

Workers' Compensation Appeal Tribunal

Decision # 34

Claim No.: 99-0627

Date of Notice of Appeal: November 1, 2001

Date of Hearing by appeal committee: January 23, 2002

Date Last Document Received: March 12, 2002

Date Hearing Closed: March 14, 2002

Date of Decision: May 21, 2002

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

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| Presiding Officer: | Heather MacFadgen |
| Member representative of employers: | Jan Stick |
| Member representative of workers: | Joseph Radwanski |

In attendance: 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: Hearing Officer's decision dated March 20, 2000.

Sections of Act considered or applied by the hearing officer: s.17.1

Policies considered or applied by the hearing officer: Policy CL-40, "Disability"; Policy CL-30, "Suspension, Reduction and Termination of Compensation"; and, CS-08, "Fitness for Employment".

Issue addressed by hearing officer: (not stated); appears to be whether or not the worker is entitled to compensation for the period immediately after benefits were terminated on April 23, 2000 up to August 7, 2000 when he returned to work.

Decision made by the hearing officer:

The hearing officer confirms the adjudicator's decision that the worker has recovered from the effects of his back injury and that the board will not accept further responsibility for any work-related injury. He finds that the worker was fit to return to his pre-accident employment on March 20, 2000 because "it is appropriate to conclude that [the worker's back] strain/sprain had resolved after nearly one year".

Sections of the Act considered or applied by appeal committee: ss.18.3(4), 18.4(1), 90.(1.2), 90.(1)(c) of the current *Act* and ss. 3 and 101 of *Worker's Compensation Act*, S.Y. 1992 as amended to May 10, 1999.

Policies applied or considered by appeal committee:

- **Policy CS-08** – Fitness for Employment, Suitable Occupation, Deeming, effective date, 94-11-09;
- **Policy GC-09** – Transitional Clause, effective date, 95-03-07;
- **Policy CL-30**- Suspension, Reduction and Termination of Compensation, effective date May 10, 1994; and,
- **Policy CL-40** – Disability, effective date 93-11-10

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. Is the worker entitled to further compensation for the period after benefits were terminated in April 23, 2000 up to and until August 4, 2000?

Decisions made by appeal committee:

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

1. The worker continued to have a work-related disability from March 20, 2000 up to and including August 4, 2000 and is therefore entitled to compensation for this period , including any necessary medical services as set out in section 28 of the *Act*.
2. The worker was not fit to return to work on March 20, 2000.

Introduction

This is an appeal by a self-employed worker [electrician] who injured his back at work on May 10, 1999: he was using a large drill overhead when it hit an obstruction and stopped, resulting in a sudden twist to the his spine.

On March 20, 2000 his adjudicator decided that he had recovered from the effects of this injury and that his claim would be closed on April 23, 2000, after he received a month of re-employment assistance benefits. The adjudicator set March 27, 2000 as the return to work date. He also found that the worker had no remaining measurable permanent clinical impairment. On March 26, 2000 (shortly after finishing a rehabilitation program but before returning to work), the worker reported that he experienced back pain and numbness in his legs when he turned suddenly to the left to look behind him, while carrying a two gallon can of gas.

He was subsequently examined for the first time by the board's medical consultant on April 25, 2000. There were also further examinations by specialists and therapy (to be detailed later). However, the adjudicator confirmed on May 11, 2000 that his original decision of March 20, 2000 to terminate compensation was unchanged.

The worker returned to work on August 4, 2000.

On June 19, 2001, the worker requested that the board's hearing officer review the adjudicator's decision dated March 20, 2000. On September 25, 2001, the hearing officer confirmed the adjudicator's decision and found that the worker was fit to return to his pre-accident employment on March 20, 2000. He further found that it was therefore "appropriate to terminate his compensation benefits after the expiration of the month of re-employment assistance benefits". Lastly, he found that "it is appropriate to conclude that the [worker's back] strain/sprain had resolved after nearly one year [after his workplace injury on May 10, 1999].

The worker appealed the hearing officer's decision to the appeal tribunal on November 1, 2001. The worker disagrees with the hearing officer's conclusion that he had recovered from his workplace injury by March 20, 2000 and asks that this decision be changed by finding that he was entitled to compensation after March 20, 2000 and until he returned to work on August 4, 2000.

The worker did not give evidence or participate in the hearing. However, his representative, the deputy workers' advocate, Julie Docherty, made submissions on his behalf. The worker is still self-employed and did not participate as an employer in this proceeding.

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 CS-08 – Fitness for Employment, Suitable Occupation, Deeming, effective date, 94-11-09;
- Policy GC-09 – Transitional Clause, effective date, 95-03-07;
- Policy CL-30- Suspension, Reduction and Termination of Compensation, effective date May 10, 1994; 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.

Entered as Exhibit 1 is an orthopedic specialist's. [Dr. D.] March 3, 2002 letter.

Evidence from the Record and Hearing

Background

We have added our comments in square brackets in this section of our decision, where necessary.

(1) The Worker's Report of Injury/Illness is dated July 14, 1999. It states that the worker injured his back (lower and middle of back) while using a large drill and pick when the drill hit an obstruction. The report states that the worker is the proprietor/owner of the company and that he earned \$2,500 per month for a 40-hour workweek. He estimates his total earnings for the past 12 months (as of July 14, 1999) to be \$26,000 to \$30,000.

(2) A chiropractor, R.H., files a doctor's first report with the board on May 17, 1999. It states:

[The worker] described his low back as stiff and painful and that he couldn't bend over because of it. On palpitation there was tenderness and hypertonicity of the lower lumbar spine musculature with restriction of the normal vertebrae motion at L5 vertebral level.

The diagnosis is "lumbar spine strain/sprain" and she recommends "exercises" and that the worker "should get x-rays of his low back".

- (3) The first treating doctor's report by Dr. C. dated June 25, 1999 states:

He was using a big electrical drill over his head . . . the bit hit an obstruction and stopped suddenly, wrenching him and causing him right upper lumbar area pain. . . he developed subsequent right lower lumbar pain which is radiating around the right side into the groin and down the right anterior thigh. . . [the worker] has numbness down the right anterior thigh. At times he gets electric shock-like pain down the anterior right thigh, especially if he is sitting too long or lifting heavy weights. . . He apparently has had a history of back injuries and back pain including a "crushed disc" about 5 to 8 years ago.

Dr. C. diagnoses "right L5-S1 radiculopathy" and recommends that the worker get x-rays, take analgesics and go to physiotherapy. [Dorland's Medical Dictionary (25th ed.) defines "radiculopathy" as a disease of the nerve roots.]

- (4) A report of x-rays of the lumbar spine dated June 30, 1999 states:

The [vertebral] bodies are intact and in normal alignment. The disc spaces are normal. There are minimal osteophytes seen anteriorly at the 3-4 level. The vertebral appendages are normal. No other abnormality seen.

- (5) A doctor's progress report dated July 9, 1999 shows no change in diagnosis and advises the worker to "continue with physio and chiropracty. Walk as much as possible. Do own stretching exercises at home. Keep fit."
- (6) Another progress report dated July 19, 1999 shows no change in diagnosis but states the worker "is definitely improving". The doctor suggests that the worker stop chiropractic sessions and attend physiotherapy. Also, the doctor says the worker "cannot do pre-accident work at this point in time."
- (7) A note to file dated July 26, 1999 states, that the worker had a previous back claim in 1998.
- (8) In a doctor's progress report dated July 26, 1999 Dr. C. says there is no change in diagnosis. The treatment plan is to "remain off work ["due to its physical nature"] and continue with physiotherapy." Suggestion of a CT scan of his lower lumbar spine "due to his slow improvement as his symptoms started roughly 2 months ago." Specific physical limitations are that the worker "avoid lifting, carrying, pulling, pushing and prolonged sitting".
- (9) The adjudicator's note to file dated August 13, 1999 states:

Discussed with worker and worker's wife . . . worker's previous back injuries i.e., Dr. C. indicates crushed disc 5 or 8 years ago and therefore my Aug 4/99 letter was sent to worker requesting further info on that incident. Worker denied any other back injury other than his 97-0984 claim with this board, he was off work for approx. 7 weeks for a back strain; he had physiotherapy. Worker does not recall any other specific back injury. Worker feels that there must have been some misunderstanding when Dr. C. examined him on June 25/99 and a medical history was taken. Worker does not recall any crushed disc.

- (10) The record contains an undated intake report provides information on the nature of the worker's job. He wears a 30-40 pound tool belt and is up and down ladders which is "presently a problem". He had a similar injury, but not so severe, approximately 3 years ago to his low back. He works above the shoulder approximately half the day. He uses drills weighing approximately 5 pounds and wire spools of 80-100 pounds. His work includes vibration and jarring activities.
- (11) A doctor's progress report dated August 9, 1999 provides no change in diagnosis and recommends "follow through with orthopedic and MRI referral."
- (12) A doctor's progress report dated August 20, 1999 provides no change in diagnosis but states, "[the worker] is somewhat improved but not entirely better." The worker is attending physiotherapy and "still gets a dull ache especially left and right lower back L4-L5-S1 area." The doctor also "respectfully suggests that [the worker] no longer needs the MRI because the only criteria for an MRI is actually if you are going to do an operative decompression and he has nothing to operate on anymore." He finds that pain overall (back and legs) as well as numbness are activity-related.
- (13) A doctor's progress report dated September 3, 1999 again provides no change in diagnosis. It says the worker will remain off work pending an MRI and orthopedic consultation.

MRI Report and First Orthopedic Specialist's Report

- (14) The record contains an MRI report dated September 9, 1999 (by Dr. V.) and a report by Dr. M., orthopedic surgeon, (same date). Dr. M. identifies the work-related injury as due to the torque and twist motion caused by the worker's drill coming to a sudden stop. He finds that pain overall (in back and legs) and the numbness are activity-related. He continues as follows:

. . . I have reviewed the MRI films of today and they reveal some degenerative change at L3-4 and L4-5 with perhaps a very small central to right sided disc herniation at 4-5 but not clinically significant as it relates to any impingement . . .

Notwithstanding the early degenerative changes that are showing up on the MRI, his symptoms remain quite disabling and he qualifies his recovery by stating that he is back to 25% of his normal before the accident.

. . . I cannot find any other anomalies on the examination other than primarily pain in the low back region. His range of motion of his lumbar spine is virtually normal. His neurological exam for motor sensory and reflexes is virtually normal.

I do not believe any specific investigations are required subsequent to the MRI. I would however recommend that he be involved in a stretching and exercise routine to strengthen his back without aggravating it. I expect he will make a full and complete recovery from his injury over time. It's difficult to predict how long it will take as it has already been 4 months but it is not uncommon to have a delay with regard to recovery. He must continue stretching, exercising and attending physical therapy to assist this condition . . . recommend a gentle analgesic for pain as needed and to work through any impairment that is subjective in nature by attending good quality stretching and exercise routines. [Emphasis added.]

- (15) Shortly after, on September 13, 1999 a local physiotherapist reports as a “subjective finding” that the worker is able to do overhead work for 2 hour periods with some minimal back pain. Objective findings are: “full range of motion; neurological negative; improved postural control”. She recommends that the worker is able to return to work. [We note that the specialist, Dr. M., only four days before did not recommend a return to work and said it was difficult to predict how soon the worker would recover from his work-related injury.]
- (16) In a September 17, 1999 note to file, a board rehabilitation counsellor documents a phone call to the worker in which she explains that Dr. M. identifies the problem as a degeneration [but see Dr. M.’s report at para. 14 above] and that the worker should be ready to return to full work.
- (17) Dr. C.’s progress report dated September 20, 1999 says there is no change in diagnosis. The report states that the worker has normal range of motion in his back, normal sensation, normal motor power, and normal reflexes of the lower

limbs and normal Babinski's sign. Dr C. gives as his "assessment" : chronic back pain.

At the time this progress report is written, this treating doctor has not seen the MRI report nor the orthopaedic specialist's report. These are faxed to him on September 21, 1999 by the board.

- (18) Another progress report by Dr. C. dated September 24, 1999 says the "patient looks somewhat agitated" and is upset with Dr. M.'s report. Dr. C. says that modified work is the ideal work environment in which to heal. Staying at home and doing nothing in particular is not particularly good for his back." He says the worker says "physio would not work with him until WCB said they would pay for it" so Dr. C. also suggests the worker attend physiotherapy at the hospital. Dr. C. suggests that the worker see the WCB medical consultant as soon as possible and "patient should be in a work hardening program under physio supervision". Under "capacity for work" Dr. C. says "patient cannot work unless he can go in an appropriate modified work situation". [Note: this report is apparently not received by the board until November 16, 1999. Emphasis added.]
- (19) An adjudicator's note to file dated September 27, 1999 documents a telephone call with the hospital physiotherapist. The adjudicator says she tells the physiotherapist that the information on file shows the worker has a degenerative condition and another [September 13, 1999 - see para.15] physiotherapist report says he is able to return to work. The adjudicator says the worker "should be ready for full work"; therefore, she tells the hospital physiotherapist that the therapy recommended [by treating doctor] did not appear to be a WCB responsibility. Finally, she says she called the worker about "date of return to work - N/A".
- (20) Dr. C.'s next progress report is October 15, 1999. The worker reports that his back is still painful but pain is "localized in the lower back area as previously." The worker is "pleased that his back improving" and "was surprised that the stretching of his back did not aggravate it too much." He says the worker told him he has not heard from WCB for two weeks. Dr. C. is "hopeful" that the worker will be able to return to work within the next month or two. The treatment plan is continued physiotherapy with a work hardening program if possible. Also, Dr. C. states under "Capacity for Work" that the worker cannot do his previous occupation at the moment.
- (21) A doctor's progress report dated November 8, 1999 by Dr. A states that the worker "feels he has had some improvement in his symptoms, since starting physiotherapy . . . Current symptoms include low back pain on both sides with

occasional pain shooting up the left side of his back”. The doctor advises that the worker should continue with physiotherapy.

- (22) An adjudicator’s note to file dated November 15, 1999 says the worker’s claim has been referred to client services to develop a return to work plan and medical management.
- (23) A progress note by the hospital physiotherapist dated November 15, 1999 states:
- Summary: Today [the worker] reports that he has noticed a decrease in back pain over the past two weeks. He notes that he is able to sit for longer periods of time without back support. Objectively, his lumbar spine range of motion has improved. Hamstrings length remains limited and functional stabilization remains poor. As I have seen improvements in [the worker’s] abilities over the past four weeks, I believe he has the potential to continue in this trend provided he makes a diligent effort to continue stretching and strengthening stabilizing muscles on a consistent basis.
- (24) [We note that the record indicates that the worker’s treating doctor (Dr. C.) has now left the territory and the worker now begins to see a number of other doctors.]
- (25) Dr. J.’s progress report dated December 9, 1999 states that the worker says there “has been marked improvement since Dr. A.’s report of November 15 [should be November 8th]. Dr. J.’s opinion is that “he is now progressing quite well despite his long period of disability resulting from his back injury, ” and he is “to be followed up about the beginning of the new year with a view to return to work shortly after that if he continues to improve.” This doctor also notes that the worker says he experienced a setback when he was flown outside to see a specialist [Dr. M.] and had a delay when he was sitting for six hours. He says when he deplaned back in Whitehorse he could barely walk. [We note that there are references in physiotherapy reports to the worker’s reduced sitting tolerance. Emphasis added.]
- (26) An adjudicator’s note to file dated December 14, 1999 documents a phone call to the worker who says he is hoping to be able to return to work early in the new year. The worker says he has spoken to a board rehabilitation counsellor several times. [We note there is no documented return to work plan or medical management plan in the record.]
- (27) The next progress report is dated January 10, 2000 by Dr. A. She recommends that the worker attend a work hardening program and states, “I’ve explained to him that if he waits for his back pain to be completely better he may end up

waiting indefinitely as quite often there is residual significant pain for some time and it takes sometimes years for disc protrusions to settle down. Certainly if it looks as if the work hardening does not improve things he may need to look at changing occupations but this would likely require some form of retraining . . . perhaps a little premature to be thinking about that.” [Emphasis added.]

- (28) The record indicates the board considers a referral to a work hardening program out of territory but the worker would prefer not to leave so he is referred to a program associated with the Whitehorse hospital, running for five weeks from February 8, 2000.

The Medical Report Immediately Before the Decision to Terminate Benefits

(29) A doctor's progress report dated March 7, 2000 by [new] Dr. M. states:

. . . [The worker] has had a normal MRI which really has not helped much. He's gone to work hardening which he has been less than impressed with. . . . He's gone through the associated depression related to his injury and feels that [it] is resolving and is quite keen to go back to work. He has no hard neuro signs by history.

CAPACITY FOR WORK: Difficult to know until he gets back at it. Should he go back on WCB for a similar problem I urge you to consider assessment by [the board's medical consultant] in that given the present manpower shortage, multiple physicians seeing individuals like this are not doing WCB or the patient much good. I am somewhat alarmed that he's been off for almost a full year in that I would have liked to have him assessed by [the WCB] medical consultant much sooner to try to get a handle on an aggressive return to work date and management plan. He's certainly keen to go back to work. I would hope that his file does remain open as time will tell whether he has to make a major job change. [Emphasis added; up to this point, the worker has never been referred to the medical consultant.]

The Adjudicator's Decision

(30) The adjudicator's letter to the worker dated March 20, 2000 states, "Please be advised that it is my decision based on the medical evidence on your file that you have recovered from the effects of this injury and that you do not have any remaining measurable permanent clinical impairment." [We note the adjudicator's letter does not acknowledge that Dr. M. is suggesting a trial return to work and has cautioned that it is difficult to know the worker's capacity for work until he tries it. Dr. M. does not say the worker has recovered. In fact he indicates that if the return to work is not successful, the worker may have to change his job.]

Subsequent Injury on March 26, 2000

(31) A progress note by Dr. W. dated March 27, 2000 states:

. . . [The worker] was involved in the rehab program locally and had just finished the program on Thursday and was about to go look for work. Yesterday he was standing holding a 2 gallon can of gas and turned to the left when he felt something move in his back to the left. His legs went numb

and his back became very sore. . . . I'm unsure if he's suffering from a mechanical back pain or if he's prolapsed a disc.

The doctor notes reduced range of motion and reflexes as well as limping and mis-aligned posture.

Dr. W. prescribes anti-inflammatory medication and rest with knees bent. The worker will see the hospital physiotherapist the next day. The doctor says if the worker continues to have problems he will reassess him with a possible referral to the orthopaedic specialist or someone else in WCB.

- (32) Another doctor's progress report (Dr. B.) is dated April 10, 2000. He reports the worker has back pain "continuing relatively unabated" as well as sciatica symptoms in the left leg, not only after walking and standing but also with prolonged sitting. He says the worker "does seem motivated and also seems to be following the treatment program that has been recommended to him." Then he says, "this most recent episode of pain is as a result of a re-occurrence of his injury on March 26, 2000. He speculates on whether the small disc herniation on the 1999 MRI has "progressed" and whether an epidural steroid injection would help. Dr. B. decides to refer the worker to the visiting orthopaedic surgeon. [We take from the doctor's comments that he means the March 2000 episode is a recurrence of the May 1999 injury and that the disc herniation showing on the 1999 MRI, after the 1999 workplace injury, may have progressed.]
- (33) On April 25, 2000 the rehabilitation counsellor asks the medical consultant for an assessment of the worker on four points: (1) the nature and extent of his current disability; (2) whether his ongoing symptoms are related to his original injury; (3) recommended treatment; and, (4) prognosis for return to work as an electrician.

The Medical Consultant's Report

- (34) The medical consultant reports on April 26, 2000 after examining the worker on April 25, 2000. The medical consultant summarizes the worker's medical history and treatments since the injury including the MRI which showed "osteophytic degenerative disease with no conclusive impingement of nerve roots". He says:

IMPRESSION: I find it difficult to produce a diagnosis.

The description of numbness following pressure at the waist does not conform to any normal anatomic pattern. There is certainly no evidence of nerve root irritation. Today, neurological examination was completely normal and this is consistent with previous examinations on file.

Somatization must also be considered in the differential diagnosis. A somatizing patient presents with bodily complaints out of proportion to any demonstrable organic pathology. This is influenced considerably by anxiety, depression and other psychological conditions. This diagnosis must be considered when the symptoms are anatomically and physiologically inconsistent with anatomy. I am not suggesting that there is any malingering but I'm not able to correlate his symptoms with any anatomic finding. Physical conditions must be ruled out before somatization can be diagnosed.

. . . I believe that an evaluation by a neurologist would be reasonable although I really could not relate the need for that evaluation to his injury at work in May 1999. I explained to him that I could find no evidence to suggest that he would have a permanent impairment. I advised him that I could not explain why he was continuing to have problems as my examination did not reveal any neurologic changes. . . .He might benefit from close observation in a multi-disciplinary rehabilitation program I could find no objective evidence to suggest that there is any nerve root impingement. Consequently, it is unlikely that a CT Scan or MRI would provide any additional information. Worsening of the apophysial joint osteoarthritic changes could account for some back pain which will likely be recurrent. However I am not able to relate the degenerative changes to any acute incident at work. [We note that the medical consultant does not comment on the worker's fitness for work although he was asked for an assessment of the worker's "prognosis for return to work as an electrician".]

- (35) The record contains a progress report from the hospital physiotherapist dated May 4, 2000 stating the worker has full lumbar spine range of motion. The physiotherapy program consists of primarily strengthening and stabilizing exercises, stretching and cardio exercises on a stationary bike consisting of 10 gym classes before the March 26, 2000 injury. He also has five appointments after March 26 for physiotherapy. There is no recommendation or assessment in this report as to whether or not the worker can return to work. He was discharged from physical therapy but returns on March 28, 2000, "reporting that he pulled the left side of his back when he had held _ can of gasoline and twisted on March 26, 2000".
- (36) Another doctor, Dr. M., provides a progress report dated June 22, 2000 which says the worker presents with "ongoing back pain" which is "improving very slowly". On examination, Dr. M. finds some limits with respect to extension and mild tenderness in the lower lumbar spine. All other parts of the physical exam are normal. Dr. M. recommends continued stretching exercises and prescribes Amitriptyline. Under "capacity for work", he says the worker is presently not able to return to his previous job. Dr. M. decides to refer the worker to neurologist

Dr. A. as the medical consultant suggested.

- (37) The neurologist examines the worker on July 24, 2000 and reports the same day (but it is not received at the board until September 1, 2000). This specialist diagnoses low back pain and says treatment should be stretching exercises and an active rehabilitation program. He also says the worker should avoid heavy lifting. [See weight/lifting requirements (up to 100 pounds) of the worker's job at para. 10.] The neurological exam is normal.
- (38) In a separate consultation report dated July 24, 2000, the same specialist says, "I can find no evidence of any motor or sensory deficit. This patient has no evidence of nerve root tension in his lumbosacral spine. . . . This patient requires stretching exercises for his low back muscles and a gradual program to get him back to work. I can find no evidence of any neurological abnormality". The specialist diagnoses low back pain due to lumbar muscle spasm. He also notes that the worker "re-injured his lower back" on March 26, 2000 when he was emptying a two gallon can of gas and twisted suddenly. [Emphasis added.]
- (39) Dr. M.'s progress report dated July 24, 2000 says the worker has ongoing back pain with some decrease: the back pain flares with exertion such as stacking wood. There is some improvement in extension and no longer tenderness to palpitation of lumbar spine nor spasm in the muscle. Under "capacity to work" Dr. M. says the worker remains unable to return to his previous job. The doctor encourages the worker to continue with stretching exercises.
- (40) The specialist (neurologist) also writes Dr. M. a letter dated July 24, 2000 and says the worker needs stretching exercises for low back muscles and a gradual program to rehabilitate and get him back to work. [Emphasis added.]
- (41) The next entry in the worker's record is a short letter to his disability insurer by Dr. I. dated May 1, 2001 which states:

Regarding [the worker's] fitness to work for the period April 1, 2000 until August 4, 2000, according to all the documents that we have here from various orthopaedic surgeons and neurologists regarding his back pain that developed from his back injury, it is our opinion that he would most probably not have been able to perform the duty of any occupation for which he is qualified by reason of his education, training and experience. [Emphasis added.]

It appears the worker receives some disability benefits from this insurer for the period June 2, 2000 to September 1, 2000, as stated in a May 22, 2001 letter. This letter, from a private insurer, says that "total disability ended on August 3, 2000".

Reports from the Second Orthopaedic Specialist, Dr. D.

- (42) Dr. D. examines the worker on August 9, 2000 and reports that he has central lumbosacral pain which flared easily in the past year with twisting movements. [We note that both the work injury on May 10, 1999 and the subsequent injury while at home on March 26, 2000 involved twisting movements.] Dr. D. also notes an episode of pain shooting down both legs in June [mistake? should be March?] when picking up a can of gas. The examination is normal except there is pain with repeated active and passive extension movements. Dr. D. gives as his medical opinion that the worker has “discogenic pain”. [We take this to mean pain originating in the discs of the worker’s spine.] He says he is 90% improved and his symptoms should completely resolve if he continues extension exercises, walks for at least an hour daily and avoids re-injury to his spine.
- (43) Entered as Exhibit 1 in the hearing is a March 3, 2002 letter from Dr. D. to the appeal committee, answering several questions as follows:

The injury of May 10, 1999 occurred when he was drilling overhead with a large drill. He twisted his spine when the drill caught. He has had persisting lumbosacral pain since this incident.

This man’s persisting symptoms and the mechanism of injury are consistent with an injury to the annular ligament of the lumbar discs. As noted on the MRI evaluation of this man’s spine done . . . September 1999, he was found to have disc bulging at the L3-4 and L4-5 level and a similar change was noted at the L5-S1 level.

I therefore felt that the discogenic pain is related to his work injury of May 10, 1999.

The discogenic pain would have a direct effect on [the worker’s] rate of recovery from the May 10, 1999 injury.

The Hearing Officer’s Decision

- (44) The hearing officer says that the worker requests he reverse the adjudicator’s decision and order the board to accept responsibility for any loss of earnings from March 27, 2000 to August 4, 2000 including payment of all related medical expenses. The hearing officer says the worker argued that (1) he was still suffering from a disability when benefits were terminated and (2) he suffered an

aggravation of that pre-existing [compensable] disability on March 26, 2000 which delayed his recovery until August 4, 2000.

- (45) The hearing officer finds that (1) the worker was no longer disabled by his lumbar strain/sprain by March 20, 2000 and (2) the worker had recovered [by then] from that injury.
- (46) The hearing officer further finds that “any limitation of [the worker’s] capacity to meet the demands of his occupation is *perhaps* due to pre-existing degenerative conditions, but not the soft tissue injury of May 10, 1999”. [Emphasis added.]
- (47) The hearing officer also finds that “nothing on the record indicates” that the “onset of fresh symptoms on March 26, 2000 was the result of the initial work-related injury”. He says that “it seems more likely that this was a new injury since the worker had been found fit for work by several caregivers”.
- (48) The hearing officer then sets out the evidence on which he bases his finding that the worker was fit to return to his pre-accident work on March 20, 2000 as follows:
 - (1) Dr. M., the orthopaedic specialist’s report of September 1999 [we note this report is months before March 20, 2000 and Dr. M. at that time says he “expects” full recovery but does not find that full recovery has already occurred];
 - (2) the September 1999 MRI report which shows L4-5 disc herniation with no conclusive impingement and moderate to marked degenerative disease;
 - (3) the September 13, 1999 physiotherapy report which says the worker is fit to return to work;
 - (4) Dr. M.’s March 7, 2000 report which recommends a return to work [but see para. 29 with respect to a trial return to work and the proviso that Dr. M. finds it difficult to predict if the worker will in fact be able to continue in his work or instead will need alternate work];
 - (5) the medical consultant’s April 26, 2000 report [which contains no findings with respect to fitness for work];
 - (6) the May 4, 2000 report from the hospital physiotherapist [we note this report contains no findings or assessment or recommendations with respect to fitness for work];

- (7) the neurologist's [Dr. A.] July 24, 2000 report which provides a diagnosis of pain due to muscle spasm which the hearing officer says was "not reported earlier" and "seems to be a new feature" [see para. 39 where Dr. A. in his report says that the worker remains unable to return to his former job];
- (49) The hearing officer also says that the initial diagnosis of lumbar strain/sprain is a soft tissue injury which is expected to resolve quickly. He quotes from the Official Disability Guidelines published by the Work-Loss Data Institute (1999 ed.) which gives a recovery time of 35 days for severe sprain or strain of the sacroiliac region. The hearing officer acknowledges that these are guidelines and that duration can vary. He then concludes that the worker's sprain/strain had resolved after a year.

Issues/Analysis

Issue #1: What is the appropriate legislation and policy to use to determine the issues of entitlement in this case?

- (50) Section 90.(1)(c) says: "Where a worker is entitled to compensation as a result of a disability caused in . . . March 31, 2000 or earlier, the worker's entitlement to compensation shall be determined according to predecessor legislation as it was in force before April 1, 2000".
- (51) This worker was injured in a workplace accident on May 10, 1999: therefore, the *Act* as it was in force on that date must be used to decide the entitlement issues in this case. Also, in our view, binding policies dealing with entitlement are a form of subordinate legislation and therefore also come within section 90.(1)(c). Therefore, it is the relevant policies in effect at the time the worker suffers a workplace disability that must be used. We will discuss those policies under Issue #3.

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

- (52) Section 90.(1.2) of the current *Act* provides that where a worker has commenced an appeal under s. 18 on March 31, 2000 or earlier, the review shall be decided according to prior legislation as it was in force before April 1, 2000.
- (53) This worker commenced his appeal to the tribunal under s. 18 on November 1, 2000 (that is, after April 1, 2000). Therefore, the review (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: Is the worker entitled to compensation for the period after compensation was terminated in April 23, 2000 up to and until August 4, 2000?

- (54) In order for a worker to be entitled to any compensation he or she must come within the eligibility requirement of the *Act* set out at section 3: it requires that a worker “suffers a work-related disability”.
- (55) Section 101 of the *Act* defines disability as a “work-related incapacity”. Policy CL-40, “Disability” in force at the time of the worker’s injury, defines disability as “the limiting, loss or absence of the capacity of an individual to meet occupational demands”. We find that there is medical evidence that this worker had some limiting or loss of his capacity to meet the occupational demands of his work prior to (as well as approximately at the time of, and subsequent to) the termination of the worker’s compensation by his adjudicator on March 20, 2000. (Unfortunately no functional capacity evaluation was ever done, so we have had to rely on the medical information available at the time.) In this regard, we rely on the following evidence:
- At para. 25, Dr. J.’s report of December 9, 1999 which says that the worker should be followed in early 2000 for return to work if he continues to improve; in addition, her report says he has had a “long period of disability resulting from his back injury”;
 - The worker’s need for ongoing physiotherapy and a muscle strengthening and stabilizing program provided at the hospital during February and March 2000 (and continued physiotherapy sessions into April 2000) - - the physiotherapy report, however, does not deal with disability or capacity with respect to the worker’s occupation(see para. 28 and 35);
 - At para. 27, Dr. A.’s report of January 10, 2000 which indicates the worker still has back pain and that “residual significant pain” is common - - this doctor recommends work hardening [again, indicating to us that this worker is not capable of work yet] with the qualifier that if things don’t improve, the worker may have to change occupations;
 - At para. 29, Dr. M.’s March 7, 2000 report which indicates a depression associated with his work injury “is resolving” [not resolved yet] and more importantly that his capacity for work is unknown until tested by a trial return to work; he also notes that some of his care (from doctor to doctor after the worker’s own physician leaves the territory) has not done him much good;

- At para. 31, Dr. W.’s March 27, 2000 report documenting symptoms of reduced range of motion, pain, numbness, etc.;
- At para. 32, Dr. B.’s April 10, 2000 report of ongoing back pain, sciatica, with possible progression of disc herniation at the site identified in the 1999 MRI after the 1999 workplace injury;
- At para. 34, the medical consultant’s report which discusses symptoms of numbness, “continuing problems” of an unknown cause, and back pain [he appears to attribute “some” back pain to degenerative changes which he does not relate to acute workplace injury];
- At para. 36, Dr. M.’s June 22, 2000 report of ongoing back pain, limits with respect to extension movements and the worker’s inability to do his pre-accident job;
- At para. 37, the neurologist’s report diagnosing low back pain and muscle spasm with the requirement the worker avoid heavy lifting [in this regard, see para. 10 job requirements with respect to 100 pound wire spools; in our view the neurologist’s prohibition on heavy lifting indicates that the worker would have difficulty moving wire spools, one of the occupational demands for an electrician];
- At para. 39, Dr. M.’s report of back pain flare-ups and the worker’s inability to return to his previous job;
- At para. 41, Dr. I.’s letter stating that the worker was not fit for work from April 1, 2000 to August 4, 2000;
- At para. 42, the orthopaedic specialist’s August 9, 2000 report diagnosing ongoing discogenic pain that by the date of examination had improved to 90% [of capacity pre-injury];
- At para. 43, the same specialist’s letter which attributes the worker’s persisting pain since the May 1999 workplace injury to an injury of the annular ligament of the lumbar discs.

Therefore on the basis of this evidence we find that this worker continued to suffer from a disability from March 20, 2000 to August 4, 2000.

- (56) The next question we must address is whether the worker’s disability is work-related. The second orthopaedic consultant who examines the worker (at the time

he returns to work) and reviews the MRI done shortly after the 1999 work injury diagnoses “discogenic pain” and attributes this to an injury to the annular ligament of the worker’s spine. We understand his comments in Exhibit 1 to mean that the worker’s “persisting” symptoms (still persisting in early August, 2000) are linked to and originate from the workplace injury of May 1999. On the basis of this expert’s evidence, we find that the worker’s disability is related to the May, 1999 workplace injury and this disability persists until he returns to work in August, 2000.

- (57) We therefore find that this worker had ongoing discogenic pain from the May 1999 injury until early August, 2000. In this regard we note that Dr. D. in his August 9, 2000 report states that the worker’s pain [which he attributes to the May 1999 injury] “flares easily” with twisting movements. On the basis of Dr. D.’s medical evidence, we find that this worker had a flare-up on March 26, 2000 of his discogenic pain [already linked to and originating from a May 1999 injury to his annular ligament] which resulted from a twisting movement which occurred when he turned suddenly while holding the gas can in March 2000. We note that two other physicians also indicate that the March 26, 2000 incident was a “re-injury” (see para. 38) or re-occurrence (see para. 32). We do not find, as the hearing officer did, that this was a fresh injury, unrelated to the May 1999 workplace injury. We therefore reverse his finding in this regard. We find that there is evidence of continuity of symptoms with respect to the May 1999 and March 2000 injuries and that the mechanism of injury (sudden twisting of the spine) is comparable.
- (58) Policy CL-30 entitled “Suspension, Reduction and Termination of Compensation” was in effect at the time of the worker’s workplace injury and is relevant to the issue of whether or not the hearing officer erred in deciding to confirm the termination of the worker’s compensation.
- (59) Section E of that policy sets out seven reasons that require the board to terminate compensation. They are: (1) there is no disability; or (2) the disability is not work-related; or (3) the injured party was not a worker at the time of injury; or (4) the worker is no longer disabled due to the work-related injury and does not require any further assistance from the board such as retraining or re-employment benefits; or (5) the worker has returned to work and no further benefits are payable; or (6) the disability was intentionally caused by a worker in order to claim compensation benefits; or (7) a worker has died. We find that none of these reasons are met for this worker during the period in question.
- (60) Section E also states “a worker’s compensation may be terminated if the board determines that a worker is fit to return to either their former employment, or alternate employment.” We reverse the finding of the hearing officer that the

worker had recovered and was fit to return to employment on March 20, 2000. Of the evidence he relies on to make this finding, only a very short physiotherapy report on September 13, 1999 actually states that the worker is fit to return to work. We give no weight to this report for several reasons: it is very short, with no analysis of the worker's capabilities in relation to his employment as an electrician; it is out of step with the many other reports documenting incapacity and lack of fitness to return to work; and it is written months before the determinative date of March 20, 2000.

We note that none of the other reports that the hearing officer relies on to determine fitness for work actually states that the worker is fit for work on or about March 20, 2000 [see our comments in square brackets at para. 48]. In addition, as we note at para. 55, there are numerous reports finding that the worker is either not fit to return to work or his fitness to do so is unknown until he tries a return to his work [for example Dr. M. says on Mar.7, 2000 that "time will tell whether he has to make a job change"].

- (62) Section B of Policy CL-30 says that fitness for employment shall be based on the medical evidence provided by the attending physician(s) and any assessment "shall be tailored to the individual requirements of the worker. In addition, a functional capacity evaluation may be conducted to assess the physical abilities of the disabled worker." We have already noted that no functional capacity evaluation was done for this worker. We have reviewed the medical evidence provided by attending physicians and have concluded, based on that evidence, that it is more likely than not that this worker was not fit for his employment on March 20, 2000.
- (63) As we noted at para. 46 the hearing officer found that "any limitation of [the worker's] capacity to meet the demands of his occupation is "perhaps" due to a pre-existing degenerative conditions, but not the soft tissue injury of May 10, 1999." Although this statement is not explained or referenced to any policy, it appears that it might be based on the medical consultant's report. The hearing officer notes that the consultant says that "some" of the worker's back pain "could" be the result of osteoarthritic changes which he could not relate to the May, 1999 workplace injury. We do not find that the worker's disability is due to a pre-existing degenerative condition. We have already found that his disability is due to the May, 1999 workplace injury which likely resulted in injury to the annular ligament in the worker's back as the orthopaedic specialist, Dr. D. finds. In addition, the worker had been able to perform his work for several years prior to the May, 1999 injury despite any such degenerative changes.
- (64) Lastly, Policy GC – 09, entitled "Transitional Clause", was provided to us as relevant to this appeal by the hearing officer. We do not find it necessary to consider this policy in order to interpret the current transition provision which we

must apply and which is different from the transitional clause as it stood when Policy GC-09 was approved. [see Issues #1 and 2].

Conclusion

1. The worker continued to have a work-related disability from March, 2000 up to and including August 4, 2000, (just before he returned to work) and therefore is entitled to compensation for this period, including any necessary medical services as set out in Section 28 of the Act.
2. The worker was not fit to return to work on March 20, 2000.

Dated this **21st day of May, 2002** in the City of Whitehorse, in the Yukon Territory.

Joseph Radwanski, Member

Heather MacFadgen, Presiding Officer

Jan Stick, Member