

Workers' Compensation Appeal Tribunal

Decision # 29

Claim No.: 97-1219

Date of Notice of Appeal: November 5, 2001

Date of Hearing by appeal committee: January 30, 2002

Date of Decision: April 8, 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 via teleconference connection
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: Internal Review Committee's ("IRC") decision dated August 24, 1999.

Sections of Act considered or applied by the IRC: s. 17

Policies considered or applied by the IRC: CS-02 "Re-employment Assistance Allowance" and CS-03 "Relocation of Disabled Workers".

Issue addressed by the IRC: Whether or not the worker was entitled to re-employment assistance, earnings loss and relocation assistance benefits.

Decisions made by the IRC: The IRC decided that the worker was fully recovered to a pre-injury level and was completely capable of the employment he enjoyed prior to his injury; therefore re-employment assistance allowance and wage loss benefits could not be considered. In addition, relocation assistance can only be given for retraining or re-education and these circumstances did not apply to this worker. The adjudicator's decision on November 4, 1998 to deny further benefits is confirmed.

Sections of the Act considered or applied by appeal committee: sections 3, 22, 23, and 30 of the *Workers' Compensation Act* S.Y. 1992 as amended to September, 1997 and sections 18.3, 18.4, 19.4, and 90 of the current *Act*.

Policies applied or considered by appeal committee: CS-02 "Re-employment Assistance Allowance", effective January 1, 1993; CS-03 "Relocation of Disabled Workers", effective 94-12-13; and CL-30 "Suspension, Reduction and Termination of Compensation", effective May 10, 1994

Issues addressed by appeal committee:

- (1) What is the appropriate legislation and policy to use to determine the issues of entitlement in this case?
- (2) What is the appropriate legislation for review of this appeal?
- (3) Did the Internal Review Committee err in deciding that the worker was not entitled to re-employment assistance allowance, wage loss benefits and relocation assistance?

Decisions made by appeal committee: The worker's appeal is allowed. The decision of the IRC is reversed and varied as follows:

1. The worker was not fully recovered to a pre-injury level and was not completely capable of the employment he performed prior to his work-related disability, at the time his compensation was terminated in April 1998.

2. The worker continues to have a work-related disability arising out of and in the course of his employment because of injuries to the medial meniscus and anterior cruciate ligament in his right knee which he sustained at work on September 11, 1997.
3. The board shall provide rehabilitation assistance to the worker according to section 30 of the Act as follows:
 - a) Re-employment assistance benefits for the period April 1, 1998 to July 1, 1998; and,
 - b) Relocation assistance in the form of reimbursement for the cost of the worker's relocation from Whitehorse to Calgary on July 1, 1998 in order to secure employment.
4. The board must provide compensation to the worker for his loss of earnings according to section 22 of the Act beginning from July 2, 1998 when he resumed employment.

Introduction

This is an appeal by a worker who injured his knee on September 11, 1997 while he was working on a construction site. He is appealing the August 24, 1999 decision of an Internal Review Committee (“IRC”) which found that he was fully recovered to his pre-injury level on March 31, 1998 and completely capable of the employment he enjoyed prior to his injury: therefore, the IRC decided that he was not entitled to (1) re-employment assistance allowance or further (2) wage loss benefits. In addition, the IRC decided that the worker was not entitled to (3) relocation assistance because his move from the Yukon for re-employment was not related to retraining or re-education.

The worker disagrees with the IRC’s findings and requests that the appeal tribunal overturn the IRC’s decision and conclude that he is entitled to all three benefits.

The worker participated in the hearing by speaker telephone and gave his evidence by affirmation. The deputy workers’ advocate, Julie Docherty, made submissions on behalf of the worker. The employer was notified of the hearing but declined to participate.

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*:

- Policy GC-09, Transitional Clause, effective date 95-03-07;
- Policy CS-02, Re-employment Assistance Allowance, effective date January 01, 1993;
- Policy CS-03, Relocation of Disabled Workers, effective date 94-12-13 – revoked April 24, 2001 (*note: this has been replaced with a policy of the same number and title – effective date April 1, 2001*);
- Policy CS- 08, Fitness for Employment, effective date 94-11-09;
- Policy CL-30, Suspension, Reduction and Termination of Compensation, effective date May 10, 1994; and,
- Policy CL-40, Disability, effective date 93-11-10.

The appeal committee has decided that it has jurisdiction under section 18.4(1) of the *Act* to hear this appeal.

Evidence from the Record and Hearing

The Workplace Injury

The appeal committee has added comments in square brackets in this part of the decision, where necessary.

- (1) The worker's Report of Injury/Illness dated September 12, 1997 describes the mechanism of injury as follows: the worker injured his right knee when he was turning the corner on a staircase - the lip of his work boot caught the stair lip and he twisted his knee. The report also states the worker earned \$15.00 per hour for a 40-hour work week and that he was employed as a fire alarm technician on a permanent basis. The worker immediately sought medical attention at the hospital emergency department. Under "Additional Information" there is a checkmark "yes" in answer to the question, "Have you had a similar injury before?"
- (2) The employer's Report of Injury on the same date says that the worker injured his right knee when he "caught his boot on stair while turning bend" and confirms an hourly rate of \$15.00 per hour for a 40-hour work.
- (3) In his testimony at the hearing, the worker provided further details about the injury. He says he was working in a dark stairwell during construction of the hospital. A lip on the stair tread was higher than normal because the ceramic tile for the stair had not yet been laid. He says the edge of his work boot (which has a ridge around it) caught on the last stair lip. He says his momentum going down the stairs carried him forward and his leg bent out of shape and buckled to the right in an outward direction instead of an inward direction. He says that "pain shot up" and he went "down like a ton of bricks". He says the emergency room of the hospital was not far away so he "hobbled over" there for treatment.

Initial Treatment and Diagnosis

- (4) The first doctor to see the worker is the emergency physician, Dr. L [who is not a specialist]. Her report notes the worker had prior right knee patella alignment surgery. [We note that the patella is commonly referred to as the kneecap.] Her diagnosis of his workplace injury is right knee sprain. She reports decreased range of motion and swelling [see the significance given to his finding by the specialist, Dr. M. at para. 27] Dr. L. also notes there is "no obvious ligament laxity" and the two tests she performs to check for laxity are negative.
- (5) A day later, Dr. P sees the worker and reports he is unable to work until September 15, 1997. He notes pain when the worker's medial collateral ligament in his injured right knee is stress tested. He refers the worker to the POWER program of treatment. [POWER is an acronym for Program of Work Evaluation and Rehabilitation.]
- (6) Dr. P.'s progress report, less than a week later, on September 17, 1997 says the worker will be off work until September 23 but "this an estimate" and he could have

continuing problems that could last another few weeks. He notes lack of improvement in the worker's symptoms despite the POWER program, as well as continuing pain and swelling, and "locking" of the knee (that is, inability to straighten).

- (7) On September 24, 1997 Dr. P. reports that the worker still has problems with his knee locking and with pain. His pain increases after POWER physiotherapy sessions. Dr. P. books the worker for "possible arthroscopy" with surgeon, Dr. S., because Dr. P. suspects a medial tear in the meniscus of the knee.
- (8) The worker sees Dr. P. again on October 2, 1997 who reports ongoing "locking" of the knee: the worker reports a fragment [of torn cartilage] locks up his knee. When Dr. P. performs McMurray's test on the injured knee, the worker says he thinks he feels a fragment of cartilage flick into the medial joint space of the knee. The worker is taking two Tylenol 3's every four hours for pain and is continuing with the POWER physiotherapy program.
- (9) Dr. P. reports on October 6, 1997 that the worker has been fitted with a Generation II trainer brace for his knee and may be fit for light duty with no climbing ladders or lifting. The doctor reports the worker's knee "gave out" at home causing him to fall, striking his elbow, which is now swollen.

The First Diagnosis of Anterior Cruciate Ligament ["ACL"] Injury

- (10) The first [general] surgeon's report by Dr. S. is October 23, 1997. It provides a medical history, including the prior patella realignment operation of August 1995 and the earlier lateral release procedure to the knee. In addition, he reports the worker had two arthroscopies – one in 1992 and another after; he also had problems with the opposite knee. The surgeon also reports that the worker was an athlete and played college football in the States for one year.
- (11) In terms of clinical findings, the surgeon says the worker has swelling, reduced flexion, and pain when the medial collateral ligament of his right knee is stressed. He performs Lachman's test on the knee - - it is positive and indicates anterior cruciate insufficiency. Lastly, the surgeon is not able to demonstrate signs of meniscus damage, largely because of the worker's pain. The surgeon recommends referral to an orthopedic specialist, Dr. L., because the problem is "clearly complex". He characterizes it as "abrupt injury" to a "chronic knee" leading to the current problem which he identifies as "anterior cruciate ligament instability" and pain in the knee. The surgeon says the worker can only do a desk job with no walking because walking causes locking of the right knee. He also reports the worker told him he was fired, probably because of his injury.

The First Orthopaedic Specialist's Report from Dr. L.

- (12) Dr. L., an orthopaedic surgeon, reports November 18, 1997 that the worker has an anterior cruciate tear (and may have meniscal damage as well) superimposed on a background of patellofemoral disease and a somewhat low pain threshold. Dr. L. also says that he is unable to say “with certainty” whether the anterior cruciate tear occurred with his recent injury or not. [We note here that “certainty” is not required and the standard proof in workers’ compensation cases is lower – on the balance of probabilities.] The specialist reports continued swelling and pain and says that the “twisting injury” September 1997 at work was followed by “quite a bit of swelling and disability.” He also says bracing is a temporary solution and ACL surgery should be considered: however, the persistence of the worker’s pain “does not bode well for rapid and effective recovery” after ACL reconstruction surgery.
- (13) Dr. P.’s progress reports dated December 2, December 3, and December 5, 1997 say the worker presents with “increasing problems with pain”. He must not do any work that involves walking or weight bearing.
- (14) POWER reports initial assessment findings dated September 17, 1997 of second degree right medial collateral ligament strain.
- (15) The POWER discharge report dated December 3, 1997 says the worker will continue on a home program until after his surgery. A Generation I brace is recommended.
- (16) The record also contains a letter to the worker from a private disability insurer dated March 3, 1997 regarding the worker’s claim for long term disability benefits. It says the worker was considered totally disabled from July 21, 1992 to January 1, 1996. The worker’s request for further disability benefits from the insurer on February 25, 1997 is denied. There are also a series of pre-1997 medical reports from the disability insurer.

Initial Adjudication of the Claim

- (17) On September 26, 1997 the adjudicator writes the worker authorizing benefits for the knee injury resulting from the “twisting” incident at work. She says that because of the worker’s prior knee problems the claim is allowed as an aggravation

of a pre-existing condition. She says that benefits will continue until the worker's knee condition returns to its pre-accident state.

- (18) There are two notes to file dated November 10, 1997 and November 12, 1997 by the rehabilitation counsellor. One note says the worker remains fit for modified work but consideration should be given to the fact that this is highly skilled work with limited availability; the worker's employment options in the Yukon are very limited now. This note also says the employer told the counsellor that there were problems with the worker's performance such as frequent lateness, belligerence, disrespect and irrationality. [No details are provided; nor is it clear whether or not these problems occurred before or after the worker's injury.]
- (19) On this point, the worker testified that after his workplace injury he was heavily medicated and he had a confrontation with the employer/owner's son about being required to do things [at work] which he couldn't do; they got into an argument and the worker was fired; but afterward, he wasn't fired because they were busy and needed someone full-time; so the worker was replaced. [See the excerpt from a document provided by Human Resources Development Canada with respect to this evidence, later in this section at para. 40.]
- (20) On November 25, 1997 the adjudicator writes the worker saying that his employer confirmed he returned to light duty and that the employer had no difficulty providing work for 4 hours a day and might have been able to provide enough work for any part of the day the worker was not in therapy. The adjudicator says the worker was terminated from employment for performance reasons. She says if the worker were still employed he would be entitled to only 50% wage loss benefits because he was working half days. Therefore, his [partial] benefits are continued as if he were still employed half-time doing modified work.
- (21) On December 19, 1997 the medical consultant advises that a diagnostic arthroscopy would be helpful in order to compare the results with medical reports dealing with the worker's previous condition. He says there have been no significant objective changes on examination to support the need for total time loss, although the attending physician does comment that the worker has difficulty with pain control which is interfering with his ability to work.
- (22) The medical consultant suggests that the decision be delayed on whether or not the board should authorize a brace for the worker's knee until the results of the arthroscopy are known.
- (23) On December 18, the attending physician, Dr. P., reports that the worker wants an operation because he has ongoing problems with pain, particularly when walking. Dr. P. says he is unable to work at any job that requires walking or weight-bearing.

He recommends another orthopaedic assessment and arthroscopy of the worker's injured knee.

- (24) A report from POWER dated December 19, 1997 states that the worker is having difficulty with pain management and wishes to return as an outpatient.
- (25) Dr. P.'s progress report on December 23, 1997 says the worker is having problems with pain control. The doctor notes the worker is booked for an orthopaedic assessment in Calgary in January 1998.
- (26) On December 30, 1997 the adjudicator writes the worker. She advises that "based on the available information and considering the medical opinion expressed, entitlement will not be authorized for total temporary disability benefits. Benefits at the 50% level will continue until January 5, 1998 at which time, because you are unavailable for employment because of your treatment [the Calgary assessment], full compensation will be reinstated."

The Second Orthopaedic Specialist Report from Dr. M.

- (27) On January 7, 1999, Dr. M., the Calgary orthopaedic surgeon, recommends an arthroscopic debridement of the knee and full evaluation followed by rehabilitation and bracing. [We note in particular the following information in this specialist's report.] He notes no previous history of ligament instability in the knee except as it related to previous problems with the patellofemoral [knee cap and femur leg bone] articulation [movement] and chondromalacia [abnormal softening of the cartilage]. He explains the mechanism of injury as an external rotation of the tibia on the femur [referring to the two large bones of the leg]. He notes the instant pain on injury and immediate large effusion [swelling] after the injury. He concludes the worker suffered an acute ACL injury and says "immediate onset of a large effusion suggests a tearing of the ACL and immediate bleeding within the joint. Simple meniscal tears and other nonvascular injuries to the knee of a mechanical nature do not result in an immediate effusion like [the worker] developed and this most certainly confirms an acute ACL injury". [Emphasis added.] He reports positive test signs for the instability in the knee and also reports that the worker says he never experienced this instability before the workplace injury. He also comments on the continuity of symptoms of pain and instability since the injury and the ineffectiveness of treatment to date.
- (28) Lastly, Dr. M. says that ongoing medial and anteromedial joint pain suggests the worker has a meniscal injury as well. He recommends (1) arthroscopic evaluation, (2) debridement, and (3) meniscectomy and then (4) use of a derotation brace and (5) at least six weeks of vigorous physiotherapy followed by "return in a protected

environment to light duty work and progressing as tolerated or indicated”.

[Emphasis added.] If this does not work, then he recommends the worker be considered for “controversial ACL reconstruction” surgery.

- (29) On January 9, 1998, Dr. M. performs surgery on the worker’s knee to remove damaged meniscal tissue (a bucket handle tear) and to debride the ACL. He reports that the worker has attenuation [thinning] of the ACL with loss of some fibre [50% intact]. The attenuation makes this ligament “less functional” and accounts for positive tests for instability. [We note that the ACL is not reconstructed at this time, only debrided and also that the worker has had several months of physiotherapy since his work-related injury.]
- (30) On January 20, 1998 the medical consultant reviews the claim including the Calgary specialist’s reports from the procedures performed on the knee. Despite the surgeon’s report of “acute injury” to the ACL, the medical consultant says it is his impression that the ACL problem may have predated the workplace injury. The medical consultant also says the worker should be able to return to modified work 14 days after surgery. [We note that this is significantly less than what the orthopaedic specialist recommends above - - at least six weeks.] The medical consultant rates the worker as having a 1% impairment due to the meniscal tear.
- (31) The worker returns to rehabilitation in the POWER program on January 29, 1998 and is assessed there as needing 4 to 6 weeks of physiotherapy.
- (32) In a memorandum to the medical consultant from the adjudicator dated February 2, 1998 she summarizes the medical reports of disability including information from the private insurer dating from 1990-1997: she notes that the worker reported his leg “giving out” as early as April 1991 and that he has an extensive history of knee pain dating back to at least 1991. He was retrained by his insurance company to be a fire alarm technician, a job believed suitable to accommodate his bilateral knee disability. The worker did not believe the work was within his restrictions and tried to have his insurance claim reopened in January 1997 claiming he was totally disabled. The adjudicator also notes that the earlier problems, including sports injuries, were diagnosed in 1993 as bilateral chondromalacia patella.
- (33) She says that when the worker was examined by the Calgary specialist the worker said that the previous knee surgeries had been effective and he had relief of the pain. As well, he stated that at no time in the past had he ever had a problem with ligament instability except as it related to patellofemoral articulation. The adjudicator says that based on the workers’ statement, the doctor concluded that the complaints in January 1998 were solely because of the September 1997 accident but in fact, it is well documented that [the worker] had ongoing chronic problems with his knees before the accident.

- (34) [We note here that it appears the adjudicator concludes that the Calgary specialist diagnosed an acute ACL injury on the basis of incorrect information provided by the worker indicating that he had had no previous instability. However, our reading of the specialist's report indicates he diagnosed the ACL injury on the basis of objective signs (immediate effusion – documented at the time of injury) and also on the basis of the mechanism of injury.] The adjudicator's memo concludes that "there is no evidence the worker sustained any damage to the ACL at the time of accident", and asks the medical consultant for his opinion.
- (35) On February 12, 1998 the medical consultant provides a report that concurs with the adjudicator's assessment of a pre-existing condition. He attributes only the meniscal tear [not ACL injury] to the workplace injury. He does not discuss the findings on which the specialist's diagnosis of acute ACL injury are based (immediate effusion, etc.).
- (36) On February 16, 1998, POWER therapists report that the worker's knee still gives way while standing in certain positions. [We note that this is a month and a half before benefits are terminated.] A job analysis done by the worker at this time indicates that crawling and use of ladders are required activities from 75 to 100% of the worker's time on a daily basis.
- (37) Treating physicians provide reports over the months of February and March which document ongoing pain and instability problems as well as the worker's concerns about returning to full-time duties. The worker reports to his doctor that the current pain is different from that associated with his earlier patellofemoral problems. In March, medical reports say the worker has developed sleep problems, agitation and anger at the "system". These reports by treating doctors all continue to advise light duties and towards the end of March 1998 there are still restrictions for crawling/bending/crouching activities. [These reports are made shortly before compensation is terminated.]
- (38) The adjudicator's notes to file in mid-March indicate discussions between her and the worker about his fitness to return to work as follows:

. . . [The worker] is adamant that he could not return to his work because a lot of his work was in crawl spaces and he could not do that work. As well he claimed he was also required to climb ladders . . . and he did not feel he had enough strength in his leg to support himself on the ladder.

. . . His employer was contacted and confirmed an inspector may climb a short ladder up to 50 times per day, however using adapted rod extension this could

be halved. He may be required to work in an attic or crawl space once a week and may have to crawl in and out of the space up to 10 times.

. . . Based on the current reports and taking into consideration the job description, there is no evidence [the worker] is required to do prolonged crawling in his job. Therefore, benefits will be terminated as he is fit to return to pre-accident employment. Compensation benefits will end effective March 31, 1998. [We note that there is no job description on file at this point.]

- (39) It appears that although the worker's treating physicians and the Calgary specialist all recommend light duties, the adjudicator finds he is fit to return to full pre-accident employment at the end of March, apparently because he will only be required to crawl once a week, based on a discussion with the employer. The worker in contrast says there is a "lot" of crawl space work. In his testimony at the hearing the worker says fire alarm technician work requires considerable amounts of crawling and extensive use of ladders: this appears [from his testimony] to be because fire alarms are situated in either ceilings or crawl spaces. The worker's doctor refers him to a psychiatrist because of his anger and agitation, which the doctor appears to attribute to his WCB claim.
- (40) A Human Resources Development Canada document dated March 18, 1998 states the worker's previous employer was contacted and he stated that he was holding the worker's job open; however, the worker could not return to work. The employer says he needed someone qualified and therefore had filled the position with someone from outside the territory. According to the document, the employer also says that WCB told him the worker's "prognosis" and "they agreed it would be long term" due to upcoming surgery. The document goes on to say:

I asked [the employer] about the reasons that the claimant gave. He states that the claimant came back and tried to work. He was on medication and this affected his relations with his coworkers. The claimant was also sick quite a few times. However, the claimant was not fired for misconduct. He would have taken the claimant back if the recovery date had been sooner. He would have spoken to the claimant about a few issues but would still have given him another chance.

The claimant was into see [the employer] within the past 2 weeks [this would be early March] looking for work. However, his job has been filled. They will keep him in mind as he is highly qualified for the type of work. However, they also have concerns about the continuing effect of his injury on his ability to do the job as [it] involves working in crawl spaces and other difficult areas that may be a problem for the claimant.

- (41) In two reports to file – the first by the adjudicator in April 1998 and the second by the medical consultant in May 1998 -- both find that pain, ongoing knee instability problems and treatment for anxiety are because of a pre-existing condition. Therefore, there is no entitlement for further medical treatment.
- (42) Treating physicians in June 1998 [well past the March termination of benefits] continue to report limits on the worker's capacity to work.

The Worker's Efforts to Find Re-employment

- (43) In the hearing, the worker testified that if his work injury had not occurred he believes he would still be working at his pre-accident job in Whitehorse. He says there are only two companies in the Yukon that employ fire alarm technicians. He says he went to both these companies regularly until he left the Yukon on July 1, 1998 and they had no work for him. He says he also looked for jobs all over Canada through the computer job bank at the federal employment centre and could not find anything. He says he was in a desperate situation and needed work [no longer on benefits as of March 1998].
- (44) He says he had a friend in Calgary working with a fire protection company and he called him "begging him" to help him find work. Through his friend's efforts, the company agreed to give him "a trial" starting on July 2, 1998. After a telephone interview he flew to Calgary on July 1 at his own expense. He says he was made full-time in August after working long hours at a lower wage than he was paid pre-accident.
- (45) He says he continues to work as a fire alarm technician but in considerable pain which he hides and keeps to himself. He also says that his [right] leg gives out sometimes when he is on a ladder doing his work. He says that he has lost his balance on a ladder many times: he is usually using both hands with a screwdriver and needlenose pliers to take out the heat detector. He says if he leans to get the device the pressure on his [right] leg is "unbelievable". Sometimes he has to stand on one leg and balance to reach the detector. He says when he stands on his left leg, he has no problems but depending on where the detector is, he cannot always stand on the left leg. Sometimes, he can only get a half of the ladder into a closet where a detector is located.
- (46) In the fall of 1998, the worker requests reimbursement for relocation to Calgary for work, re-employment assistance from the end of March 1998 to the beginning of July and ongoing wage loss benefits due to the difference between his

pre-accident and post-accident earnings. This request is denied by the adjudicator on November 4, 1998. The IRC confirms the adjudicator's denial of these forms of compensation in the decision under review.

The Third Orthopaedic Specialist's Report from Dr. B.

- (47) The second orthopaedic specialist, Dr. M., refers the worker to another orthopaedic specialist, Dr. B., at the University of Calgary Sports Medicine Centre in July and October of 1999. [At this point, the worker has resumed employment as a fire alarm technician for over a year.] This new specialist recommends ACL reconstruction and it appears from his findings that ACL insufficiency in the worker's knee is increasing. He reports that pain and instability have continued since the time of injury. He performs an arthroscopy on October 25, 1999 which confirms ACL insufficiency [now a complete tear] and a ragged tear of the medial meniscus of the right knee [it is debrided - - this is the meniscus previously repaired]. Dr. B. relates the current ACL problem to the 1997 work injury.
- (48) On January 18, 2000 the medical consultant reviews Dr. B.'s medical reports at the adjudicator's request. He reviews the knee problems dating back to 1990. He says ACL injuries are common, especially in athletes and refers to the worker's hockey and football activities (pre-1997). Then he says that tests for ACL instability were negative when the first physician to see the worker after his work injury in 1997 performed them. [We note that this would suggest no ACL injury from earlier sports activities.] He notes that initially in the POWER program, instability tests were also negative. [We note that it is the examining specialists that find positive instability tests shortly after the work injury as well as the first local surgeon who examines him a month after the September 1997 injury - - see Dr. L. at para. 12 and Dr. M. at para. 27 and Dr. S. at para. 11.] He says that Dr. M. in January 1998 found attenuation of the ACL but that there was no evidence of acute injury to this structure. [But see para. 27 where Dr. M. does find an acute ACL injury.] The medical consultant says the ACL "thinning" is "chronic."
- (49) On March 9, 2000 Dr. B. writes the worker's adjudicator and says he has a different perspective on the worker's injury than the medical consultant does: he says the medical consultant "was not convinced that the anterior cruciate insufficiency the worker is currently suffering from is related to his work-related injury." Dr. B. says he has "no doubt" the ACL insufficiency is work-related and bases this opinion on the results of Dr. M.'s initial arthroscopy which found ACL damage. Dr. B. notes that there is a recurring risk of injury with this instability.
- (50) On January 25, 2000 the adjudicator advises the worker by letter that the board denies further responsibility for right knee problems and that the new medical

evidence from Dr. B. does not alter the earlier decision. The worker successfully appeals this decision to a hearing officer. In his June 23, 2000 decision, the hearing officer finds that “the worker was not recovered to his pre-accident condition. [We note that this decision is not under appeal here.]

- (51) On April 24, 2000 the worker has surgery for bone-ACL reconstruction.
- (52) Just over a year later, on May 28, 2001, Dr. B. does an arthroscopy on the worker’s knee because of complaints that his medial joint pain is increasing. He again debrides the medial meniscus and also the insertion of the ACL graft into the tibia [done a year before] which is “fraying”.
- (53) On August 1, 2001 the medical consultant assesses the worker’s level of impairment due to his ACL laxity.
- (54) The worker has a comprehensive functional capacity evaluation (“FCE”) on November 20 and 21, 2001. The FCE report includes as follows:
 - “Subjectively, the client reports intermittent dysfunction in the knee primarily provoked with deep squatting, kneeling and crawling activities”;
 - “reports of medial knee pain [are] . . . in the appropriate position for what may be the attachment of the medial meniscus”;
 - test descriptions indicate that the worker sustained 8 out of 8 metres of crawling but reported retropatellar pain; he sustained 1.28 minutes out of 5 minutes of kneeling but reported pain throughout; he self-limited to 12 out of 20 repetitive squats due to right knee pain; he also reported more intense medial pain after the second day of testing which included the kneeling/crouching/crawling tasks;
 - there was no physical demands summary in the file detailing the worker’s current job duties;
 - no particularly overt pain behaviours were noted during the examination;
 - the worker could sustain the stair climbing and ladder tasks and was “safe in doing so at the time of assessment”. [Emphasis added: the ladder task involved 3 – 4 steps of 10 repetitions - - the evaluator notes that he does not have details on the ladder climbing required in the worker’s employment.];

- The evaluator recommends that specialist Dr. B. review and comment on the FCE and be asked to identify whether or not the clinical findings should restrict the client in crouching, kneeling, and crawling tasks; and,
- The evaluator’s impression based on the available information is that the worker can presently perform his job duties [but see addendum below.]

(55) An addendum, dated December 17, 2001, to the FCE report above states that the only job duty [the worker] does not meet when the FCE is compared with the 1998 Job Demands Survey [see para. 36] is the kneeling task: he would only be capable of performing kneeling tasks on an occasional and “perhaps” frequent basis. [See again para. 36 which states kneeling occurs to a maximum of 75-100% of job on a daily basis.]

Issues/Analysis

Issue #1: What legislation and policy should be used to determine issues of entitlement in appeal?

(56) We find that the worker was injured arising out of and in the course of his employment as a fire alarm technician on September 11, 1997.

(57) Section 90.(1)(c) of the current *Act*, the “transition” provision, provides that “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 pursuant to predecessor legislation as it was in force before April 1, 2000. Therefore, we find that the *Workers’ Compensation Act* SY 1992 as amended up to the date of the worker’s 1997 injury is the legislation to be used to determine the issues of entitlement in this case. Specifically, s. 3 of the *Act* says, “a worker who suffers a work-related disability is entitled to compensation . . .”. We interpret this to mean that the right to entitlement arises at the time the worker suffers a work-related disability, and in this case it arises in September 1997.

(58) With respect to relevant policies, we note that of the six policies submitted to the tribunal by the board as being relevant to this case, only Policies CS-02 and CS-03 are cited by the IRC in its decision. However, all six policies appear to have been in force on the date of the worker’s injury.

Issue #2: What is the appropriate legislation for review of this appeal?

- (59) Section 90.(1.2) of the current *Act* provides that where a 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.
- (60) The worker commenced his appeal to the tribunal pursuant to s.18 on November 5, 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 #3: Did the Internal Review Committee err in deciding that the worker was not entitled to re-employment assistance allowance, wage loss benefits and relocation assistance?

- (61) In order for the worker to be entitled to any of the compensation he seeks on this appeal (relocation assistance, wage loss benefits, etc.), he must come within the eligibility section of the *Act*. This is section 3 and it requires that the worker “suffers a work-related disability”.
- (62) The worker’s compensation was terminated as of April 1, 1998 because his adjudicator decided he had recovered from a September 1997 compensable aggravation to his non-compensable knee disability. She found that any residual disability in the worker’s knee was because of a pre-existing condition [not identified] and therefore under Policy CL-30, Section E, he no longer had a work-related disability. The IRC decision we are reviewing on this appeal confirms the adjudicator’s decision.
- (63) The IRC specifically finds that the evidence shows that the worker was “fully recovered [on March 31, 1998] to his pre-injury level and was completely capable of the employment he enjoyed prior to his injury”. In the IRC’s “analysis” section of its decision, the committee states “the medical reports indicate that the worker recovered from his compensable condition and was declared fit to work on March 31, 1998. The worker still had problems with pain control but the medical consultant indicates that this was related to his pre-existing condition”.
- (64) There is no discussion by the IRC of what medical reports it relies on in this regard: we infer from the quote above and our review of the record that it is the medical consultant’s report the IRC relies on to come to its finding on the worker’s recovery. In the “evidence” section of our decision we have reviewed the extensive medical reporting by the worker’s treating physicians and specialists.

- (65) We disagree with the IRC's finding of recovery. We find that there is substantial evidence of the worker's ongoing disability, in particular with respect to an acute injury to the anterior cruciate ligament of his right knee that continued to produce instability in the right leg after March 31, 1998. All three orthopaedic specialists - - Dr. M., Dr. L., and Dr. B. - - agree on the damage to the worker's ACL. As well, the first (general) surgeon to examine the worker a little over a month after his workplace injury describes it as an "abrupt injury" to a "chronic knee" which resulted in the current problems which he identifies as ACL instability and pain in the knee. We note that there is no indication in the record of ACL injury prior to the September 1997 work injury.
- (66) Although the first physician to examine the worker's knee immediately after the injury did not find objective signs of ACL damage, she was not an orthopaedic specialist and it is possible that due to the pain and swelling shortly after the injury it was difficult for her to perform these tests. In any event, we prefer the evidence of the orthopaedic specialist Dr. B. who clearly finds that the immediate swelling after the injury as well as the mechanism of injury both indicate ACL damage as a consequence of the work-related injury. In addition to his expertise in orthopaedics, Dr. B. had the advantage of examining the worker several times.
- (67) Only the medical consultant considers the worker's ACL damage to be chronic and pre-existing. We prefer the opinion of the orthopaedic specialist Dr. B. because of his specific expertise, his opportunities to examine the worker, and his explanation of why he comes to his opinion that the ACL damage is work-related, including his deductions from documented objective findings of swelling in the right knee immediately after the injury.
- (68) Our review of the medical reports prior to the 1997 work-related injury show that the worker was diagnosed with bilateral chondromalacia patella. There is nothing in our review of the medical evidence to indicate any aggravating relationship between the worker's pre-existing chondromalacia and the meniscal and ACL damage diagnosed after the worker's injury on September 11, 1997.
- (69) Taking the medical evidence as a whole, we find that this worker has suffered a work-related disability including instability in his right knee and pain arising out of the damage to his medial meniscus and ACL sustained as a result of his September 11, 1997 injury arising out of and in the course of his employment. We further find that he had not recovered from this disability as of April 1, 1998. The record shows that the ACL in his right knee was not surgically reconstructed to address ongoing instability until April 24, 2000. In addition, the latest FCE [December 17, 2001] with respect to the worker's abilities indicates that he cannot perform the kneeling tasks required in his duties as an alarm technician.

- (70) Therefore, we find that the worker meets the eligibility requirement of s. 3 of the *Act*.
- (71) It follows from our findings and conclusion with respect to eligibility that the worker should not have had his compensation terminated on March 31, 1998 and he does not come within the criteria of Policy CL-30, section E for termination of compensation. This is because he continued to have a work-related disability after March 31, 1998.
- (72) We also find that the fact that the worker returned to his pre-injury line of work as a fire alarm technician on July 2, 1998 does not mean he was fit for that work on March 31, 1998. As he testified, he was at the time no longer on benefits and was in a desperate situation financially. We find that he returned to his work because he needed income, not because he (or his treating professionals) had decided he was fit for this work without modified duties. [See for example, the treating physician's reports of June 1998 that state the worker is fit for "light duties only".]
- (73) We will now deal with each type of compensation the worker is seeking (and that was denied by the adjudicator and IRC).

1. Relocation Assistance

- (74) Relocation assistance can be a form of rehabilitation assistance. Rehabilitation assistance is governed by s. 30 of the *Act* which 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.

We note that section 30 says rehabilitation assistance "includes" vocational or academic training but it is not limited only to these types of training.

- (75) The IRC did not consider the broad entitlement language of s. 30 in its analysis of whether or not the worker was entitled to relocation assistance. It relied on Policy CS-02.
- (76) Policy CS-02 "Relocation of Disabled Workers" [subsequently revoked] was in force at the time of the worker's 1997 work-related injury. The policy states it is in reference to section 30 of the *Act*. The policy addresses relocation for the purpose of re-education and retraining.

- (77) The IRC finds that “relocation assistance can only be given for retraining or re-education.” We disagree. Policy CS-02 does not say that relocation assistance can only be given for retraining or re-education. Some policies or sections of the *Act* do expressly limit entitlement to the terms of a policy. See for example, section 19.4 of the current *Act* which says that interest must be paid in accordance with board policy: we interpret this to mean, in the context of the *Act* as a whole, that there is no entitlement to interest other than as provided in board policy. In contrast, there is no such limitation in the rehabilitation assistance provision of the *Act* (s. 30).
- (78) We agree with the IRC’s finding that “there were no jobs in [the worker’s] line of work” after his September, 1997 injury. On the basis of the worker’s testimony in this regard and the document from Human Resources Canada, we find that the worker lost his job because he was unable to perform his full duties as a result of his workplace injuries throughout the fall and into the first quarter of 1998. We find that he was only capable of light duties.

We further find that the employer was busy at this time and needed someone qualified and able to replace the worker and perform the full duties of fire alarm technician; so he hired someone else while the worker was disabled and on temporary partial disability benefits. We find that this replacement and resulting unemployment of the worker was an “effect of a handicap” within the language of section 30, for which the worker required assistance. [Handicap is not defined in the *Act* but the *American Medical Association’s Guide to Evaluation of Permanent Impairment*, 4th ed., defines “handicapped ” as “Under [American] federal law, an individual is handicapped if he or she has an impairment that substantially limits one or more of life’s activities, has a record of such impairment, or is regarded as having such an impairment”].

We also find that the worker’s inability to kneel [see para. 55] before issues and analysis.] was a substantial limit on his ability to perform work activities which included kneeling [crawling] as a required duty.

- (79) We also find that the worker has “experienced a long term disability” as set out in section 30 due to the instability in his right knee (a loss of function) that the ACL injury caused – this injury was still under repair by surgery in April 2000.
- (80) Therefore, we conclude that the worker is entitled to relocation assistance for the cost of relocating from Whitehorse to Calgary for work when employment was not available to him in the Yukon with his pre-injury employer by March 1998.

2. Re-employment Assistance Allowance Benefits

- (81) We find that the worker searched for work from March 31 to July 1, 1998 because his employer had replaced him when he could only perform light duties after his September, 1997 work-related injury.
- (82) Re-employment assistance allowance is governed by Policy CS-02 which was in effect at the time of the worker's injury. It states: "the purpose of this allowance is to assist workers in supporting themselves . . . until they are able to establish themselves in employment following a period of temporary total disability or temporary partial disability." The policy goes on to state that a period of such assistance may be approved by the claims officer for a period of three months. In light of our finding of the worker's eligibility for compensation for ongoing disability continuing after a period of total partial disability benefits ending March 31, 1998, in our view the worker comes within the terms of Policy CS-02.
- (83) Therefore, the worker is entitled to re-employment assistance allowance for the three months he was looking for work from April 1, 1998 to July 1, 1998, after which he established himself in employment.

3. Wage Loss Benefits

- (84) We have already found that this worker continued to suffer a work-related disability after his benefits were terminated on April 1, 1998. In this regard, surgery to reconstruct his ACL, in order to remedy the instability as a result of his workplace injury, was not performed until April 2000. In addition, an FCE in December 2001 reports a limit in this worker's functional abilities with respect to crawling, which is a required component of his pre-injury work as a fire alarm technician.
- (85) The evidence from the record is that the worker was earning \$15 per hour prior to his workplace injury. He testified that his hourly rate for his employment in Calgary after his workplace disability arose was only \$13 an hour. However, he also said that he was working long hours. The appeal committee was not provided with any documentation from the worker with respect to his earnings after he resumed employment in July, 1998. The worker's advocate said that such documentation could be provided to the board.
- (86) In light of our finding with respect to eligibility for compensation, the board must compensate the worker for any loss of earnings to which he is entitled under section 22 of the *Act*.

Conclusion

The worker's appeal is allowed. The decision of the IRC is reversed and varied as follows.

1. The worker was not fully recovered to a pre-injury level and was not completely capable of the employment he performed prior to his work-related disability, at the time his compensation was terminated in April 1998.
2. The worker continues to have a work-related disability arising out of and in the course of his employment because of injuries to the medial meniscus and anterior cruciate ligament in his right knee which he sustained at work on September 11, 1997.
3. The board shall provide rehabilitation assistance to the worker according to section 30 of the Act as follows:
 - a) Re-employment assistance benefits for the period April 1, 1998 to July 1, 1998; and,
 - b) Relocation assistance in the form of reimbursement for the cost of the worker's relocation from Whitehorse to Calgary on July 1, 1998 in order to secure employment.
4. The board must provide compensation to the worker for his loss of earnings according to section 22 of the Act beginning from July 2, 1998 when he resumed employment.

Dated this **8th day of April, 2002** in the City of Whitehorse, in the Yukon Territory.

Donald Inverarity, Member

Heather MacFadgen, Presiding Officer

Karen Waroway, Member