoid strenuous labour”. As part of his findings on the objective examination, he reports swelling at the left supraclavicular fossa. He also reports full range of motion in the worker’s neck [Emphasis added. We note this finding here because of the medical consultant’s statement (see para. 31) that osteoarthritic changes generally limit rotation.]

- (36) A rationale by the adjudicator, undated, states, “[The worker] was considered fit to return to his pre-accident employment on August 26, 1997” [typing error - should be 1996] and that he is not entitled to “any rehabilitation”. The adjudicator repeats the medical consultant’s general statement about osteoarthritis limiting neck rotation and then finds that the worker’s pre-existing arthritic condition limited his ability to perform the duties of a rock truck driver. The adjudicator also reports that the worker’s employer had offered him training as a drill operator. [Note: This training was not part of a board rehabilitation plan and was cancelled due to the worker’s motor vehicle accident.]
- (37) On September 3, 1997 the nurse at the worker’s community nursing station writes the board providing details of the car accident - - that it occurred just after a physiotherapy session arranged by the board as part of the worker’s rehabilitation. Because of the accident he was unable to attend the second day of scheduled physiotherapy.
- (38) On September 16, 1997 the medical consultant writes a report to the Internal Review Committee responsible for the worker’s appeal. [The file does not indicate what questions the medical consultant was asked to answer.] He prefaces his report as being general information only and not specific to the worker’s individual claim. Much of the report provides information from the “American College of Occupation and Environmental Medicine’s 1997 Occupational Medicine Practice Guidelines – Evaluation and Management of Common Health Problems” as follows. Cervical strain normally disables a person for 5 – 7 days. There are three types of neck disorders - - (1) fractures/dislocations/tumours; (2) osteoarthritis and degenerative disc disease; and, (3) “non specific disorders . . . with unclear etiology” such as neck pain and shoulder pain. If an underlying condition is aggravated at work the course of pain and activity limitation should be documented and the goal should be restoring prior activity levels. *When the goal is reached, if ever, the effects of the aggravation can be said to have ceased and cure of the work-related injury to have been accomplished.* [Emphasis added: we note there is no evidence that this goal has been reached in this worker’s case at the time of the medical consultant’s report to the IRC.] The medical consultant also says that if recovery is delayed, non-physical factors should be investigated and addressed. [We note there is no evidence in the file of such an investigation at this time.]
- (39) In addition, the medical consultant notes that under the *American Medical Association Guides to Evaluation of Permanent Impairment* [4<sup>th</sup> edition] that pain alone is not sufficient to create permanent impairment because it is not objectively measurable. In conclusion, the medical consultant states soft tissue injuries usually heal uneventfully [Note: he does not state that this worker’s soft tissue injuries have healed] and he repeats the point that when a patient’s prior activity levels are restored this indicates a cure [Note: he does not state this worker’s prior activity levels are restored - - in fact he quotes Dr. F. in the report as stating that the worker is only at a sedentary activity level.] The medical consultant then

repeats the point that delayed recovery means non-physical factors should be addressed. [However, the medical consultant does not recommend this be investigated.] Then he concludes “this worker would not have any measurable impairment of function as a result of his work-related injury”. [This conclusion is not explained.]

*An October 28, 1997 IRC Decision - - [not on appeal here]*

- (40) The Internal Review Committee decides on October 28, 1997 that just prior to the car accident the worker had improved with treatment, was pain free with full range of motion and was about to undergo retraining for alternate work. [But see the physiotherapy report to the contrary at para.16 from the treatment session just prior to the accident.] The committee concludes that if the car accident had not occurred he would have returned to work and retrained [as a drill operator]: he would have recovered from the aggravation. Therefore, any ongoing difficulties are not the result of the July 1996 workplace injury. The committee upholds the adjudicator’s decision to deny entitlement.
- (41) The appeal committee notes here: no consideration seems to have been given to two things: (1) that the worker’s treating physician and the medical consultant had advised against vibrating/bouncing work including his pre-accident work and (2) that the car accident may have affected an almost healed, but still vulnerable injury area. In this regard there was a report of swelling in the July 1996 injury area just after the August 26, 1996 car accident. However, as noted earlier, this IRC decision is not under review here.
- (42) Two x-ray reports dated December 5, 1997 of the chest and dorsal spine state that there is calcified granulomata present bilaterally in the chest and right ribs and that spinal curvature is unremarkable with disc spaces being well maintained.
- (43) On December 23, 1997 Dr. F. refers the worker to two physicians [both surgeons] asking for assessment and suggestions with respect to continuing chest pain.
- (44) The worker claims for long term disability benefits from a private insurer. Further medical information is requested from Dr. F. who responds on December 23, 1997. Dr. F. reports that the worker’s persistent right lower posterior chest pain on exertion with tenderness in the same area prevents the worker from returning to his own occupation. Dr. F. says that the worker has been on a program of deep breathing, stretching and aerobic exercise, but finds the pain prevents much exercise. The worker was referred to a surgeon but at the time of the inquiry, no reports had been received from the surgeon. In answer to Dr. F.’s prognosis for a return to work, he states that the worker’s prolonged recovery is “a mystery” and suggests that Dr. T. will be able to cast some useful light on the process.

- (45) On December 31, 1997 the board requests details of the car accident from the Justice Department and begins consideration of how Policy CL-27, "Arising out of Travel" might apply to this worker. On the same date the worker is asked further details about the car accident.
- (46) On January 8, 1998 Dr. T. responds to Dr. F. He cannot explain why the worker's pain persists and suggests acupuncture and massage therapy might help but not surgery. Dr. T. also says x-rays of the worker's spine are within normal range for a man his age, with some osteophytic bridging. He reports limited range of motion in the worker's neck as well as pain in the worker's chest on the right side.
- (47) Dr. F. reassesses the worker on March 17, 1998. He reports that the worker continues to complain of pain in his left shoulder on the slightest exertion and also swelling on the left side of his neck and above his clavicle bone. Dr. F. reports there has been no change in symptoms for the past year. Dr. F. suggests that (1) the worker be given the benefit of the doubt and considered completely disabled [presumably from his pre-accident work] and (2) that an independent assessment of the worker's vocational disability be done preferably by a specialist in rehabilitation medicine.
- (48) On March 17, 1998 the adjudicator writes the worker saying the board cannot accept responsibility or liability for the car accident, or the injuries arising from it. The worker appeals the adjudicator's decision to the IRC.
- (49) On July 27, 1998 the IRC reverses the adjudicator's decision. The IRC finds that the "disability arising from the motor vehicle accident . . . is disability arising out of and in the course of employment."
- (50) The worker is sent for a Functional Capacity Evaluation ("FCE") on August 25 and 26, 1998. The report states that the results of the FCE are self-limited by the worker and are not reflective of his true physical abilities at the present time as well as his future potential. The therapists who do the evaluation suggest that the chronic pain symptoms present should be dealt with promptly and appropriately as they are solidly being ingrained at the current time. They say that despite the self-limiting behaviour that was observed at the assessment, there are a number of things that the worker could actively participate in to improve his physical and functional status. Overall range, strength and endurance are reduced but there is room for improvement - - general deconditioning is noted "as likely due to the past two years of managing and dealing with his symptoms".

The therapists report that the worker's current physical limitations led them to identify two functional contraindications - low level work below ten inches or overhead work. These are due to range and strength limitations in his shoulder and left ankle.

No formal job descriptions were explored by the FCE because none were provided. The summary report recommends the worker receive chronic pain treatment and that he learn how to use accessory muscle groups for tasks involving movement. [We note here that the FCE does not conclude that the worker would be able or unable to do his pre-accident work.]

- (51) The medical consultant's reports on September 15, 1998 that there is no evidence of any measurable permanent functional impairment as a result of the two injuries. He states that the current limitations appear to be due to pain behaviour and possibly to osteoarthritic changes in the cervical spine which are not related to the accidents. He states that there is little further treatment to be offered for the chronic pain other than consideration of treatment at a chronic pain centre. He also reports that the functional capacity evaluation suggests that the worker might be fit for returning to work as a truck driver, possibly with some modifications to accommodate the osteoarthritis in his neck. [Emphasis added - - this is not explained or referenced to any specific findings in the FCE.]
- (52) In a note to file dated 1998-10-06 the adjudicator says that the worker was examined by his family physician and has requested an MRI. His doctor does not support the request, but would support attendance at a pain management clinic.
- (53) The worker attends the Columbia Rehabilitation Centre for admission to the Pain Rehabilitation – II program on November 2, 1998. The rehabilitation plan states, “The worker was assessed for admission to the Pain Rehabilitation – II Program at the Columbia Centre on November 2, 1998, and admitted to the program on November 3, 1998, with an admitting diagnosis of recurrent soft tissue injury to the cervical area and left shoulder and multiple rib fractures resulting in chronic pain exacerbated by increased activity.”
- (54) The FCE summary [done at Columbia] dated December 9, 1998 reports that the worker developed an upper respiratory infection during the program and as a result lost time from his treatment program. This contributed to his ongoing complaint of pain in the right lateral thoracic region because of coughing. The report states that the worker was very pain focused during the FCE and reported pain in both the left anterior neck region and right low back. He walked with a limp during the one-handed carry tasks. He self-limited on all tasks attempted and would not attempt the final three tasks. He became increasingly irritable towards the end of the FCE, and was adamant that he could not continue the FCE because the “pain was worse than anyone could imagine”.

Further, the report states that the worker's heart rate response did not indicate that he reached physiological maximum on any of the attempted lifts. Since the worker was unable to reach physiological maximums he could not be assigned a functional rating as defined by the Canadian Classification and Dictionary of Occupations (CCDO).

(55) The Columbia Rehabilitation Centre Pain Rehabilitation – II Program Discharge Report dated January 9, 1999 report says:

- [The worker] has had multiple soft tissue injuries to the neck, shoulder and low back area. He had multiple rib fractures which were slow to heal with residual pain with movement. [The worker] has radiological evidence of cervical disc disease with facet joint osteoarthritis.
- [The worker] is capable of returning to work activities where there is limited upper extremity torque required and working in a capacity where there is limited whole body vibration.
- It is believed that [the worker] has the ability to progress from his present demonstrated sedentary abilities to light duty activities with commitment to ongoing conditioning and use of pacing and body awareness. A modified F.C.E. carried out on December 9, 1998, following a week of cold symptoms demonstrated very poor functional abilities in the low/sedentary category. An accurate rating as per the C.C.D.O. could not be assigned due to his self limiting pain behaviour and the fact that he did not reach physiological maximums on any of the attempted lifts. . . . [Emphasis added.]

(56) The worker appeals to the IRC the adjudicator's decisions dated October 1, 1998 and January 28, 1999. The issue at appeal is, "whether or not the worker was disabled from his pre-accident work on January 28, 1999". The IRC decision is dated September 15, 1999. It concludes that the evidence shows the worker recovered from the rib fractures sustained in the motor vehicle accident of August 26, 1996. The IRC says it has no opinion regarding the worker's fitness for pre-accident employment as he has no remaining work-related disability and thus no entitlement to vocational rehabilitation. The IRC states that the evidence shows the worker has a degenerative condition in the cervical spine, which might limit his physical capacities. The appeal is denied.

(57) On January 28, 2000 the workers' advocate submits Dr. F.'s report of July 30, 1998. Dr. F.'s report attributes the worker's disablement to persistent right lower posterior chest pain following the motor vehicle accident. He also states the date when the worker will be able to return to work is "unknown."

(58) On February 22, 2000 Dr. d'E. reports that the worker is still experiencing constant daily pain aggravated by any movement of the left arm and shoulder and he is "unfit" to go back to his job of haul-truck driver. He says this is because the worker cannot lift above his shoulders or extend his left arm above 90 degrees, such as required in climbing ladders [to get in to his Euclid truck] or extending his arm as needed while driving the heavy rig at the mine. The doctor recommends physiotherapy. This doctor is a new treating physician, after the worker moves to Nova Scotia.

- (59) Dr. d'E. reports on March 7, 2000 that the worker is also experiencing pain in the right lower rib cage secondary to the residual pain from rib fractures suffered in the motor vehicle accident of August 25, 1996.
- (60) In a letter to the workers' advocate from the adjudicator dated March 13, 2000 she notifies him she had considered the medical report prepared by Dr. F. on July 30, 1998 in support of entitlement to compensation for the period February 1, 1998 to and including July 30, 1998. She states that Dr. F. reported that the worker was unable to work because of chest pain. She cannot relate this chest pain to injuries received in the motor vehicle accident and states that the evidence does not support entitlement to compensation.
- (61) A physiotherapy report – assessment summary, dated May 19, 2000, suggests treatment in the form of exercises and back education and states that the worker was given home exercises to promote muscle lengthening and trunk strengthening. The physiotherapist says the worker needs to increase flexibility despite pain over the next 1-2 months.
- (62) On May 30, 2000 Dr. d'E. reports a diagnosis of right lower rib cage strain, musculotendinous -- prognosis for recovery is somewhat guarded mainly due to the length of history. The doctor says he is hopeful that with physiotherapy the worker will get close to 100% recovery of functional abilities although there could be some "10% permanent disability". He also reports that an area like this is always prone to re-injury and that the worker's left shoulder injury is contributing to the overall stiffness of his torso and could be contributing to the persistent right chest wall stiffness and pain.
- (63) On June 12, 2000 the medical consultant provides his opinion on Dr. d'E.'s report. He says that the current diagnosis appears to be a right lower rib cage strain, musculotendinous. It suggests to the medical consultant some acute type of injury which he finds "really impossible to relate to healed rib fractures from 1996". He says he is unable to come to the same conclusion as Dr. d'E. regarding the possibility of a 10% permanent disability because this requires objective evidence of a functional impairment for which there is limited medical evidence in the report Dr. d'E provided.

*Rehabilitation and Physical Medicine Specialist - - Dr. M.'s Reports and Other Concurrent Treatment Reports*

- (64) Dr. M. is a specialist in physical medicine and rehabilitation and is the co-director of MLH Whiplash Associated Disorders Clinic and Director of the Canadian Paraplegic Association, Nova Scotia Division as well as a lecturer for the Department of Medicine, Dalhousie University from 1987 to 1998. His recent presentations include one to the Workers' Compensation Board of Nova Scotia on

“Musculoskeletal Impairment and Disability, Evaluation” and “Assessing Chronic Pain and Disability” for the Canadian Bar Association, Nova Scotia.

- (65) On November 10, 2000 Dr. M. provides a history of the worker’s injuries, a review of medical records, past medical, family, social history and review of organ systems and a discussion of diagnosis and related issues. He says that he finds it difficult to understand the nature of this injury. It manifests itself as a soft tissue injury, as x-rays in the past revealed no evidence of a fracture, with tenderness, restriction of range, reduced strength (pain inhibited) and is associated with objective swelling in the left anterior triangle (the region above the collarbone). Dr. M. attests that this swelling increased during the physical examination: that is an increase from that which was detected on inspection at the start of the examination and that which was detected on inspection at the end of the examination following assessing range of motion and strength. He says this finding [objective] is most commonly associated with the scalene muscles which are small muscles which attach to the inner aspect of the collarbone and the other attachment is at the upper cervical spine (vertebral bodies 2, 3, and 4). It is not possible to objectively evaluate these muscles with imaging studies as muscular injuries of this nature are not apparent on such studies. Dr. M. is not able to detect on physical examination why the worker has pain which persists to this degree at a point 50 months following the motor vehicle accident. He acknowledges that there may be some hypomobility or restriction in the posterior chest wall and this would be a common concomitant in most individuals who had fracture to this extent. [Emphasis added.] He adds that he is unaware as to whether the worker currently meets the qualifications to perform sedentary type of work such as supervisory/monitoring security work but feels that the ability to perform this work would be within “his residual functional capacity” after a course of treatment. He goes on to recommend a number of treatments such as anti-inflammatory medication, specific types of physical therapy, and exploration of adjunctive pain control with acupuncture and TENS.
- (66) Dr. M. also reports that he accepts that an injury of this magnitude could, and did, produce a chronic right mechanical chest wall pain although there are no objective findings on examination (findings which are outside the control of the examinee) which would corroborate or refute this opinion. He finds an internal consistency between the history of injury provided by the worker, current symptoms and physical examination. Dr. M. also states that there has been a degree of deconditioning and this would be consistent with the worker’s description of a very sedentary lifestyle over the last five years. Dr. M. finds no evidence to indicate that the worker is totally disabled for all forms of employment. He also states that barriers to return to work exist. These are defined as issues outside any recognized defined medical impairment and resultant physical disability and include:
- a. his age;
  - b. he has not performed security sedentary work for several years;
  - c. he has not worked for 5 years;

d. he has no job to which he can return at this time.

- (67) On January 15, 2001 Dr. M. writes a letter to the worker's lawyer. He comments on Dr. T.s' reports dated May 29, 1996 and January 8, 1998. He states that the reports would be consistent with the history and subjective report of the worker which was provided to Dr. M. In addition, it is Dr. M.'s understanding from reviewing Dr. T.'s report is that the worker was left with an injury to the left anterior and lateral neck following the occupational injury in 1995. Dr. T. reported symptoms and restriction on lateral bending to the right and on shoulder movements. Dr. M. attributes the findings with regard to the anterior and lateral neck on the left to the occupational injury of 1995.
- (68) The worker attends physiotherapy from February 6 to June 25, 2001. The discharge report dated June 25, 2001 states that the worker's diagnosis is "right 7<sup>th</sup> and 12<sup>th</sup> rib and costotransverse joint hypomobility and left lateral neck and scalene strain. The worker, although continuing with physiotherapy, has reported minimal changes in flexibility. Lumbar active range of motion and thoracic range of motion are "remarkably unchanged in the past month". Strength is within normal limits and joint mobility is restricted in the distal thoracic and lumbar segments, especially over the right ribs. There has been no change in mobility and the worker is "significantly deconditioned with poor posture and flexibility. The physiotherapist recommends that the worker continue with a home program of treatment and states, "[the worker] will not be able to return to any type of employment similar to his previous job".
- (69) On April 5, 2001 the medical consultant reports that Dr. M.'s advice was for the worker to undertake a program of physical activity and physiotherapy. He states that Dr. d'E. gave no explanation [report dated March 23, 2001] for his recommendation that the worker is not fit for employment and that his lack of confirmation of any physical findings must be weighed against the comprehensive report from Dr. M.
- (70) On April 4, 2001 the physiotherapist reports that he feels that the worker will have minimal changes in his future active and passive flexibility compared with progress thus far. He states that the worker has been inactive and not working for the past 5 years and as a result is significantly deconditioned. The worker's return to work options are limited at this time, however it is possible that he may be able to perform a light to sedentary job if some of the objective findings for flexibility and strength improve over the next few months. He states that the worker's overall pain levels have been relatively similar from his initial visit. The physiotherapist states that he feels that with continued flexibility, strengthening, and conditioning exercises, the worker may see some improvements in his pain levels. However, as a result of the significant trauma to the lateral trunk and ribs, he may continue to have ongoing pain and discomfort in the future, all dependent on his activity level. [Emphasis added.]

- (71) On May 4, 2001, Dr. M. answers two questions posed by the worker's lawyer, after reviewing the most recent treatment reports. He says (1) the worker's rib injuries alone would disable him from performing his pre-accident work and (2) recommended treatment would probably not enable him to do his pre-accident work. [Emphasis added.]

*The Worker's Testimony*

- (72) The worker says that he has worked all his life and has never drawn UIC. He also says that over the course of his work life he rarely missed work because he didn't believe in this. If he was sick with the flu, he would go in anyway.
- (73) The worker said that before his 1996 accident and subsequent motor vehicle accident his health in general was very good. He says he never felt a day over 40 before his accident at the mine: he played ball, went hunting and fishing, and was also a fire department volunteer. He says he was also active in his community, assisting the RCMP with search and rescue and participating in the Neighbourhood Watch Program.
- (74) He says before the accident he could take 100 pounds over his shoulder and not think anything about it.
- (75) The worker describes an earlier accident which occurred on September 11, 1995 at the mine site. He says part of the mountain face where he was working came down on his truck. He was knocked unconscious, when the first part of the rock face gave way. When the second part of the rock face also fell on his truck, it dislodged the mounts holding his engine in place. He says that after his 1995 accident he went on light duties for a time.
- (76) The worker says that after his July 15, 1996 workplace accident he also used ice packs on his shoulders to try and control the swelling. However, he says it got to a point that he thought there was a safety issue and as well his foreman said he should go return to his doctor.
- (77) The worker says that because of his workplace injuries he could not drive the Euclid truck safely. He says he is not capable of using his arm quickly enough to avoid accidents as is necessary in this job. He also says that there is a lot of vibration for the driver in the cab of the Euclid when dumping the loads. There is also vibration because of the terrain at the worksite. He says that sometimes rocks in the load would become stuck and so the driver-operator had to rock the Euclid truck back and forth in order to unload. When this was done, the front wheels could come completely off the ground and then down again. In addition, the worker says that sometimes backhoes were loaded into the box of the Euclid truck to scrape out the interior. When this was done, there would be lots of movement.

- (78) The worker says that it was necessary he do over-the-shoulder checks when driving in the cab of the Euclid truck. These checks are part of the safety training and requirements for driving these vehicles.
- (79) The worker says that his car was written off after the accident. He says that when his benefits were terminated in 1998, it had a great impact on his life. In order to support himself he had to take his Canada Pension Plan benefits early and therefore lost \$300 per month as compared to what he would have been paid had he been able to wait until 65 years of age.
- (80) Also, he says that after the accident when he was no longer receiving an income it became too expensive to live in the small Yukon community where he had worked: his rent there was \$625 per month plus heat. To reduce expenses, he and his wife decided to move back to Nova Scotia where rental accommodation is cheaper. He currently pays rent of \$300 per month. However, after his benefits were terminated, he was unable to maintain a phone line and unable to heat his home. He had no money for fuel oil. He says that he went to the local Lion's Club and they donated some wood for him to heat his house. He says he has relatives living nearby in Nova Scotia and they helped by stacking the wood.
- (81) The worker says that his wife has many health problems: she is diabetic, asthmatic, and has a heart condition. He said that in 1998 after he was no longer on workers' compensation benefits he could not afford to pay for her heart pills. In addition, she had to use her needles for injecting insulin 12 times rather than just once in order to save money. When they lived in the Yukon his wife's medications were provided through the chronic illness program and paid for by the government. However, in Nova Scotia all her medications have to be paid from their household income. His wife does not work and is on a small disability pension herself.
- (82) The worker also says that after his workplace accident when he was no longer on benefits he could not afford to pay for prescription glasses for himself. He says it was also difficult, on a reduced income, to provide the proper diet for his wife who is a diabetic and needs fresh fruit. He says they could only afford second hand clothes.
- (83) The worker says that when he moved to Nova Scotia he was offered work as a security person at the local wharf and hoped he could do it. When he went to see the job, he realized that it involved climbing down ladders from the wharf onto lobster boats to check them as part of security duties. The worker says the boats rock heavily with the movement of the sea. He says because of his workplace injuries he was unable to lift his body weight with both hands to go up and down the ladder.

- (84) The worker says that he has not yet been contacted by the Nova Scotia Workers' Compensation Board to schedule any medical or vocational assessments despite this being ordered by the hearing officer approximately five months ago.

**Issue #1:** What is the appropriate legislation for review of this appeal?

- (85) Section 90.(1.2) of the current *Act* provides that where an worker has commenced an appeal under s.18 of the Act on March 31, 2000 or earlier, the appeal shall be decided according to predecessor legislation as it was in force before April 1, 2000.
- (86) The worker commenced his appeal to the tribunal pursuant to s.18 on October 1, 2001, (after April 1, 2000). Therefore the appeal should be determined according to the present *Act*. In other words, the appeal tribunal has jurisdiction to hear and decide this appeal.

**Issue #2:** What is the appropriate legislation for deciding the issues of entitlement in this case?

- (87) Section 90.(1)(c) says "where a worker is entitled to compensation as a result of a disability caused in March 31, 2000 or earlier, the worker's entitlement to compensation shall be determined to predecessor legislation as it was in force before April 1, 2000."
- (88) This worker was injured in a workplace accident on July 15, 1996. Therefore, the legislation as it was in force on that date must be used to determine the issues of entitlement in this case.

We do not find it necessary to consider Policy GC-09 in order to interpret section 90 of the current *Act* with respect to issues #1 and #2.

- Issue #3:**
- (a) Did the hearing officer make an error of fact when he found that the worker was fit for suitable employment when discharged from the Columbia Rehabilitation Centre on December 11, 1998?
  - (b) Did the hearing officer err in deciding that benefits should only be reinstated from the date that the board received Dr. M.'s report only?
  - (c) If so, is the worker entitled to further compensation?

## Analysis

- (89) In the decision under appeal to us, the hearing officer says he is reviewing three different adjudicator decisions on this claim. Two of these decisions are made after the worker provides new medical reports from a new treating doctor in Nova Scotia, Dr. d'E. The third adjudicator decision is made after the worker submits another medical report from a specialist in rehabilitation medicine, Dr. M.
- (90) Unfortunately, the hearing officer does not set out in his decision anything about the first two decisions he is reviewing – neither the findings, analysis, conclusions nor decision reached. The hearing officer does say that the third decision authorizes ten more physiotherapy sessions for the worker and that therefore, by implication, this means the adjudicator has made a finding that the worker has a work-related disability.
- (91) Because the hearing officer does not review two of the three decisions at all and only briefly mentions the third, we set out below the decisions and findings from all three adjudications so that it is easier to understand what the hearing officer was reviewing when he came to his decision.

### *The March 7, 2000 Adjudicator Decision*

- (92) The adjudicator finds that based on medical opinion the worker has completely recovered from the work-related motor vehicle injury of fractured ribs with no remaining disability. [We note here that the adjudicator does not specify, explain, or analyse the medical opinion she is relying on nor does she refer to any contrary medical opinions, for example, that of Dr. d'E.] The adjudicator also finds that limits on the worker's physical capabilities "might" be due to a degenerative condition of the cervical spine but this is not work-related. Finally, she confirms her earlier January 28, 1999 decision that the worker was fit to return to his pre-accident employment on December 11, 1998. [We note that this is the date of discharge from the Columbia Rehabilitation Centre – however, the reports from the Centre do not state that the worker was fit to return to pre-accident employment: instead the reports say he is at a sedentary level with limits/restrictions for upper extremity torque and whole body vibration [see para. 55 and see also the worker's evidence with respect to vibration and torque involved in his pre-accident employment at para 70.]

### *June 13, 2000 Adjudicator Decision*

- (93) The adjudicator confirms denial of entitlement, despite the subsequent diagnosis by Dr. d'E of a right lower rib cage strain, musculotendinous. The adjudicator says this diagnosis indicates acute injury but gives no further explanation. She says that the rib fractures were well-healed by January 1998 and "the medical

shows you had complete recovery from the injuries arising out of and in the course of your employment.” There is no specific reference to what medical opinion she relies on.

*January 25, 2001 Adjudicator Decision*

- (94) This decision is very short. The adjudicator briefly refers to Dr. M.’s November 2000 report and notes that he says the worker is fit for suitable employment. There is no explanation of what employment is “suitable” for the worker. The adjudicator does not mention the barriers to return to work that Dr. M identifies (which we will discuss later). She also makes no reference to Dr. M.’s opinion that based on the worker’s description of his pre-accident job, the worker is disabled from performing this work. In addition, the adjudicator does not discuss Dr. M.’s statement that he does not know if the worker “currently meets the qualification to perform sedentary type work” but feels that it would be within his residual functional capacity following a course of treatment.

*The Hearing Officer Decision Under Appeal*

- (95) The hearing officer “varies” the adjudicator’s January 25, 2001 decision. He orders four things:
- (1) a complete medical and vocational assessment of the worker [as of the date of the hearing this had not been done];
  - (2) if required (presumably on the basis of the assessment above), provision of rehabilitation assistance to the worker and “consideration” of loss of earning capacity;
  - (3) retroactive wage loss benefits from the date the board receives Dr. M.’s report (that is, December 21, 2000); and,
  - (4) ongoing wage loss benefits until (1) and (2) above are completed.
- (96) The first issue we must address is the finding made by the hearing officer that the worker was fit for suitable employment when discharged from the Columbia Rehabilitation Centre in December, 1998. He does not specify what in the Centre’s report he relies on to make this finding. Earlier in his decision, the hearing officer says:

I believe that the information in the Columbia Rehabilitation centre report ruled out a return to operating Euclid type ore haul trucks and such equipment as dozers and scrapers. But given the worker’s extensive experience he may well have been *medically fit for suitable employment that would have resulted in no loss of earnings*. The worker has testified that because of his network of colleagues he could acquire employment in mining in the Northwest Territories, health permitting. [Emphasis added.]

- (97) We note here that the phrase, “health permitting”, is a significant qualifier in the worker’s assertion that he had employment contacts who could help him find work in mining. We find that there is no evidentiary foundation for the hearing officer’s speculation with respect to “no loss of earnings” for this worker, basing it as he does on the worker’s possible [“may have been”] fitness for suitable work. There is no determination made as to whether or not the worker actually has a weekly loss of earnings as set in sections 22 and 23 of the Act (in place at the date of injury) or as elaborated in Policy CS-08, “Fitness for Employment, Suitable Occupation, Deeming.” (This policy was also in effect at the time of the worker’s 1996 injuries.)
- (98) Such a determination was also not made by the board in the initial years of this claim because of earlier decisions (since overturned) which found that the worker had no work-related injury.
- (99) Finding a worker fit for suitable work without identifying what such work is, makes it impossible to determine whether or not there is any loss of earnings. Without a specific job, there is no way to determine the difference, if any, between what the worker earned immediately before the work-related disability arose and what he could earn in a suitable occupation after the disability arose, as section 23 requires. Section 23 says: “ A worker’s weekly loss of earnings is equal to the difference, if any, between the (a) worker’s average weekly earnings, up to the maximum wage rate for a week, immediately before the work-related disability arose, and (b) estimated average weekly earnings that the worker could, in the board’s opinion, earn from time to time, in a suitable occupation after the disability arose.”
- (100) The process for determining a suitable occupation for a worker who can no longer perform his pre-accident employment is set out at section C of Policy CS-08 as follows:

The Claims Adjudicator shall refer a worker to Client Services for assessment regarding suitable occupations. The Rehabilitation Counsellor shall evaluate and assess a worker for suitable occupations.

A vocational assessment may be done to assess and determine suitable occupations for a worker. The assessment may include, but is not limited to, the assessment of aptitude, academic achievement, vocational interest and transferable skills.

The assessment conducted by Client Services to determine a suitable occupation shall be tailored to the individual requirements of a worker. Each situation shall be determined on a case by case basis by the Rehabilitation Counsellor.

- (101) The hearing officer's decision clearly recognized that an assessment for suitable occupations as Policy CS-08 requires is needed: this is evidenced by the hearing officer's order that a vocational assessment be conducted by the Nova Scotia Worker's Compensation Board.
- (102) Without such an assessment there is no way in this case to determine what work is suitable. Therefore, in answer to the question posed as issue #3(a), we find that the hearing officer made an error in fact when he found that the worker was fit for suitable employment in December 1998.
- (103) We further find that without identifying a suitable occupation, there is no way to decide whether or not there the worker has a weekly loss of earnings in accordance with section 23.
- (104) However, the hearing officer does order wage loss benefits to be paid from the date that the board receives Dr. M.'s report on December 21, 2000. Entitlement to compensation first depends on whether or not a worker is suffering a work-related disability. Entitlement to wage loss benefits then depends on whether or not the worker is experiencing a weekly loss of earnings. It cannot depend on the date a report is received by the board. There is no explanation in the hearing officer's decision as to why this date is used as the day for reinstatement of benefits. Therefore, in answer to the question posed as Issue #3(b), we find that the hearing officer erred when he decided that benefits should be reinstated as of the date that the board received Dr. M's report.
- (105) The worker argues that he is entitled to benefits for loss of earnings from the time these benefits were terminated to the time that the hearing officer reinstated them. It is therefore necessary to determine whether or not the worker continued to suffer a work-related disability from the time benefits were terminated to the date they were re-instated by the hearing officer on December 21, 2000.
- (106) Policy CL-40, "Disability", defines disability as "limiting, loss, or absence of the capacity of an individual to meet occupational demands". We find that this worker did suffer from a work-related disability from December 1998 (when he left the Columbia Centre) to December 20, 2000. In coming to this conclusion, we rely on the many medical reports documenting disability as follows:
- On January 8, 1998 Dr. T. reports persistent ongoing right-sided pain dating back to the August 1996 car accident [work-related]. He also reports that the worker has limited range of motion in the neck in all directions and stiffness in his shoulders as well as tenderness in the right side of his chest. He says the worker finds the pain completely disabling and it restricts his ability to bend over, to do heavy lifting, to breathe deeply and to sleep comfortably. Dr. T. also notes that the spinal x-rays are normal for a man this age, with some osteophytic bridging. We note that Dr. T. does not attribute the

worker's pain and other symptoms to osteoarthritic changes (as the medical consultant does). Lastly, Dr. T. says he cannot explain why the worker's pain persists but acupuncture or massage therapy might be helpful [see para. 46].

- On March 17, 1998 the worker's treating physician, Dr. F., reports on the worker's ongoing symptoms of pain and swelling in the left neck area with no change in these symptoms for the past year. He recommends a vocational assessment be done and that the worker be considered completely disabled from performing his pre-accident work.
- As set out at para. 50, the FCE in August 1998 reports chronic pain symptoms which need prompt treatment as well as restrictions in range of motion in the neck and shoulder and back and general deconditioning due to two years of dealing with symptoms. The FCE also notes the earlier work-related cervical strain in September 1995 "with exacerbation in January and February 1996" [see also para. 1 and 2 with respect to these earlier injuries]. There are no findings with respect to fitness for specific suitable work and the report notes no job descriptions were supplied or "explored". Overhead work is contraindicated.
- As set out at para. 51, the medical consultant reports on September 15, 1998 and says that the FEC "suggests" the worker might be fit to return to work as a truck driver, possibly with modifications for osteoarthritis. This statement is speculative and we find nothing in the FCE to corroborate fitness for this occupation. The medical consultant does not explain his statement nor reference it to any of the findings or recommendations in the FCE.
- The Columbia Centre reports are important to analyze because the hearing officer confirms the adjudicator's termination of benefits in January 1999 just after the worker left the Columbia Rehabilitation Centre. The hearing officer finds that the Centre's reports "indicate" that the worker could return to work where there is limited upper extremity torque and "whole body vibration". He also says that based on the worker's testimony and record, the worker has "skills which would have served him well had he actually sought employment". He does not identify what those skills are or what employment they might have been suitable for. Then, the hearing officer says, "it appears to me that there is an element of personal choice in the worker's current situation". This comment is also not explained. He then says: "the worker's condition and circumstances is at least in part due to his work-related injuries and for that reason I believe it fair and appropriate to pay him a wage loss benefit from the date the board received medical opinion from Dr. M." What is again not explained is how the work-related "condition and circumstances" entitles the worker to wage loss after December 21, 2000 but not before.

- In our view the key findings in the Columbia report are (1) that the worker’s ability at the time is characterized as “sedentary” and (2) that he has the ability to progress to light duty activities with ongoing conditioning and use of pacing and body awareness. The worker was sick during the FCE and demonstrated “very poor functional abilities in the low/sedentary category”. The report also says that an accurate rating according to the Canadian Classification and Dictionary of Occupations (CCDO) could not be assigned because of the worker’s “self-limiting pain behaviour” and the fact he did not reach physiological maximums on any of the attempted lifts.
  - We find nothing in this report to indicate that the worker could perform his pre-accident work and as stated the indications were that he was only fit for sedentary work. However, specific jobs were not explored.
  - There are also many earlier medical reports identifying as early as July 1996 that there may be problems with respect to the worker’s future occupational abilities [see para. 9, 10 and 12]. Dr. F. at the end of July 1996 [before the second work-related accident] says the worker is unlikely to return to his pre-accident job without “periodic recurrence of his disability” which he defines as incapacity with respect to lifting or strain on the left neck and shoulder. At that point he offers to comment on the “suitability” if job descriptions for alternate work are provided. Dr. C. reports “possible long term damage to neck muscles” [see para. 14].
  - We also note that many medical and other reports comment on injury to the scalene muscles as well as report objective findings of swelling in this area as early as 1996 [see para. 6 and 11] and as late as 2000 [see para. 65].
  - In February 1997, Dr. F. reports that the worker’s neck and left shoulder condition is unlikely to improve and he is fit for sedentary employment only [see para. 29].
  - The medical consultant does say in 1997 that the worker has no measurable impairment of function as a result of his work-related injury. It appears that he considers osteoarthritis to be the primary cause of any impairment with respect to range of motion, etc. However, this opinion is not consistent with other medical opinions in this regard. See also our comments on the medical consultant’s findings at para.31 and 32.
- (107) We find, considering the medical evidence as a whole, that this worker does experience work-related incapacity (or disability) as a result of his work-related

injuries. We do not attribute this disability to a pre-existing condition and therefore Policy CL-47, “Pre-existing Conditions” is not relevant.

- (108) We further find there are ongoing barriers to return to work for this worker as well as restrictions on the type of work he can do. We base this finding on the latest medical evidence as set out in Dr. M.’s reports at para. 65 and 66. In particular, we note that Dr. M. says he does not know if the worker currently meets the qualifications to perform sedentary type work but feels it would be within his residual functional capacity following a course of treatment.
- (109) We also note that Dr. M. attributes the worker’s disability with respect to ongoing chronic right mechanical chest pain to the car accident (which the board has already determined on an earlier appeal to be work-related). He also clearly states on May 4, 2001 [see para. 71] that the worker’s rib injuries alone disable him from performing his pre-accident work. We give considerable weight to Dr. M’s evidence, because of his expert qualifications in rehabilitation medicine, his expertise in assessing disability, and his detailed and comprehensive reports which are based on a thorough examination of the worker.
- (110) In conclusion, we find that the worker continues to have a work-related disability that prevents him from performing his pre-accident work. We also find on the evidence that this worker is and has been functioning at a sedentary level because of and since his workplace accidents. We further find that, in addition to his work-related disabilities (with respect to his chronic right mechanical chest pain as well as well as ongoing neck and shoulder injuries) his age, his deconditioned state, and his length of time away from the workforce are all barriers for any return to work, as set out in Dr. M.’s opinion. Given these barriers and the lack of any vocational rehabilitation assistance or vocational assessment as of the date of his hearing, we cannot find that he has been or is “employable” in a suitable occupation since suffering his work-related disability. Policy CS-07, “Vocational Rehabilitation” defines ‘employability’ as “meaning the disabled worker possesses the skills, aptitudes and physical abilities required to be safely employed for a specific occupation or group of occupations.” We therefore find that this worker has experienced a loss of earnings, from the time his benefits were terminated to the date that they were reinstated and this loss of earnings continues into the present. Therefore, in answer to the question posed as Issue #3(c), we find that this worker is entitled to further compensation.

## **Conclusion**

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

1. The worker has suffered and continues to suffer work-related disability as a result of injuries received at work on July 15, 1996 while operating a Euclid ore truck and also on August 26, 1996 in the subsequent car accident.
2. The board must retroactively provide the worker with compensation for loss of earnings in accordance with sections 22 and 23 of the *Act* (as it was in force in July 1996) from the date such benefits were terminated (and excluding any period of time benefits were temporarily resumed while the worker received treatment).
3. The board must ensure, through arrangements with the Nova Scotia Workers' Compensation Board or such other service provider as the board sees fit, that the worker receives a vocational assessment as soon as possible.
4. The board must also provide appropriate rehabilitation assistance to the worker in accordance with section 30 of the *Act*, taking into consideration the results of the vocational assessment.

Dated this 6<sup>th</sup> day of **February, 2002** in the City of Whitehorse, in the Yukon Territory.

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Donald Inverarity, Member

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Heather MacFadgen, Presiding Officer

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Karen Waroway, Member