

Workers' Compensation Appeal Tribunal

Decision # 30 – Board Direction to Rehear

Claim No.: 94-0749

Reasons for Review Received from the Board: November 14, 2001

Date of Documentary Review: January 10, January 21, 2002

Date Last Document Received: March 12, 2002

Date of Decision: April 9, 2002

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

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

Documentary Review

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

Summary for the Reader

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

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

Policies considered or applied by Hearing Officer: CS-07

Decision made by Hearing Officer: The worker does not require further vocational assistance. The provisions of Policy CS-07 have been met.

Sections of the *Act* considered or applied by appeal committee: s.5, 17.(1), 18.4, 19.4, 19.5, 22, 30, 101.(1) *Worker's Compensation Act*, SY 1992 as amended up to the date of the injury in 1994.

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

Issue addressed by appeal committee:

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

Decision made by appeal committee:

1. The board shall continue to provide vocational rehabilitation to the worker until such time as the worker no longer requires assistance to reduce or remove the effect of a handicap, in accordance with Section 30 of the *Act*.
2. The board must provide compensation to the worker for his loss of earnings according to section 22 of the *Act* beginning from May 2000, when benefits were terminated on the basis that no further vocational assistance was required.

Introduction

This is a rehearing of an appeal originally decided by this appeal committee on August 30, 2001. On November 14, 2001 (received in the tribunal office on November 21, 2001) the Yukon Workers' Compensation Health and Safety Board of Directors (the "Board") acting under section 18.3(8) of the *Workers' Compensation Act*, 1992 as amended by SY 1999, c.23, s.11 (the "*Act*"), directed the appeal committee to rehear the appeal because in the board's view the appeal committee (a) did not present a balanced view of the entire record, (b) failed to consider the entire record of the claim in the board's possession, and (c) failed to comply with Sections 11, 18.4(1) and 30 of the *Act*. At the same time, under s. 18.3 (10), the Board also stayed the original decision of the appeal committee (Decision #24).

On November 21, 2001 the appeals officer provided the workers' advocate with a copy of the board's letter. On January 11, 2002 the appeals officer wrote the workers' advocate confirming that the advocate, on behalf of the worker, was willing to proceed with the rehearing of the appeal by way of documentary review and written submissions in response to the board's written reasons. In e-mail correspondence from the workers' advocate dated January 21, 2002, the workers' advocate stated that he had provided his written submissions on December 11, 2001 and had nothing further to add to this submission.

On November 30, 2001 and January 8, 2002 the appeals officer requested an update of the worker's file for the period since the original hearing. Those updates were received on December 12, 2001 and January 11, 2002. As this is a rehearing, the members of the appeal committee have reviewed again and considered afresh the worker's entire record.

On April 3, 2001 the worker originally appealed the decision of the Yukon Workers' Compensation Health and Safety Board's ("board") hearing officer dated July 27, 2000.

Jurisdiction

- (1) The appeal committee determined that it has jurisdiction under section 18.3 (8) to rehear this appeal. This is an appeal from a decision of a hearing officer made under Section 17: Section 18.(1) states that a worker may appeal a decision made under section 17 to the appeal tribunal.

The Internal Review Committee Decision

- (2) The IRC in its July 27, 2000 decision made these findings:

1. "...that the goal of Board Policy CS-07 has been met. The worker has been returned as close as possible to his pre-injury level of employability and is unlikely to benefit from continued vocational assistance."
 2. "...it is inappropriate to apply a policy, which changes a worker's established right to compensation benefits and therefore find that the CL-35 Average Weekly Earnings Policy Statement Application cannot be applied retrospectively to the calculation of the worker's compensation rate."
- (3) In addition, the IRC made the following decisions (orders):
1. The decision that the worker did not require further vocational assistance was confirmed.
 2. The decision that the worker's claim was at finality was not confirmed.
 3. The decision to reduce the worker's compensation rate in accordance with Policy CL-35 was reversed.
- (4) The worker appeals only the first of the three decisions: that is, he appeals the decision that he did not require further vocational assistance.

Fair and Reasonable Consideration

- (5) Under section 18.3 (8), we are required to give fair and reasonable consideration to board policies and *Act* provisions as set out in the written reasons of the members of the board (the "Board").

Accordingly, we set out the Board's reasons in this regard.

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

- (6) The board says that the hearing officer's decision did not deal with a functional capacity evaluation and that the only relevant issue on the appeal was whether the worker possessed the skills, aptitudes and physical abilities required to be employed in a specific occupation or group of occupations.

- (7) They say that the hearing officer, applying Policy CS-07, found that the worker had been returned as close as possible to his pre-injury level of employability, and was unlikely to benefit from continued vocational assistance. (We found, in our previous decision, that Policy CS-07 did not apply).
- (8) The board says that the role of the Workers' Compensation Appeal Tribunal ("WCAT") under Section 18.4(1) of the *Act* is to confirm, reverse or vary a decision of the hearing officer, and that "to vary does not mean adjudicative or rehabilitation decisions. It is not the function of the WCAT to act as an adjudicator."

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

- (9) The board says that we did not present a balanced view of the entire record in our decision, and that the evidence in Decision # 24 does not reflect a fair evaluation of the claim file in the board's possession.. They cite numerous references from the file, many of which were also referenced in our decision, and most of which appear to support our decision.
- (10) The board says that Section 18(2)(b) makes it clear that the appeal committee shall consider the entire record of the claim in the board's possession. The implication from this statement is that they do not believe we have done so, however they do not state that. (We stated on page 3 of the decision that we did consider the entire record of the claim in making our decision).

BACKGROUND

- (11) The worker slipped and fell backward, downhill, while working as a labourer in August 1994. He was carrying a chain saw in his right hand and tools in his left hand. He landed with his left hand folded under him.
- (12) After several inconclusive examinations the worker was eventually found, in May 1995, to have sustained a significant tear of his scapholunate ligament, with residual carpal instability. Medical opinion was that only very light use of the hand was possible. A complete wrist fusion or intercarpal fusion was recommended as the only "salvage" procedures available. It was noted that this would permit some wrist movement but would not be effective for pain relief. Surgery for intercarpal fusion was performed in September 1995.

- (13) In November 1995 a vocational rehabilitation counsellor with VocAid Disability Management Services reported that the results of vocational testing indicated that the worker's basic skills were at a grade 1 level in reading and writing and a grade 3 level in mathematics. Literacy training to prepare the worker for a job search was recommended, as was Class 1 driver training in heavy equipment operation.
- (14) In December 1995 the worker was admitted to Program of Work Evaluation and Rehabilitation for range of motion strengthening and ultrasound, and upon discharge continued a home exercise program for mobility and strengthening.
- (15) The worker continued to experience a lot of pain and a complete wrist arthrodesis was performed in May 1997. Then bone grafting was done in March 1998.
- (16) In July 1998 a Return to Work plan was developed. The worker completed a work conditioning program in October 1998 and was released "fit for medium level employment". Literacy training to Grade 3 level was provided. Class 1 driver training had been provided to the worker during the spring of 1996, but he had not been successful in passing the exam at that time. In October 1998 further driver training was undertaken and he successfully passed the exam in November. A "training on the job" arrangement was made with an employer in order to provide work experience in the field.
- (17) In May 2000 the worker was advised that he required no further vocational assistance and he was considered capable of earning more than his pre-accident earnings.
- (18) On August 30, 2001 the worker's appeal was heard.
- (19) In September 2001 the worker underwent a partial Functional Capacity Evaluation , with specific reference to his left wrist. The opinion of the therapist was that it was unlikely that the worker's functional abilities would improve much further. Occupations of truck driver and heavy equipment operator were not recommended.
- (20) Subsequent to that evaluation, the adjudicator determined that [the worker] would require further education to be considered employable. The worker began tutoring with Learning Disabilities Yukon and Yukon Learn in October 2001. A vocational rehabilitation plan was constructed and [the worker] was enrolled in Essential Skills program at Yukon College.
- (21) Our decision was released October 29, 2001. That decision required the board to provide literacy training to the worker, to authorize a functional capacity evaluation in order to determine [the worker's] current ability, and to provide vocational rehabilitation as appropriate based on the results of that evaluation. It also required

them to provide compensation to the worker for his loss of earnings according to section 22 of the *Act*, beginning from May 2000, when benefits were terminated, and to pay interest in accordance with board policy, if that policy applied to his claim once it was developed. It therefore appears that the board was in the process of implementing, on its own, most of the requirements of our decision.

- (22) The decision was stayed by the board on November 13, 2001 and the WCAT was directed to rehear the worker's appeal.

Analysis of the Issues/Reasons

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

- (23) We find that the worker was injured arising out of and in the course of his employment as a labourer in August 1994.
- (24) Section 90 of the current *Act*, the "transitional provision", states "where a worker is entitled to compensation as a result of a disability in . . . March 31, 2000 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000."
- (25) Therefore, we find that the *Worker's Compensation Act*, SY 1992 as amended up to the date of the injury in 1994 is the legislation to be used to determine the issues of entitlement in this case. Specifically, section 3 of that *Act* says "a worker who suffers a work-related disability is entitled to compensation" We interpret this to mean that the right to entitlement arises at the time the worker suffers a work-related disability, and in this case it arises in August 1994.
- (26) With respect to relevant policies, we note that of the policies submitted to the tribunal by the board as being relevant to this case only CS-07 was cited by the IRC in its decision.
- (27) We will not examine the application of Policy No. 28, Calculation of Loss of Earning Capacity; Policy GC-04, Illiteracy; Policy GC-09, Transitional Clause; Policy CS-02, Re-employment Assistance Allowance; Policy CS-04, Training-on-the-Job; Policy CS-05, Rehabilitation; Policy CL-30, Suspension, Reduction and Termination of Compensation; or, Policy CL-46, Permanent Impairment because the issues that they address are not ones that are under appeal.

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

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

(29) Section 30 of the *Act* states:

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

(30) Policy No. 3 states, in part:

Vocational Rehabilitation

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

- a) A statement indicating how the family is involved, the financial situation of the family – specifying income and expenditures.
- b) The worker's present formal education level, what other courses have been taken and how successful the worker was.
- c) Have attempts been made to find other suitable employment, if so, what attempts and what were the results?
- d) Has retraining on the job been attempted, if so, what attempts and what results?
- e) A full description of the physical aspects of the job the worker is being trained in. How does the worker's physical disability fit in with the recommended new field of training?
- f) What is the opportunity for employment after re-training?

(31) [The worker] attended a work conditioning program at Work Abilities Ltd. for

ten sessions beginning in August 1998. He was discharged in October 1998. The discharge report states:

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

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

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

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

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

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

- (38) September 2001 the worker underwent a partial Functional Capacity Evaluation, with specific reference to his left wrist. The opinion of the therapist was that it was unlikely that the worker's functional abilities would improve much further. In the recommendations section for her summary report she says: "The strength ratings for [the worker] are very close to the most likely demands of a truck driver. However, based on the physical impairments I recommend that [the worker] not return to work that involves forceful maneuvers or repetitive firm grip activities on the left. Over the long-term the combined severe restricted range of motion, instability, wrist malalignment and decreased grip/pinch grip will make [the worker] vulnerable to repetitive strain and further exacerbation or reinjury. Specifically, the tasks that [the worker] would likely have difficulty with over the long-term would be handling of tire chains, adjusting of brakes, left hand steering on rough roads, unloading of weights greater than 40 lbs. from trucks, and cinching down and handling of tarps on trucks. Likewise the work of heavy equipment operator which can involve supporting body weight with left hand on ladders, use of wrenches and levers with left hand, steering with left hand only on difficulty terrain and handling of grader blades would not be advised" In short, occupations of truck driver and heavy equipment operator were not recommended.
- (39) The appeal committee disagrees with the hearing officer that the worker has been returned as close as possible to his pre-injury level of employability and is unlikely to benefit from continued vocational assistance. The committee agrees with the worker that his illiteracy is a barrier to employment.
- (40) An adjudicator's note to file dated October 1, 2001 reads "... I have determined that he will require further education to be considered employable..." According to a summary in the file, the worker began tutoring with Learning Disabilities Yukon and Yukon Learn in October 2001. A vocational rehabilitation plan was constructed and [the worker] was enrolled in Essential Skills program at Yukon College.
- (41) The appeal committee finds that the worker does require vocational assistance to become employable. The committee also finds that the board is currently providing vocational assistance to the worker.

Conclusion

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

1. The board shall continue to provide vocational rehabilitation to the worker until such time as the worker no longer requires assistance to reduce or remove the effect of a handicap, in accordance with Section 30 of the *Act*.

2. The board must provide compensation to the worker for his loss of earnings according to section 22 of the *Act* beginning from May 2000, when benefits were terminated on the basis that no further vocational assistance was required.

Dated this **9th** day of **April, 2002** in the City of Whitehorse, in the Yukon Territory.

Jan Stick, Member

Janet Wood, Presiding Officer

Joseph P. Radwanski, Member