

Workers' Compensation Appeal Tribunal

Decision # 32

Claim No.: 94-0169

Date of Hearing: February 14, 2002

Date of Decision: April 23, 2002

Appeal Committee Members

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

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

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

Summary for the Reader

Decision under review: IRC decision – January 23, 1995

Sections of Act considered or applied by IRC: s.5, 17.(1), 19.5

Policies considered or applied by IRC: Not identified

Decision made by IRC:

- Medical problems may or may not be related to injury;
- The issue of work relatedness cannot be addressed;
- No further benefits are awarded.

Appeal Committee decision summary:

The appeal committee found that the board should have applied Board Policy No. 46. The appeal committee also found that if the issue of work relatedness could not be addressed then a finding that the disability was work related was required. The appeal was allowed.

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

Policies considered or applied by appeal committee: No. 46, CL-42, CS-01, GC-09

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 work, with no remaining disability as a result of the workplace injury, when benefits were terminated in July 1994?
3. Is the worker entitled to benefits under Section 30 of the *Act*?

Decision made by appeal committee:

1. The *Worker's Compensation Act*, SY 1992 as amended up to the date of the injury in 1994 is the appropriate legislation.
2. The board must provide benefits to the worker in accordance with Sections 22, 28 and 30 of the *Act*, beginning from the date in 1994 when benefits were terminated.

Introduction

By his Notice of Appeal dated November 28, 2001, the worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Internal Review Committee ("IRC") dated January 23, 1995.

In the decision under appeal, the IRC upheld the July 14, 1994 decision of a board adjudicator to terminate the worker's temporary total disability benefits as it appeared that the worker had recovered from the injury he suffered at work, and that any remaining disability was not attributable to the accident.

The worker and his representative, the workers' advocate, say that the adjudicator was wrong to terminate benefits because the worker had not recovered from his work related injury.

The workers' advocate asks that the appeal committee find that in light of evidence prior and subsequent to the IRC decision, the worker has not recovered from his injury at work, and that he is entitled to benefits under S.30 of the *Act*.

The hearing was held on February 14, 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) (c) of the *Act* to hear the appeal.

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

The appeal committee considered all of the worker's record as provided by the board, as well as the following board policies also provided by the board, according to section 18.3 (4) of the *Act*:

- GC-09 Transitional Clause;
- CL-42 Arising Out of and In the Course of Employment, and;
- CS-01 Treatment

During the hearing, no exhibits were entered to the appeal committee.

Issues

1. What legislation and policy should be used to calculate the worker's entitlement in this appeal?
2. Was the worker fit to return to work, with no remaining disability as a result of the workplace injury, when benefits were terminated in July 1994?
3. Is the worker entitled to benefits under Section 30 of the *Act*?

BACKGROUND

The worker was employed as a caterpillar operator. In March of 1994, while clearing a trail marked by survey stakes, an approximately three inch diameter tree came up over the cat track and impaled him inside the cab.

The worker was transferred by medevac to Whitehorse where he was admitted for surgery. The discharge diagnosis was “massive disruption of abdominal wall, small bowel infarction, mesenteric tear.”

The surgical wound healed satisfactorily, although the worker continued to experience abdominal and back pain.

On June 23, 1994 the worker was examined by the Medical Consultant, whose impression was that the major limiting factor in the worker’s ability to return to work was alcohol intake. He suggested that the adjudicator consider providing the worker with re-employment assistance with a definitive return to work date and cessation of benefit payments.

On July 14, 1994 the adjudicator advised the worker that it appeared he had recovered from the injury suffered at work, and that any remaining disability was not attributable to the workplace injury. She also advised that no further medical aid would be provided and that the worker’s total temporary disability benefits terminated June 30, 1994. Re-employment assistance benefits were authorized for one month until July 31, 1994.

The worker appealed to the IRC, whose January 15, 1995 decision upheld the adjudicator’s decision.

Analysis of the Issues/Reasons

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

We find that the worker was injured arising out of and in the course of his employment as a cat operator in March 1994.

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.”

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 March 1994.

With respect to relevant policies, we note that none of the policies submitted to the tribunal by the board as being relevant to this were cited by the IRC in its decision.

We also note that while Policy CS-01 (Treatment) applies retroactively to the claim, it was not in effect at the time of the injury, or at the dates of the decisions under appeal. Although it was not provided to us as relevant to the appeal, Policy No. 46 Alcohol and Drug Services was in effect at the date of the injury and at the dates of the decisions under appeal and the appeal committee has determined that Policy No. 46 is also relevant to this appeal.

Issue #2: Was the worker fit to return to work, with no remaining disability as a result of the workplace injury, when benefits were terminated in July 1994?

The worker argues that he had not fully recovered from his workplace injury, and was not fit to return to work, when his benefits were terminated in July 1994.

The worker testified that he believes that the reason his benefits were terminated was that he suffered from alcoholism during the period following his injury.

The Medical Consultant, in his June 23, 1994 report, stated under Impression:

“... Normal healing for this would be 6-8 weeks with possibly a further 4 weeks to increase the muscle strength to allow to return to heavy work. He is now at almost 15 weeks following the injury and is not fit to return to work. It is my impression that the major limiting factor in his ability to return to work is from his alcohol intake.

...

Prolonged payment of compensation benefits can sometimes be counter productive. By this I mean that continued compensation payments can allow for a continued alcohol intake which further delays the ability to return to work.

In this instance the claims officer may want to consider re-employment assistance with a definitive return to work date or more specifically the cessation of benefit payments. ...normally people with this type of surgery would have recovered by now and that the delay in recovery might be related to alcohol intake.

In conclusion I believe that he has virtually recovered from the injury suffered at work. He is not yet fit to return to work primarily as a result of alcohol ingestion.”

[Emphasis added]

In her July 14, 1994 letter terminating the worker’s benefits, the adjudicator says:

“Your file has been reviewed by the Claims and Medical Departments following your examination on June 21, 1994, by our Medical Consultant.

It appears you have recovered from your injury suffered at work. Any remaining disability is not attributed to your accident of March 1, 1994.”

We therefore agree with the worker that his benefits were terminated as a result of his alcoholism.

Board Policy No. 46 states, in part:

“When a Claims Officer suspects that an injured worker has an alcohol or a drug problem which is delaying the recovery, the Claims Officer shall refer the file to the Medical Consultant who will discuss the subject with the attending physician. If assistance is recommended, for the worker, the Claims Officer will arrange suitable counselling.

Should the worker refuse to acknowledge the problem and/or refuse to attend suitable treatment, the worker is to be advised that payment of compensation benefits may be suspended.”

It seems clear that the intention of Policy No. 46 was to provide assistance in overcoming the effects of alcohol or drug use on recovery. It also seems clear from his June 23, 1994 statements that the Medical Consultant recognized that the worker had an alcohol problem, and that he brought it to the attention of the adjudicator. However, there is

nothing in the file to indicate that the Medical Consultant or the adjudicator ever applied Policy No. 46 in this worker's case.

On January 23, 1995 the IRC concluded its review of the worker's file. It decided that the worker "displayed continued medical problems which may or may not be related to his injury of March 1, 1994." We understand from this that the IRC found that the worker's medical problems may be related to the injury at work, or may be related to the worker's alcoholism.

It does not appear that the IRC considered Policy No. 46 in deciding this worker's appeal.

We find that rather than terminating the worker's benefits due to his alcoholism, the board should have provided benefits in accordance with Policy No. 46 (later Policy CS-01). However, since the worker has advised that he completed a rehabilitation program for alcoholism in 1998, without the assistance of the board, this may be of limited benefit to him now.

In its decision, the IRC also said "The issue of work relatedness cannot be addressed if the worker will not attend for medical attention. Therefore, the Internal Review Committee upholds the Adjudicator's decision, no further benefits are awarded."

We note that the IRC did not find that the worker was fit to return to work, rather, they found that they were unable to address work-relatedness.

Policy CL-42 Arising Out Of and In The Course Of Employment state, in part:

"B. UNLESS THE CONTRARY IS SHOWN

A disability is presumed to have arisen out of and in the course of employment or vice-versa, unless it can be shown, not proven, that the disability was not work-related."

In our opinion, a finding that work-relatedness cannot be addressed is not sufficient to "show that the disability is not work related". Further, we interpret Policy CL-42 to mean that a presumption of work-relatedness is required, where the board does not show that the disability was not work related.

We therefore find that the worker's disability was work related when benefits were terminated in July 1994.

Issue #3: Is the worker entitled to benefits under Section 30 of the *Act*?

With respect to the worker's request for benefits under Section 30 of the *Act*, we note that there is no decision on benefits under that section on this claim. Section 18.4(1) grants the appeal tribunal jurisdiction to determine "all matters arising in respect of an appeal from a decision..." In this case, there is no decision to appeal, except to the extent that treatment for alcoholism may be permitted by this section.

It is not clear if Policy No. 48 relies on section 30 to enable treatment for alcoholism, however the subsequent policy, CS-01 Treatment, references Section 30. We therefore assume that Section 30 is an enabling section for provision of such treatment. We have already determined that the worker should have been provided treatment for his alcoholism, based on policy in effect at the time.

We therefore find that the worker is entitled to benefits under Section 30 of the *Act*.

Conclusion

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

1. The board must provide benefits to the worker in accordance with Sections 22, 28 and 30 of the *Act*, beginning from the date in 1994 when benefits were terminated.

Dated this 23rd day of April, **2002** in the City of Whitehorse, in the Yukon Territory.

Joe Radwanski, Member

Janet Wood, Presiding Officer

Jan Stick, Member