

Workers' Compensation Appeal Tribunal

Decision # 31

Claim No.: 83-0982

Date of Hearing: January 17, 2002

Hearing Closed: February 4, 2002

Date of Decision: April 11, 2002

Appeal Committee Members

Presiding Officer:	Janet Wood
Member representative of employers:	Karen Waroway
Member representative of workers:	Donald Inverarity

In attendance: The Worker
The Worker's representative – Julie Docherty
Reporter/Recorder - Doug Ayers

Location: Boardroom 2C Elijah Smith Building
Whitehorse, Yukon Territory

Summary for the Reader

Decision under review: Hearing officer's decision – September 7, 2000

Sections of Act considered or applied by hearing officer: s.5

Policies considered or applied by hearing officer: GC-09

Decision made by the hearing officer: The hearing officer agreed with the adjudicator that the worker was medically fit to return to his pre-injury employment. He found that the board had fulfilled its responsibility to the worker upon his discharge from the BC Rehabilitation Clinic.

Appeal Committee decision summary: The worker was not medically fit to return to his pre-injury occupation when benefits were terminated in November 1986.

Sections of the Act considered or applied by appeal committee: s.5, 17.1(1), 19.5, 90.(1)(b) *Workers' Compensation Act* 1992; and s.5.1, 39.1(1) *Workers' Compensation Act* 1983

Policies considered or applied by appeal committee: GC-09, No. 28

Issue addressed by appeal committee:

1. What legislation and policy should be used to determine the worker's entitlement in this appeal?
2. Was the worker fit to return to his pre-injury employment when benefits were terminated?

Decision made by appeal committee:

1. The board must provide compensation to the worker for his loss of earnings according to section 39 of the *Act* beginning from the date in 1986 when benefits were terminated.

Introduction

By his Notice of Appeal dated November 1, 2001, the worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Hearing Officer dated September 7, 2000.

In the decision under appeal, the hearing officer upheld the January 17, 1986 and November 14, 1986 decisions of a board adjudicator to terminate the worker's temporary total disability benefits as the worker was fit to return to his pre-injury employment.

The worker and his representative, the workers' advocate, say that the adjudicator was wrong to terminate benefits because the worker was not fit to return to his pre-injury employment.

The workers' advocate asks that the appeal committee find that in light of evidence prior and subsequent to the hearing officer's decision, the worker has a loss of earnings as a result of a work-related disability which prevented him from returning to his pre-accident employment.

The hearing was held on January 17, 2002 before an appeal committee of the tribunal established by the tribunal Chair under section 18.3 (1) of the *Workers' Compensation Act*, 1992, as amended by SY 1999. C.23, s.11 (the "*Act*").

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

The worker attended the hearing by telephone conference and gave evidence by affirmation. The employer was notified but did not attend.

The appeal committee considered all of the worker's record on claim provided by the board as well as board policy GC-09 Transitional Clause, also provided by the board, according to section 18.3 (4) of the *Act*.

During the hearing, the appeal committee accepted as exhibits:

Exhibit 1:

- a) 12 pages of dates of office visits by the worker from the Beechwood Professional Center – dated 22/12/89 to 02/11/01;
- b) pages 19-21, 35, 37, 58-60, 62, 78, 79, 89-93, 103-107, 109, 110, 206-209, and 215-219, *Workers' Compensation In Canada* (2nd ed.), Terence G. Ison
- c) pages 286-289, 341-345, 398-401, Yukon WorkFutures; and,

Exhibit 2: Memo from the Manager, Employee Records & Pensions, Yukon Department of Renewable Resources to the Claims Officer, Workers'

Compensation Board dated 84/11/27 with accompanying document entitled, "Physical Movements Corrections Officer Position, Department of Justice, Whitehorse Correctional Centre.

Exhibit 3: Pages 346 and 347, Yukon WorkFutures

Exhibit 4: Pages 330 – 332, Yukon WorkFutures

Exhibit 5: 1 page from National Occupational Classification, 1992

Issues

1. What legislation and policy should be used to determine the worker's entitlement in this appeal?
2. Was the worker fit to return to his pre-injury employment when benefits were terminated?

Background

- (1) The worker, a corrections officer, was injured in November 1983 when the couch he was seated on collapsed under him as he was getting up off it. The worker fell, hitting his lower back on the edge of the couch, and landing on the floor.
- (2) Medical diagnosis subsequent to the accident was "low back pain – probable disc protrusion".
- (3) The worker returned to work March 12, 1984 but continued to report intermittent pain and in July 1984 a lumbosacral laminectomy was performed.
- (4) In November 1984 the board's medical consultant referred the worker to the BC Rehabilitation Clinic. The January 17, 1985 discharge summary indicates the worker was considered fit to return to work.
- (5) The worker returned to work for a short period, with a recurrence of pain, and on January 30, 1985 the surgeon recommended continued rest, with gradual increase in activities. A decision as to whether the pre-injury work was appropriate for the worker was also recommended.
- (6) The worker began working 4 hour shifts in February 1985, with continued pain. He was examined in March and again in April 1985 by the medical consultant, who found him fit for suitable employment, but noted that the additional stresses in a correctional officer's work would make it difficult for him to return to that occupation.
- (7) The worker resigned his position as a corrections officer in April 1995 and moved to Prince Edward Island.

- (8) On January 17, 1986 a board adjudicator wrote the worker terminating his Total Temporary Disability benefits on the basis that he was considered fit to return to his pre-injury employment. However, the worker's benefits were reinstated shortly afterward, on the recommendation of the medical consultant, after his review of a January 16, 1986 report from Dr. Muzumdar, who diagnosed the worker with chronic pain syndrome.
- (9) Upon the request of Dr. Muzumdar, the worker was referred to a pain management clinic in May 1986, but without significant results.
- (10) In November 1986 the worker was once again advised that he was fit to return to his pre-injury employment. Benefits were terminated November 15, 1986.
- (11) The worker appealed the adjudicator's decision to the hearing officer who found that, with the exception of the subsequent award for permanent impairment resulting from the laminectomy, the board had fulfilled its responsibility to the worker upon his discharge from the BC Rehabilitation Centre.

Analysis of the Issues/Reasons

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

- (12) We find that the worker was injured arising out of and in the course of his employment as a corrections officer on November 26, 1983.
- (13) Section 90(b) of the current *Act*, the "transitional provision", states "where a worker is entitled to compensation as a result of a disability in . . . 1992 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before January 1, 1993."
- (14) Therefore, we find that the *Worker's Compensation Act*, SY 1983 as amended up to the date of the injury in 1983 is the legislation to be used to determine the issues of entitlement in this case. Specifically, section 5.(1) of that *Act* says "Where in any employment to which this Act applied, a worker suffers injury or death by accident arising out of and in the course of employment, compensation shall be paid..." 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 November 1983.

- (15) With respect to relevant policies, we note that only Policy GC-09, Transitional Clause was submitted to the tribunal by the board as being relevant to this case. The appeal committee has identified Board Policy No. 28 Calculation of Loss of Earning Capacity as being also relevant to this appeal.

Issue #2: Was the worker fit to return to his pre-injury employment when benefits were terminated?

- (16) In his decision, the hearing officer makes reference to a pre-existing degenerative condition. We will not deal with this issue as it does not appear to have formed the basis for the decision under appeal. He has not found that the worker is unable to work as a result of a pre-existing condition; rather he has stated that “factors other than medical fitness made the return unlikely”. Although he does not say what those factors are, it seems clear that a pre-existing medical condition that prevented the worker from returning to his pre-injury occupation would fall into the category of “medical fitness”. In his decision, he states “I also agree with the adjudicator that the medical opinion was that the worker could return to his work as a corrections officer,” and “The fact that the worker was able to undertake approximately 20 weeks of work, as an aquarium technician, shows that he was capable of physical work. The occupation included the tasks of welding and pipe-fitting which can be fairly demanding.”
- (17) Although we do not agree that the work undertaken was sufficient to “show that the worker was capable of physical work”, for reasons given in the following paragraph, this statement does support our finding that it was not a pre-existing condition that is the basis of the hearing officer’s decision that the board has fulfilled its responsibility to the worker.
- (18) We do not agree that the short-term aquarium technician job establishes the worker’s fitness for his pre-injury employment. The worker testified that the job with the marine aquarium was “light duty work” that was arranged for him by Social Services in order that he could qualify for unemployment insurance. The employer was made aware of his physical restrictions and accommodated them. The work involved “hooking up _” or _” plastic pipes – gluing or screwing. All plastic pipes, not heavy pipe-fitting. The heavy work was done by others”. This is supported by a letter from the employer, dated April 6, 2001 which reads “. . . He assisted existing staff at the Station in the set-up of a salt water grid system. This system used plastic pipe and [the worker] was involved in threading pipe and gluing this system together. The work conducted was not strenuous...” Finally, a medical report shortly after the job concluded refers to the employment and says, “At that time his back got progressively worse, with pain in the low back area, right buttock and right leg down to the ankle”.

(19) In confirming the adjudicator's November 1986 decision to terminate benefits on the basis that the worker was fit to return to his pre-injury employment the hearing officer appears to have relied on the January 17, 1985 discharge report of the BC Rehabilitation Clinic, that the worker was fit to return to work. In his decision, he says: "From the information in Dr. Mudie's [BC Rehabilitation Clinic] report, I believe the worker was returned to his pre-accident level of fitness and was considered medically fit to return to his duties as a Corrections Officer." He found that the board had fulfilled its responsibility to the worker upon his discharge from the BC Rehabilitation Clinic.

(20) We do not agree with the hearing officer that the worker was returned to his pre-accident level of fitness and was medically fit to return to his duties as a corrections officer in January 1985. We find that medical information subsequent to that date shows that the worker was not fit to return to work, and that the adjudicator accepted that he was not fit to return to his pre-injury work at that time. Benefits continued until November 1986, almost 2 years after the date of the BC Rehabilitation Clinic report.

(21) When the worker returned to his pre-injury employment, after his discharge from the

BC Rehabilitation Clinic in January 1985, he experienced a recurrence of pain. On January 30, 1985, Dr. Watt, the orthopedic surgeon, recommended continued rest, with gradual increase in activities. He says "I think he will improve again and the decision is going to have to be made whether he can carry on with his present job as a guard" [Emphasis added]

(22) The worker began working 4 hour shifts in February 1985, with continued pain. He was examined in March 1985 by the medical consultant, who noted that the additional stresses in a correctional officer's work would make it difficult for him to return to that occupation. The medical consultant reported that he discussed the stresses involved in the worker's pre-injury occupation with him. The worker had identified some alternative occupations that he was interested in and the medical consultant encouraged him to try to start working. He thought that those positions the worker had identified might be ones that he was physically capable of performing in but noted that the worker was not a candidate for many jobs, due to his education level (grade 5 to 7). He made the following recommendations: "I would suggest that the worker is fit to return to suitable employment as of today. He is not fully recovered but his impairment is in the neighbourhood of 5% of total. ... If he is not able to find suitable employment, the Replacement of Earnings Committee may need to investigate in order to deem suitable income level for him. [Emphasis added]

- (23) On January 17, 1986 a board adjudicator wrote the worker terminating his Total Temporary Disability benefits on the basis that he was considered fit to return to his pre-injury employment. The worker's benefits were reinstated shortly afterward, on the recommendation of the medical consultant, after his review of a report from Dr. Muzumdar. Dr. Muzumdar is a former head of the Pain Control Unit at the New Brunswick WCB. He assessed the worker January 16, 1986 and diagnosed chronic pain syndrome. Upon the request of Dr. Muzumdar, the worker was referred to a pain management clinic at Queen Elizabeth Hospital in May 1986.
- (24) The June 12, 1986 discharge summary from the Queen Elizabeth Hospital states "It was the unanimous opinion of the treatment team that the worker was not yet ready to undertake full time or heavier activities on an ongoing basis." The medical consultant's June 25, 1986 opinion, after reviewing the discharge report, was that it was unlikely that there would be any change in the worker's condition. He suggested that consideration be made for "deeming" for return to suitable employment.
- (25) It does not appear that any action was taken as a result Dr. Watt's January 30, 1985 identification of possible problems with a return to the pre-injury occupation, or of the medical consultant's March 1995 and June 1986 suggestions about deeming for a suitable occupation.
- (26) The worker was seen by Dr. Parton September 9, 1986 for assessment of chronic back pain. Dr. Parton "... was struck by the tremendous amount of muscle spasm this patient has. ... He is obviously in great discomfort and can't sit up straight in a chair and has to keep moving from side to side. He can't lie down flat on the examining couch without a lot of discomfort, and has to roll over on his side." Dr Parton could find no evidence of neurological dysfunction and had no recommendations for the patient's management.
- (27) The medical consultant reviewed Dr. Parton's report October 15, 1986 and concluded that there was no further treatment to offer the worker. He advised that "... the best treatment for this worker will be to get him back into the work force with a gradual increase in time spent at work."
- (28) At the request of the adjudicator, the medical consultant completed a "Loss of Earning Capacity – Medical Information" form in October 1986. On that form he indicated the worker was fit for "suitable" [as opposed to "No" or "Full"] work with limitations identified as "avoid prolonged sitting, avoid lifting over 40 lbs. weight". Under "Comments" he stated "physically should be fit to return to his previous type of work as a corrections officer". He did not provide reasons for his

apparent change of opinion since his June 1986 report when he recommended that “consideration be made for deeming for return to suitable employment”. [Emphasis added]

(29) Board Policy No. 28, Calculation of Loss of Earning Capacity, specifically addresses situations where a worker is found fit for employment but has not returned to employment, and it includes the board’s interpretation of the term “suitable occupation”.

(30) Board Policy No. 28 states, in part:

... Especially difficult will be cases where workers found fit for employment but have not returned. In these cases, after what may be Vocational Rehabilitation involvement if lengthy disability has been present, the Board will have to estimate what the worker is capable of earning at a suitable occupation.

The Board interprets ‘suitable occupation’ as follows:

1. An occupation which the individual is physically capable of performing;
2. An occupation for which the individual is qualified;
3. An occupation for which the individual has a reasonable expectation to be hired (...); and
4. An occupation which does not place unrealistic demands on the worker.

... The question of a suitable occupation must be worked out between the worker and the Vocational Rehabilitation Counsellor after medical determination of physical restrictions. ... The onus will be on the Board to show they were reasonable in assigning an estimated earnings capacity.”

[Emphasis added]

(31) We find that the specific limitations identified by the medical consultant on the “Loss of Earning Capacity” form are exceeded by the physical requirements of the corrections officer position as described in the statement of physical requirements provided to the board by the employer in 1984. Those requirements include, in part:

- Sitting in wooden or hard office chair for 6 – 8 hours;
- ... /carrying adult person(s) with medical problems;
- Carry 50 lb. Scott Air Pac breathing apparatus... pull/lift/carry adult person(s);
- ... Handling/controlling fire hose with 100 lb. back pressure;
- Physical restraint of uncooperative adult person;
- Walking on uneven ground/up hill/down hill coupled with long distances. May be loaded with backpack or snow shoes or pull sleigh.

- (32) We note that the medical consultant did not examine the worker in making the determination that the worker “physically should be fit to return to his pre-injury work as a corrections officer”, rather he relied on the September 9, 1986 report of Dr. Parton. We find that Dr. Parton’s description of a patient with “tremendous muscle spasm” and in “great discomfort” who “can’t sit up straight in a chair” is not convincing support of a conclusion that the worker can return to the occupation described.
- (33) Nor does the June 12, 1986 discharge summary from the Queen Elizabeth Hospital support such a conclusion: it states “It was the unanimous opinion of the treatment team that the worker was not yet ready to undertake full time or heavier activities on an ongoing basis”.
- (34) We find that Policy No. 28 requires the Board to estimate the loss of earning capacity resulting from the injury at work, with consideration given to “suitable occupation”. The policy clearly states that the onus is on the board to show they were reasonable in assigning an estimated earnings capacity. We find that, by implication, the onus is on the board to show they were reasonable in determining the suitable occupation upon which an estimated earnings capacity was based.
- (35) We find nothing in the file that suggests that the worker was fit to return to his pre-injury occupation of corrections officer when benefits were terminated. The preponderance of medical opinion on the file, from a variety of sources, indicates that the worker was not physically fit to return to his pre-injury occupation of corrections officer when benefits were terminated in November 1986.
- (36) We note that the appropriateness of the worker’s return to his pre-injury occupation was questioned as early as January 1985. We also note that the medical consultant identified suitable employment as appropriate, but he did not identify full employment as appropriate, when completing the “Loss of Earning Capacity” form.
- (37) We find that the board has failed to show that it was reasonable in determining that the pre-injury occupation was a suitable one for this worker to return to.
- (38) We further find that the worker was not medically fit to return to his pre-injury occupation of corrections officer when benefits were terminated in November 1986.

Conclusion

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

1. The board must provide compensation to the worker for his loss of earnings according to section 39 of the *Act* beginning from the date in 1986 when benefits were terminated.

Dated this **11th** day of **April, 2002** in the City of Whitehorse, in the Yukon Territory.

Karen Waroway, Member

Janet Wood, Presiding Officer

Donald Inverarity, Member