

Workers' Compensation Appeal Tribunal

Decision # 37

Claim No.: 97-0929
97-1189
97-1584

Date of Hearing: May 23, 2002

Date of Decision: July 15, 2002

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

Presiding Officer: Janet Wood
Member representative of employers: Donald Inverarity
Member representative of workers: Joseph Radwanski

In attendance: The Worker
The Employer
The Worker's representative – Julie Docherty
Reporter/Recorder – Total Reporting

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

Summary for the Reader

Decision under review: Hearing Officer decision – November 16, 2001

Sections of Act considered or applied by the hearing officer: 3.1, 20, 22, 101

Policies considered or applied by the hearing officer: CL-46

Decision made by the hearing officer: The decision of the adjudicator set out in a letter dated June 16, 2000 is confirmed. The board will not pay to the worker benefits for loss of earnings or permanent impairment as requested.

Appeal Committee decision summary: The appeal is denied. The decision of the hearing officer that the worker is not entitled to loss of earnings is upheld.

Sections of the Act considered or applied by appeal committee: 18.4(1), 101.(1)
Worker's Compensation Act, SY 1992 as amended to July 7, 1997.

Policies considered or applied by appeal committee: CL-23, CL-40

Issue addressed by appeal committee:

1. What legislation and policy should be used to determine the worker's entitlement in this appeal?
2. Does the worker have a disability as a result of the work accident?
3. Does the worker have a loss of earnings as a result of the workplace accident?
4. Does the worker require rehabilitation to assist him in overcoming the effects of a work-related disability?

Decisions made by appeal committee:

1. The *Worker's Compensation Act*, SY 1992 as amended up to the date of the injury in 1997 is the legislation that should be used to determine the worker's entitlement in this appeal.
2. The worker does not have a disability as a result of the work accident.
3. The worker does not have a loss of earnings as a result of the workplace accident.
4. The appeal tribunal does not have jurisdiction to hear the issue of rehabilitation.

Introduction

By his Notice of Appeal dated April 15, 2002, the worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") hearing officer ("HO") dated November 16, 2001.

In the decision under appeal, the hearing officer upheld the June 16, 2000 decision of a board adjudicator that the worker was not entitled to further benefits because he had no evidence of any remaining work related disability.

The worker and his representative, the deputy workers' advocate, say that the adjudicator was wrong to deny benefits because the worker continues to be disabled as a result of the work accident.

The workers' advocate asks that, in light of evidence prior and subsequent to the HO decision, the appeal committee find that the worker has a loss of earnings as a result of a work-related disability, and that he requires rehabilitation to assist him in overcoming the effects of that disability.

The hearing was held on May 23, 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 via telephone conference and gave evidence by affirmation. The employer attended the hearing and also gave evidence by affirmation.

The appeal committee considered all of the worker's record on claim 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*:

- CL-11 Chiropractic Treatments;
- CL-23 Evidence of Disability;
- CL-25 Back Claims;
- CL-27 Accidents Arising Out of Travel;
- CL-30 Suspension, Reduction and Termination of Compensation;
- CL-35 Average Weekly Earnings;
- CL-38 Medical Examination or Evaluation;
- CL-40 Disability;
- CL-42 Arising Out Of and In The Course Of Employment;
- CL-46 Permanent Impairment;
- CL-47 Pre-Existing Conditions;

CS-02	Re-Employment Assistance Allowance;
CS-05	Rehabilitation;
CS-07	Vocational Rehabilitation;
CS-09	Return-to-Work Programs;
GC-01	Subrogated Claims;
GC-09	Transitional Clause.

During the hearing, the appeal committee accepted as exhibits:

Exhibit 1: Page 1854, *Dorland's Illustrated Medical Dictionary*, (27th ed.)

Exhibit 2: Page 954, *Dorland's Illustrated Medical Dictionary*, (27th ed.)

Exhibit 3: Pages 399 – 407, *Yukon Work Futures*

Issues

1. What legislation and policy should be used to determine the worker's entitlement in this appeal?
2. Does the worker have a disability as a result of the work accident?
3. Does the worker have a loss of earnings as a result of the workplace accident?
4. Does the worker require rehabilitation to assist him in overcoming the effects of a work-related disability?

Background

- (1) The worker was involved in a motor vehicle accident on July 7, 1997 when he was a passenger in a _ ton van which was struck by a _ ton truck. The worker was in the course of his employment as a window installer when the accident occurred.
- (2) The medical report of an examination approximately 2 hours after the accident identified muscle spasm and tenderness in the cervical area, as well as pain on flexing his neck laterally to the left. X-rays were taken with no acute injury evident. It was recommended that the worker stay off work, but remain fairly active.
- (3) The worker did not take any time off work, but returned to work on "light duties" for about a week and then to full duties.

- (4) On August 22, 1997 the worker injured his lower back while carrying glass up stairs. He missed 2 days as a result of that injury and then returned to work once again.
- (5) On November 5, 1997 the worker injured his upper right back while removing a large “picture” window from a house. As a result of this injury the worker missed a week of work, returning to full duties.
- (6) The worker was laid off due to lack of work sometime in 1998.
- (7) Since then he worked for a glass company in Edmonton for several months before moving to Nova Scotia, and, more recently, he worked as a truck driver for 15 months in Fort McMurray. Currently the worker is unemployed and is waiting for truck driving work through the Teamster’s union. He continues to experience pain and headaches.

Analysis of the Issues/Reasons

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

- (8) We find that the worker was injured in a work-related motor vehicle accident July 7, 1997.
- (9) 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.”
- (10) Therefore, we find that the *Worker’s Compensation Act*, SY 1992 as amended up to the date of the injury in 1997 is the legislation that should be used to determine the worker’s entitlement in this appeal. 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 first arises July 7, 1997.
- (11) 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 CL-46 Permanent Impairment was cited by the HO in his decision. We will not examine the application of Policy CL-46 because the deputy workers advocate has stated that the worker is not appealing the decision that he is not entitled to a permanent impairment award.

- (12) We will not examine the application of Policies CL-11 Chiropractic Treatments, CL-25 Back Claims, CL-27 Accidents Arising Out of Travel, CL-30 Suspension, Reduction and Termination of Compensation; CL-35 Average Weekly Earnings, CL-40 Medical Examination or Evaluation, CL-42 Arising Out Of and In The Course Of Employment, CL-47 Pre-Existing Conditions, CS-02 Re-Employment Assistance Allowance, CS-05 Rehabilitation, CS-07 Vocational Rehabilitation, CS-09 Return-to-Work Programs, GC-01 Subrogated Claims, or GC-09 Transitional Clause, because the issues that they address are not ones that are under appeal.

Issue #2: Does the worker have a disability as a result of the work accident?

- (13) The worker has testified that he has always done physical work, and that he now is unable to do that work. He cannot do any lifting, or carpentry work, for example. He took a three month truck driving course beginning in November 1999 and is able to drive truck successfully.
- (14) Currently, he suffers from “excruciating headaches, from the back of his head to the tip of his nose” from time to time, but keeps working.
- (15) The medical report of examination at the time of the injury notes muscle spasm and tenderness, with limited range of motion in all directions in [the worker’s] neck. X-rays indicate a mild degenerative disease as well as a slight straightening of the normal cervical curvature “which may be positional or related to the presence of muscular spasm”.
- (16) The examining doctor advised the worker to stay off work but remain fairly active.
- (17) Dr. D., a chiropractor who treated the worker the same day, suggested an estimated return to work date of July 14, 1997.
- (18) In fact, the worker testified that he did not take any time off work, but returned on “light duties”. After about a week he was doing the full duties that he had done prior to the injury. The worker suffered two subsequent injuries, on August 22, 1997 and November 5, 1997.
- (19) In February 1999 Dr. D. provided a report of his treatment of the worker for the three injuries. Under “Diagnosis” he states:

A diagnosis of post-traumatic dyskinesia/fixation (improper and or lack of motion) to the C5-6, C6-7 joints on the left and left T3-4 costotransverse (rib/spine) joint is given, along with related myofascial strain to the left cerviothoracic musculature, most

notably on the left levator scapular, trapezius and rhomboid muscles. The mild loss of the cervical lordosis (forward curve) is often traumatic in origin (due to muscle spasm or ligamentous sprain) as it may be in this case. Occasionally it is seen in healthy spines. The C5-6 degenerative changes were present prior to this accident but have the potential to make this region more vulnerable to injury following insult. The direction of impact is in concurrence with creating a strain to the involved musculature also.

- (20) Dr. D. identified treatment dates arising from the three workplace accidents as July 7, 9, 11, 14, 16, 18, 22, and 28, 1997, November 19, 20, 22, 24, 26, 1997, and December 1, 4, and 8, 1997. Under “Treatment and prognosis”, he states:

On initial treatment schedule [the worker] improved steadily and his cervical range of motion was essentially restored to 90 degrees (90 degrees is normal) in left rotation and full extension was noted. There was still some tenderness in the left rhomboid muscle over the T3-4 costotransverse fixation. He also noted some crepitis (grinding) in left rotation in his right upper cervical region since the accident which had not resolved.

On the second series of treatments similar areas in his left upper back were re-injured and similarly he experienced a painful and limited left cervical rotation to 60 degrees. Treatment improved his problems quickly but residual discomfort remained in his upper back. ...

At the time of his last visit, [the worker’s] remaining discomfort is of a mild to moderate degree and is more of a nuisance and aggravation than of a disabling severe pain. I believe the underlying degenerative changes will worsen over time and the possibility exists that his progression may have been facilitated from the accident. If [the worker] is still experiencing discomfort to date it is likely to prove recalcitrant to most treatment and supportive care on an ongoing basis every few weeks may provide relief. [Emphasis added]

- (21) The employer’s testimony agreed with the worker’s that the worker did not take time off work after the accident in July. However, the employer also testified that he was not aware that the worker should have been on light duties. The worker worked 33 hours of overtime in July, after the date of the accident, and 35 overtime hours in August. He also worked substantial overtime hours in September, October and November 1997. There was nothing in the file, or in the worker’s behavior, to indicate that he was not capable of the work.

- (22) Until his lay-off in 1998, the worker continued to meet the requirements of the job. He never refused overtime work, and did his share of the heavy aspects of the job. He was given a wage increase, and at one point, he wrote the employer inquiring about an apprenticeship. He reported no issues from the accident.
- (23) In the fall of 1999 the worker telephoned the employer from Edmonton looking for work. He made no mention that he was looking for light duty work. At the time he was working in Edmonton for a glass company, doing similarly heavy work.
- (24) The worker concurred with the employer's statements.
- (25) The *Act* defines "disability" as "a work-related incapacity, as determined by the board, ..."
- (26) The board defines disability in Policy CL-40 Disability, in the following manner: "A disability is the limiting, loss or absence of the capacity of an individual to meet occupational demands."
- (27) It is clear, from the chiropractor's report and from the worker's and the employer's testimony, that the worker was able to, and did, return to his pre-accident job shortly after the accident, with no loss of earnings. The worker remained in the position until several months later, when he was laid off for lack of work. Subsequent to that he was employed in a similar industry in Edmonton, where he reports he worked for 3 or 4 months before moving to Nova Scotia in the fall of 1999.
- (28) From the foregoing, we find that, according to the definition in Policy CL-40, the worker was not "disabled" at that time.
- (29) There is no further medical information after Dr. D.'s 1997 chiropractic treatments until March 2000. A letter from Dr. V., dated March 9, 2000 and apparently relating to visits in May and November 1999, states:

[The worker] seems to have some restricted range of motion of his cervical spine; he has decreased extension flexion is normal; and lateral rotation and lateral extension is reduced about 30%. His lumbar spine shows normal range of motion, somewhat slower in movement but has full range of motion and his thoraco-lumbar spine is normal. His shoulders are normal, as well as his peripheral extremities...I do not know what his pre-existing condition was, other than from a subjective nature and I hope you understand I have nothing to compare his previous range of motion to.

(30) In his report of a motor vehicle licensing dated November 22, 1999 Dr. V. selects “No” to “Evidence of musculoskeletal disabilities ... ?”

(31) Policy CL-23, “Evidence of Disability” states:

Time loss compensation is payable only where there is medical or similar evidence of disability. Where a worker stays off work without having been attended by a doctor or at the hospital, the following policy shall apply:

- (a) By personal interview or letter the worker should be asked to explain the reasons for not reporting to a doctor.
- (b) Should describe the condition which would not permit the claimant to work.
- (c) Details should be given of home remedies which were used.
- (d) With the information received from the worker and the Employer’s Report of Accident, the claim should be assessed by the medical consultant.
- (e) The opinion of the medical consultant should be accepted as to whether or not the time loss is justified.

(32) Although it is not stated in the file, we have assumed that the adjudicator was guided by that policy in making her determination. The worker had indicated, through his representative, that he was disabled as a result of the accident, and there was no medical information on file for the intervening period since the claim was closed. Further, the worker was asked to provide a Worker’s Continuity Report, which asks the questions outlined by the policy.

(33) We find that the circumstances fit those contemplated by Policy CL-23 and that the adjudicator was correct in applying that policy.

(34) In the Worker’s Continuity Report, dated April 18, 2000, the worker describes his condition: “ ... sharp pain shoots up my neck up the back of my head down my nose, my neck and back go totally out of whack about every 2 to 6 weeks ... my lower back feels like someone stuck a knife right between his shoulder blades and that comes and goes as well”. Later he says “I’ve taken 12 week long haul truck driving course Nov 1999 to Feb 2000 but I have not found employment as of yet.

... I hope to be working soon but I don't know how long I can drive without my back getting sore and neck getting sore.”

- (35) The deputy workers' advocate argues that the adjudicator's decision was based on a report of the board's medical consultant, and that other medical reports on file and the information in the Worker's Continuity Report were not considered.
- (36) We accept that the adjudicator's decision was probably based on the report of the medical consultant. We find that Policy CL-23 requires, in part (e), that the opinion of the medical consultant be accepted in determining if time loss is justified.
- (37) However, we disagree that other reports were not considered. The medical consultant specifically references the March 9, 2000 letter from Dr. V., and under "Impression" he states:

The worker apparently has neck pain and decreased range of motion which has interfered with his work. ... Unfortunately there is a large gap in time in which there is not medical evidence to support the ongoing continuity. ... In light of the evidence on file, he would appear to have recovered from the initial injury – I cannot relate his present condition to the accident of July 1997. Further medical investigation including a specialist assessment and possible scanning, 'either CT or MRI' to rule out either pre-existing problems, disc disease or cervical stenosis may be helpful or indicated from the medical point of view. The case could be reconsidered in the future once we have further medical evidence.

- (38) We note that the medical consultant does not rule out the possibility of a work-related disability if additional medical investigation rules out other causes.
- (39) We find that the medical consultant did consider the other medical reports on file, and the Worker's Report of Accident, but that he did not relate the worker's current condition to the July 1997 the accident.
- (40) Revisiting the definition of disability in the *Act*, "a work-related incapacity, as defined by the board" we find that the worker does not does not have a disability as a result of the work accident. [Emphasis added]

Issue #3: Does the worker have a loss of earnings as a result of the workplace accident?

- (41) According to Policy CL-23, time loss compensation is payable only where there is a disability, and according to the *Act*, that disability must be work-related.

- (42) We found in our analysis of issue # 2 that the worker does not have a disability as a result of his accident at work. It therefore follows that the worker does not have a loss of earnings as a result of a work-related disability.
- (43) Even if we had found that the worker has a work-related disability, the worker testified that until recently he worked as a truck driver in Ft. McMurry. He worked the “from the beginning to the end of the project” he was working on – approximately fifteen months. He further testified that he is currently waiting for a call from the Teamster union in Edmonton to go back to work as a truck driver. He reported that problems with his neck “come up from time to time”, but that he keeps working.
- (44) Thus, it appears that despite his current medical condition, the worker is able to work in an occupation with an income potential comparable to, or better than, that of his previous occupation of window installer.
- (45) We find that the worker does not have a loss of earnings as a result of the workplace accident.

Issue #4: Does the worker require rehabilitation to assist him in overcoming the effects of a work- related disability?

- (46) The issue of the rehabilitation is not dealt with in the file. The issue was not considered, or decided, by the board.
- (47) Section 18.4(1) of the *Act* states:

The appeal tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matter arising in respect of an appeal from a decision of the board under subsection 7(1), from a decision of a hearing officer under subsection (17(1), or from a decision of the president under subsection 19(4) and it may confirm, reverse or vary the decision. [Emphasis added]

- (48) We find that the appeal tribunal does not have jurisdiction to hear the issue of rehabilitation.

Conclusion

The appeal is denied. The decision of the hearing officer that the worker is not entitled to loss of earnings is upheld.

Dated this **15th** day of **July, 2002** in the City of Whitehorse, in the Yukon Territory.

Joseph P. Radwanski, Member

Janet Wood, Presiding Officer

Donald Inverarity, Member