

# Workers' Compensation Appeal Tribunal

## Decision # 39

**Claim No.: 2000-0017**

Date of Notice of Appeal: May 2, 2002

Date of Oral Hearing by Appeal Committee: July 18, 2002

Date Hearing Closed: July 18, 2002

Date of Decision: August 13, 2002

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

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Donald Inverarity
Member representative of workers:	Joseph Radwanski

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

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

## Summary for the Reader

**Decision under review:** The hearing officer's decision dated May 1, 2002

**Sections of Act considered or applied by the hearing officer:** 3.1, 11, 17.(1), and 101.(1) of the current *Act*

**Policies considered or applied by the hearing officer:** CL-40, Disability, effective 93-11-10; and CL-42, Arising Out of and in the Course of Employment, effective 93-11-17.

**Issue addressed by the hearing officer:**

Whether or not the worker's right shoulder problem is related to the workplace motor vehicle accident of December 30, 1999.

**Decisions made by the hearing officer:**

1. "The evidence does not indicate that [the worker's] right shoulder problem resulted from the motor vehicle accident of December 30, 1999."
2. The adjudicator's decision of May 22, 2001 is confirmed.

**Sections of the Act considered or applied by appeal committee:** ss. 3, 5, 18.3(1) and (4), 18.4(1), 90.(1.2), 90.(1) (c), and 101 of the current *Act*

**Policies applied or considered by appeal committee:** CL-40, Disability, effective 93-11-10; CL-42, Arising Out of and in the Course of Employment, effective 93-11-17; and CL-47, Pre-existing Conditions, effective date 94-04-01

**Issues addressed by appeal committee:**

1. Did the hearing officer err in finding that the evidence does not indicate that the worker's right shoulder problem resulted from the work-related motor vehicle accident on December 30, 1999?
2. If so, is the worker entitled to further compensation?

**Decisions made by appeal committee:**

The appeal is allowed. The hearing officer's decision is reversed as follows:

1. The worker suffered and continues to suffer a work-related disability as a result of his December 30, 1999 workplace accident which caused soft tissue injuries to his shoulders as well as aggravated his pre-existing osteoarthritis in his shoulder joints.
2. The worker is therefore entitled to compensation under the *Act*.



## Introduction

- (1) The worker was injured in a motor vehicle accident while performing his job as a snowplow operator on December 30, 1999. He was travelling south along the highway when a motorist parked off the road suddenly pulled out in front of him, attempting to make a U-turn. The worker tried to stop but could not avoid hitting the vehicle. At the moment of impact, the pins securing the snowplow blade to the front of the truck broke and the blade dug into the highway asphalt, slowing the truck, and probably saving the other motorist's life.
- (2) Immediately after the accident, the worker got out of his snowplow and tried to free the woman trapped in the other vehicle -- he did so by pulling on the driver's door with all his strength; but the door was also imbedded in the highway as result of the crash so it would not open, even though his pulling on it bent the door frame. The worker says this action injured both his shoulders and they have never fully recovered.
- (3) The worker has osteoarthritis in both shoulder joints and in addition was in a subsequent car accident in June 2000 which was not work-related.
- (4) In May 2001, the worker's adjudicator wrote his lawyer saying "in the absence of further medical investigation it is difficult to relate the [worker's] right shoulder problem to his work-related injury of December 31 [should be 30], 1999." The adjudicator also found that the worker would continue to have problems in his shoulders especially when driving and doing overhead work because of the pre-existing arthritic condition in his shoulders.
- (5) The worker unsuccessfully appealed this decision to the hearing officer who confirmed the adjudicator's decision and found that "the evidence does not indicate that the worker's right shoulder problem resulted from his workplace accident of December 30, 1999." The worker has appealed the hearing officer's decision to the tribunal.
- (6) The worker testified under oath at the hearing. The employer was notified of this appeal but declined to participate.
- (7) The board's hearing officer provided the following policies to the tribunal as relevant to this appeal under the authority of section 18.3(4) of the current *Act*.
  - Policy CL-40, Disability, effective date 93-11-10;
  - Policy CL-42, Arising Out of and in the Course of Employment, effective date 93-11-17; and,

- Policy CL-47, Pre-existing Conditions, effective date 94-04-01.
- (8) The appeal committee considered these policies as well as the entire record provided by the board.
- (9) During the hearing, the appeal committee entered as Exhibit 1 a written statement from the worker's wife signed and dated July 18, 2002 regarding the worker's physical and family activities before and after the December 30, 1999 workplace accident.

## **Jurisdiction**

- (10) The worker submitted his notice of appeal on May 2, 2002. Since the worker began his appeal after March 31, 2000, the current legislation must be used for his appeal: in other words, the appeal tribunal has jurisdiction under s. 18.4 (1) to hear his appeal because of s. 90 (1.2) of the transition provision in the *Act*.

## **Entitlement**

- (11) A threshold issue on any appeal is determining the appropriate legislation and policy for deciding issues of entitlement. Again, the transition provision of the current *Act* provides the answer. It says at s. 90.(1)(c) that "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 pursuant to predecessor legislation as it was in force before April 1, 2000." The worker was injured in his workplace on December 30, 1999: therefore, it is the legislation in force as of December 30, 1999 that must be used to decide any entitlement to compensation under the *Act*.
- (12) In addition, as the tribunal has decided in many decisions from #5 forward, it is generally the policies dealing with entitlement in place at the time of the worker's injury that must be applied to his or her case.

## **Issues**

1. Did the hearing officer err in finding that the evidence does not indicate that the worker's right shoulder problem resulted from the work-related motor vehicle accident on December 30, 1999?

2. If so, is the worker entitled to further compensation?

## **Evidence from the Record and Hearing**

### ***The Worker's Testimony***

#### *The First Motor Vehicle Accident*

- (13) The worker drives a snowplow to clear winter roads as part of his employment. He says he was working the night shift and on his way to an area to be sanded on the highway at approximately 11:45 p.m.
- (14) He was travelling south on the highway at approximately 70km/hr with the beacon flashing on the snowplow. The road was bare and there was no oncoming traffic. He was wearing a lap/shoulder belt which crossed his body from the left shoulder to the right hip. At the time of his accident, he was 37 years old.
- (15) The snowplow he was driving is actually a truck, weighing approximately 50,000 pounds and at the time of the accident it was fully loaded with sand. There is also a snowplow blade on the front of the truck. It weighs approximately 2500 pounds and is made of solid steel. The worker says the plow at the front of the truck is angled so that the plow blade is further forward on the left and this enables the plow to push the snow off the road to the right.
- (16) The worker says that as he got to the south access off the highway he saw a vehicle parked on the right of the road near the south entrance to a trailer park. It was parked inside the stop sign taking up both lanes and angled parallel to the highway. He said he noticed there were pedestrians near the car. The worker says he made note of the vehicle and the people standing there and he noticed someone getting into the driver's side of the car.
- (17) At this time he pulled over right into the middle of the road on the yellow line. Then he says he saw the car nudge out onto the highway a couple of feet and he therefore sounded his air horn but the vehicle did not stop and proceeded to make a U-turn directly in his path.
- (18) He says he hit the other vehicle on the front of the driver's door and then forward [on the left front fender]. He says that as the accident happened, he had a "death grip on the steering wheel". The worker says that although he steered to the left [just before impact] he did not have a lot of time to turn the truck so it was not a big turn to the left, maybe six or seven degrees.
- (19) He says that when he hit the brakes the blade of the snowplow broke right off and the plow left a mark in the highway asphalt: the steel pins attaching it to the truck

broke right in half. He says the blade was still in front of the truck after the accident because it was held there by safety chains. The worker says the blade pushed the other motorist's car out of his path and that vehicle did a 360-degree turn off the snowplow, coming to a stop in the same place it had been when the two vehicles collided. The worker says his truck skidded to the left where there was a driveway, came to a stop there, and then stalled out.

- (20) The worker says that the other motorist's car was right on the yellow line at a ninety-degree angle to the road. He says that as he ran to that vehicle he thought he was going to see a decapitation or a death. He says that immediately after the accident he was very angry.
- (21) He says that he learned later that what had taken place was that the woman driving the other vehicle had just dropped someone off on the trailer park road. That person came running back when he heard the accident. When the worker reached the other vehicle after the accident, the person who had been dropped off was sitting in the passenger's side of the car. The worker says that the motorist driving the other vehicle was alive and saying, "oh my god, I can't believe I didn't even look." The worker says she was also crying about her daughters. The worker says there was a lot of blood because the motorist had cuts from the broken glass.
- (22) He says he was worried about looking at her from her knees down because that was "where her car was crunched": he couldn't see that part of her body because of the darkness. The worker says this made him panic because he realized that her feet could be cut off. He says this is when he tried to open her car door. The worker says he remembers the passenger screamed at him, "slow down, slow down!!!". The worker says that just after the accident he was really mad and he felt "like he was coming out of a fit".
- (23) He says it was impossible to open the car door, although he tried as hard as he possibly could. The worker says as it turns out he ended up bending the frame on the driver's door because he put his foot against the body of the car and pulled as hard as he could with both hands. He says he pulled on the top corner of the driver's door -- it was open enough that he could get his fingers in there. Then he says he realized the bottom of the door was stuck in the asphalt because the front driver's side tire had been punctured.
- (24) The worker says that the car that he hit was a Buick and not a Toyota. He says that this means that the doorframes were thick as they would be on a big car and were solid steel. He says he doubts he could bend the doorframe of such a car now. He says he was able to do this at the time because of the mixture of anger, panic and rage that he felt at the time of the accident.

- (25) The worker says when he dialed 911 he was asked if there were any injuries and he replied yes. He was also asked if the “Jaws of Life” were needed and he replied yes.
- (26) The worker says the police came as well as the fire truck with the “Jaws of Life” [and freed the other motorist]. He says the police asked him if he was ok and he said he was. They offered to take him to the hospital but he said no. He says that after the accident he did not have bruises.
- (27) The worker says that he feels it was his mistake not to admit right at the outset to the board that he had tried to open the car door of the other vehicle right after the accident occurred. He says that he thought it would be to his detriment if he said anything about this, because he thought it would not be considered part of his work.

*Continuing to Work*

- (28) The worker says he phoned his dayshift foreman from the accident scene. He came out to the highway and took the truck back to the shop. The worker says that the next day (December 31) wasn't a work day for him but his employer needed him for the afternoon for four hours to work in the yard in order to mix sand and salt together for the trucks. The vehicle [bucket loader] that he used to do this task has a device on the steering wheel called a “suicide knob.” He says this knob makes the driver able to turn the loader faster. He says he operates this knob with his left hand and uses his right hand to operate the other panel controls for the bucket. The worker says that shortly after beginning this work, he realized there was something wrong in his left shoulder: it was painful. He says as that day got going, he became sore all over. (He says nonetheless that after the accident he thought he would heal on his own, because pain generally goes away.)
- (29) The worker says that several days later on January 2, 2000, he took his three children swimming at the pool. He says when he reached to his waist to take his shirt off as he was getting undressed, he heard his left shoulder pop: it made a noise. The worker says at that moment he thought he had dislocated it and he could no longer lift his hands up. He says he didn't feel pain in the right shoulder at that time. The worker says his children were already in the pool so he went to join them but he was unable to lift them in the water at all, as he normally could. So he says he went into the hot tub and stayed there.
- (30) He says on that day or the next day he made an appointment and saw his doctor. He says he thinks he called his doctor on January 4 (and also his employer to say that he would not be to work) and then he took a week off. He says he can't remember if he phoned his employer before or after speaking with his doctor. The worker says that his doctor told him he should take a week off.

- (31) The worker says from December 15, 1999 to April 15, 2000, he was the acting night shift foreman. He says this was an important job with more money and responsibility. He says that therefore after the accident he took as little time off as

possible because he knew if he took more time off, his employer would just get somebody else to act as the foreman. He says when the summer shift started [and the acting position ended], he told his foreman he would like to take some time off because “his shoulders were really messed-up”.

- (32) The worker says that while he was acting foreman, from January 11 to April 12, he still operated the plow. He says he would just work through the pain he was experiencing; he would also be extremely careful when he was lifting. He says he worked around his injuries: for instance, he would use the forklift [rather than lift by hand] whenever he could. The worker says after the accident, the things he could do before, now caused him pain. For instance, one of his duties was to move twenty litre pails of oil out into the yard to put into the equipment. Each pail weighs approximately 50 pounds. He says it is always easier to lift two rather than one (in order to balance the load). So this task meant lifting about 100 pounds. After his accident, he could do it but the day afterward he would experience a great deal of pain. As well, while he was lifting, he would have to stop along the way, because his body was telling him his limits.

#### *Other Activities Before and After the Accident*

- (33) The worker says that before the accident he had no pain in his shoulders whatsoever. He says he had no pain in his body at all. He says the only time he had been to doctors prior to the accident was for the flu. He says that he was happy and healthy and very active. He coached his children’s hockey teams and was very active on the ice with the players.
- (34) The worker says after the accident he was not able to play around with his children anymore. When he was coaching, he stayed more on the bench.
- (35) The worker says before the accident he had played softball and soccer and had done lots of hiking. He has two dogs. He says he also did a lot of gardening as a hobby. He says this could be very strenuous. The worker says that at the time of his accident he had three boys -- twins nine years old and an eleven-year-old son. He says he also coached his children’s soccer and baseball teams. He says the children also have mountain bikes and they did a lot of mountain biking together.

- (36) The worker says that after the accident he was unable to mountain bike all summer. And in the following autumn, he opted out of coaching entirely for the full year. He also says he could no longer roughhouse with his children: they didn't understand why he couldn't play with them in the way he had before the accident. He said his oldest child was about 125 lbs. at the time and he says he figures all together his

three children would be six arms and legs and about 325 lbs. -- before the accident, he was able to take them on all together. The worker says before the accident he could pick up his youngest and lightest child (approximately 65 lbs.) and put him over his head and play airplane.

- (37) The worker says after the accident the children would still try and play with him in this way and it would hurt him; then he would yell at them and he felt very badly about this, because he says it wasn't fair to them.

#### *Meeting and Examination at the Board*

- (38) The worker says that in early April 2000, he told his doctor he needed some time off because of his injury from the accident. He says the doctor gave him three weeks off. He says it was shortly after that that the board phoned him to come in and talk with them. He says at a meeting on April 12 [record indicates this meeting was probably April 11], he told his adjudicator and rehabilitation counsellor the story of the accident, including how he tried to open the door of the other vehicle by pulling on it so hard that he bent the frame of the door. He says he doesn't know if they were upset that he had not reported the information about trying to open the door at the time he initially reported the accident in January.
- (39) The worker says that he also saw the medical consultant at the board the same day on April 12 [record indicates examination was April 11], at the request of his adjudicator and the rehabilitation counsellor. He says the medical consultant checked his flexibility and told him he did not have full range of motion. He says that when he took his shirt off, the medical consultant said he could see that there was something wrong and so recommended an MRI.

#### *The April 2000 MRI*

- (40) The worker says that after he saw the medical consultant, he talked with his adjudicator and agreed to go to Calgary to have an MRI. He says he presumed the

MRI would be of both shoulders as well as both elbows because they were all sore. However, when he attended the MRI clinic, the receptionist told him that only the left shoulder would be imaged. The worker says that he then asked to phone his adjudicator in Whitehorse and he did talk to her and questioned why only one shoulder would be investigated on the MRI.

- (41) The worker says the first time he came in to see his adjudicator and rehabilitation counsellor [in April] he told them about both shoulders. [We note there is not a note to file or documentation indicating this April meeting with the adjudicator and rehabilitation counsellor.]
- (42) The worker says that at the April meeting with his adjudicator he was not told about any pre-existing condition and he was not shown any policy in this regard.
- (43) The worker says that the results from his MRI noted a 5mm tear in the rotator cuff muscles of his left shoulder. The worker says that he wondered himself whether the tear had been bigger at first in December at the time of the accident and whether some healing had occurred before he had his MRI. The worker also says that if there had been an MRI of his right shoulder it may also have shown a tear. The worker, with his advocate, says that without an MRI of both shoulders there was not enough information to determine the extent of his 1999 shoulder injuries; whether there had been aggravation of a pre-existing condition; and whether there had been recovery.

#### *Ongoing problems*

- (44) The worker says that he still feels anger now when he thinks about the accident. He says he was treated for post-traumatic stress at the time. He says he wants to say for the record that he still has residual trauma from the accident (and from listening to his testimony, this appears to be a problem).
- (45) The worker says that now when he is in his plow and doing roads he still has some close calls and he still thinks at the back of his head that another accident could happen to him. He says that a lot of snowplowing involves driving a very large vehicle at the very edge of the road on the rim of snow just adjacent to the ditch. He says that he lives on the edge when he is doing this every night for six or seven hours because the snowplow is going 60-70 km/hr right on the edge and “it is scary”. He says when he is plowing, approximately once every hour something grabs the plow and pulls it towards the ditch. He says he often worries about going into the ditch.

- (46) The worker says it's a question in his own mind whether or not he would have lived a lot longer before he would have felt any symptoms of osteoarthritis if there had been no accidents.

*The Second Motor Vehicle Accident -- June 2000*

- (47) The worker says that the second motor vehicle accident occurred very near the spot of the first, right at the intersection between the south access and the highway. He says his family had borrowed a friend's boat and were towing it behind their new family van. They were off to a fishing derby. He says the car he hit had American plates and was in the right hand lane, signalling as if it were turning off at a tourist

attraction. He says he realized the driver was probably confused as it was 6 a.m. and the attraction would not be open. He says that just as he got to within 25 feet, the other car suddenly made a sharp left turn into his path. He says he cranked right but hit the other vehicle on the [right] side back corner with the front centre of his vehicle. He says everyone in his vehicle was wearing seatbelts. As he braked, the antilock brakes operated. He estimates that he was moving at a speed of between 0-30km/hr when impact occurred.

- (48) He says there was \$5000 damage to his van, but very little damage to the other car. He says the air bags did not go off. The police came and asked if his family wanted to go to the hospital but they decided it was not that bad. They had planned for the trip [and the van still worked] so they continued on with their fishing trip. The worker says, however, that sitting in the boat all day at the fishing derby was not a great posture for him and when they came back the next day, he went to the hospital shortly after. He says he went to the hospital because he had a sore back with pain in the long muscles running up and down his spine. The worker says he believes he missed a week of work because of this accident.
- (49) The worker says that in the second accident he was driving a van weighing approximately 4,000 lbs. and towing a boat (aluminum) weighing approximately 500 lbs. as opposed to a 50,000 lb. truck as in the first accident. In addition, he says in the second accident, two similar objects hit each other.
- (50) The worker says that he believes the source of his shoulder problems is tearing damage done to his muscles when he tried to open the car door during the first work-related accident. He does not believe that his shoulder problems are due to the impact of [either] accident rather they are due to injury from the force he exerted trying to open the door to free the motorist just after his 1999 workplace motor vehicle accident.

- (51) The worker says today he couldn't pull on a door like he did in the moments after the first accident. He says that the medical consultant told him that the adrenaline in his body just after the accident would enable him to do things he could not normally do. The worker says he does not think he could move the frame of the door as he did without the adrenaline in his body [as a result of the accident]. The worker referred to stories about superhuman feats of strength in moments of panic after accidents.
- (52) The worker says that he saw a lawyer when the board adjudicator told him that his physiotherapy treatment would no longer be covered because the medical consultant had reviewed his file and decided he was okay. The worker says that after the board decided to subrogate his motor vehicle accident claim he was told that his lawyer was now the board's lawyer. He says he was told this on February 16, 2001.

*The December 15, 2000 Incident at Work/Board Views as New Injury*

- (53) The worker describes what happened approximately a year after his 1999 workplace accident in this way. He says he was working the night shift by himself and had to change some blades on the underbody of the plow of the truck. He says there are four blades across the bottom of the plow and these are hydraulically angled like the front plow blade, but are not as thick. He says these blades are approximately a foot and a half deep with replaceable blade edges and each blade weighs approximately 40lbs. They are bolted on side by side on the bottom of the main blade at the front. The blades are changed by driving the truck over a pit which is six feet deep, enabling a worker to do this task from underneath the vehicle.
- (54) The worker says that on December 15 "there was no incident" involved: the blades didn't fall, but it was hard strenuous work. He says normally he would do this with two people. He says there are five or six bolts in each blade and you work on one blade at a time. The worker says that before the accident he could do this task by himself. However, he says that he found it to be very hard work and the next day he was really sore and tired. He says this was not a new injury or incident as the board has said. He says it took about an hour to do this work and the work was overhead. He says the blades are changed using a large air gun which creates a lot of vibration.
- (55) The worker disagrees with the medical consultant's report about this incident dated January 15, 2001, specifically where the medical consultant says "since soft tissue injuries generally fully resolve, I suspect that the recent flare-up is related to the heavy overhead lifting rather to either motor vehicle accident.... suggests new incident because of right shoulder."

- (56) The worker says he wants the board to recognize that his right shoulder was injured in the December 30, 1999 work-related accident and continued to cause him problems, including pain.

***The Statement from the Worker's Wife***

- (57) The worker says that his wife was unable to attend the hearing because she had just started a new job and was in training. However, he says he asked her to write something for the hearing and give it to him to submit for the appeal committee's consideration.
- (58) The worker provided a statement which he identified as having been written by his wife and signed by her, dated July 18, 2002. We accepted this document as Exhibit 1 and summarize its contents below.
- (59) The worker's wife writes that before the December 30, 1999 motor vehicle accident her husband had no physical ailments and did not complain of pain in his shoulders or any other parts of his body. But after the accident she realized that her husband had seriously hurt his shoulders, both left and right. She says he would not be able to sleep, tossing and turning all night and awaking in the morning with great discomfort. She says this went on for a year before he showed signs of improvement. She says although the pain has subsided somewhat it is still very much a problem and very obvious to this day, particularly after her husband puts in a hard day's work.
- (60) The worker's wife says that the accident took a toll on her husband's physical abilities, and changed their lives. She says after the accident he was unable to roughhouse or play physically with his three boys and the children were very disappointed. Her husband was also very disappointed and felt bad that he could not continue a physical relationship with his sons. She says the boys did not understand what their father was going through and it took them a long time to understand.
- (61) The worker's wife says that her relationship with her husband has also suffered because of his restlessness at night and his "agonizing".
- (62) The worker's wife says that one day, shortly after the 1999 motor vehicle accident, her husband confided in her and told her that he felt he had made a mistake by trying to open the door on the other motorist's car. He felt this was the reason that he had injured his shoulder. She says he asked her if it would be wise not to say anything [to the board] about trying to open the car door and instead to claim that the injury

was due to the seat belt. She says she agreed that this was best and hoped that his injuries would not last long and he would be fine, given some time to heal. She says this was a bad judgment call and a mistake on both their parts.

### ***Workers' Advocate Submissions***

- (63) The worker's advocate referred the appeal committee to a number of excerpts from Terence Ison's *Worker's Compensation in Canada* (2d ed.) as follows:
- 3.2.7 "Pain"
  - 3.3.22 "Deteriorating Conditions"
  - 3.3.27 "Arising out of Employment"
  - 3.7.1 "Multiple Causes of Disability"
  - 3.7.2 "Pre-existing Conditions - Individual Susceptability"
  - 5.4.1 "Pre-existing Causal Factors"
- (64) The worker's advocate says that the process required to investigate the effect of a pre-existing condition in accordance with Policy CL-47 ["Pre-existing Conditions"] was not properly followed on this claim.
- (65) In addition, the worker's advocate says that the worker was eventually denied entitlement for physiotherapy treatment of his right shoulder because the effect of the December, 1999 accident on his right shoulder was never properly investigated. (She notes the lack of an MRI for the right shoulder.)
- (66) In particular, the advocate points to the adjudicator's decision letter which states "in the absence of further medical investigation it is difficult to relate [the worker's] right shoulder problem to his work-related injury" from the 1999 motor vehicle accident. The advocate says this indicates that further investigation is required: instead the worker's benefits were terminated contrary to the presumption in section 5 of the *Act* which requires the board to have "evidence to the contrary" -- that is, evidence that a disability is not work-related -- before the presumption is displaced. She submits that there is sufficient evidence to show that the worker's right shoulder was injured as a result of the first motor vehicle accident in 1999.
- (67) With respect to investigation, the advocate cites Ison's commentary on burden of proof as follows:

The Acts provide for an enquiry process, not an adversary system.  
There is, therefore, no burden of proof on anyone except the board.

In common law litigation, it is normal to place a burden of proof upon the plaintiff, and in medical science, the negative is commonly assumed from the absence of positive data. Neither of these approaches is appropriate to a workers' compensation system operating on an enquiry model. The worker, the employer and the attending physician are responsible for supplying information to the board which it is within their power to provide. With regard to any other information that may be required, the obligation rests on the board to make the necessary enquiries. The absence of evidence on any point leaves the adjudication in a neutral position that calls for further enquiry. It is not itself a ground for any particular conclusion.

### ***The Reports of the December 30, 1999 Workplace Accident***

- (68) The employer and worker both report the December 30, 1999 accident on January 4, 2000: both identify the injury as one to the worker's left shoulder and lower back.

### **The Medical Evidence**

- (69) Dr T.'s first report is dated January 4, 2000 and states that at the time [of the accident] the worker did not notice any pain but shortly afterwards developed some soreness in the left lower back area as well some discomfort in the left shoulder on subsequent days. Presently, he has persisting pain in the left shoulder and left lower back. Dr. T. also reports enlargement and tenderness over the left AC shoulder joint. There is also tenderness in the anterior left shoulder. There is decreased abduction and some tenderness in the paralumbar musculature.

Dr. T. diagnoses "painful left shoulder secondary to strained shoulder capsule and possibly left AC joint separation". The worker is referred to physiotherapy and cleared to continue at work but advised not to use the left shoulder or do any heavy work for one to two weeks.

- (70) An X-ray report of the left shoulder dated January 17, 2000 finds osteoarthritic changes at both AC joints with no abnormality of width or movement on either side.

- (71) On the same day, Dr. T. reports a visit by the worker due to his left shoulder injury. Pain continues but the worker wants to return to work, which the doctor advises can be done as long as the worker avoids heavy lifting.
- (72) The physiotherapy initial assessment report dated January 27, 2000 reports “left AC joint separation . . . left sided neck pain resolving”.
- (73) A note to file by the adjudicator dated February 22, 2000 documents that the worker requested permission for chiropractor services because “he is having difficulty with his shoulder and believes it is now affecting his neck. He is also getting bad headaches”. The adjudicator recommends that the worker see his family physician for referral.
- (74) Physiotherapy progress report dated February 25, 2000 notes “uncertain of current status” because the worker cancelled a February 3 appointment and did not attend on February 8. The report also notes the worker contacted the physiotherapist on February 22 and said he had “re-injured” and was “too sore to attend” so rescheduled for February 24 but he did not attend. [The record indicates that the worker was having difficulty attending appointments because he worked night shifts and needed to sleep during the day.]
- (75) Dr. T.’s April 5, 2000 report states the worker has ongoing shoulder pain bilaterally, the left greater than the right and also complains of pain in both elbows. [We note the word “ongoing” denotes pain that has been going on before

the April report.] There is also swelling and tenderness over the AC joint on both sides, mostly on the left. Left shoulder shows full range of motion. There is some tenderness at the medial epicondylar areas of the elbows bilaterally but no discomfort on resisted wrist flexion. [Emphasis added: we note the reference to pain and swelling in both shoulders.]

The diagnosis is shoulder pain secondary to osteoarthritis at the AC joint and bilateral medial epicondylitis (refers to inflammation in the elbows where there is no reported osteoarthritis).

- (76) The medical consultant reports on April 12, 2000 after examining the worker. He states that the worker ran to the assistance of the woman in the other vehicle and used his strength and adrenaline to pull the top of the doorframe out from the body of the vehicle before realizing that it was impossible to open the door. It was at this time that the worker noted that his shoulders were painful and

suspects the attempt to open the door was the underlying cause of his shoulder pain. [We note the use of the plural in reference to shoulder pain.] The consultant says the worker returned to work after January 8, 2000 and “used some sick time” when his shoulder was bothering him so much that he was unable to work. The medical consultant says the worker’s most significant problem involves the left shoulder and suspects that he may have suffered a partial tear of the rotator cuff muscles. He also says the x-ray evidence of osteoarthritis in the acromioclavicular joints predates the injury at work, although an acute AC separation could have occurred during the accident but no tests have documented this.

- (77) The physiotherapy progress report of April 12, 2000 states that the worker has “ongoing bilateral top of shoulder pain” and mild neck pain on occasion. Also bilateral lateral elbow pain only with full extension range and with heavy lifting.” [Emphasis added: we again note the reference to shoulder pain bilaterally... that is, on both sides of the worker’s body.]
- (78) The board’s April 13, 2002 referral letter for an MRI requests a determination as to whether there is a “left rotator cuff tear” and whether any other injuries are apparent.
- (79) MRI report dated April 24, 2000 says the imaging was of the left shoulder. The report finds prominent acromioclavicular degenerative joint disease with mild spurring from the anterior aspect of the undersurface of the joint. The radiologist also reports a small (5 mm or less) tear within the substance of the posterior supraspinatus/anterior infraspinatus tendons. Other tendons are normal.

The diagnosis is acromioclavicular degenerative joint disease as well as supraspinatus/anterior infraspinatus tendon tear. The report also refers to a possible SLAP tear [not explained, but appears to refer to the glenoid labrum area of the shoulder].

- (80) The medical consultant reviews the MRI results and reports on April 28, 2000 that the most significant finding is of prominent acromioclavicular degenerative joint disease with mild spurring from the anterior aspect of the undersurface of the joint. He says this is a chronic condition that does not develop acutely and is in keeping with the x-ray evidence of osteoarthritis previously noted. He says the worker’s tenderness over the acromioclavicular joint is consistent with this diagnosis and the discomfort will likely be permanent. The medical consultant says that he cannot attribute the degenerative joint disease to the incident that

occurred at work; but the tiny tendon tear may well have occurred at the time of the accident. (There is no discussion of the possible SLAP tear.)

- (81) In a May 2, 2000 note to file the adjudicator says “the worker has a degenerative shoulder condition which is likely contributing to a slower healing process”.
- (82) A doctor’s note from Whitehorse Medical Services - intialled by R.M. and dated July 4, 2000, states that the worker will not be able to work for the next week due to injury. [We note this is shortly after the second motor vehicle accident of late June 2000.]
- (83) The physiotherapy progress report, dated July 25, 2000, says subjective findings are a decreased range of motion in the shoulder and elbows with cervical spine restriction at C5/6/7 and also at T6/7/8; muscle spasm (rev. scapula/rhomboid) right greater than left is also reported. [Emphasis added.]
- (84) Notes to file by the adjudicator dated August 8, 2000 and by the rehabilitation counsellor dated August 11, 2000 state the worker was in a motor vehicle accident, which was not work related and missed work as a result. One note reports the accident date as June 24th, the other note states date of accident is July 24th. The August 11th note to file states the worker was off work “due to low back strain.” The worker is to see the physiotherapist “but noted that the only area which might have some overlap to his compensable injury is in his neck . . . [the worker] noted compensable injury is improving”. [We note that this report indicates that the worker’s shoulders and elbows are improving but not healed almost 8 months after the accident.]
- (85) Dr. T’s progress report of August 17, 2000 states that the worker attends with persisting complaints of pain in shoulders and an ongoing sensation of tightness in the neck on extreme rotation to the left. Dr. T. says he reviewed his notes and could find no mention of neck problems at the time of his MVA, however, the worker does state that this seemed to occur three weeks later. Dr. T. says the worker did re-injure his neck in June in his private car. [We note that Dr. T. does not report that the private motor vehicle accident resulted in any injury to the shoulders - - only the neck.]
- (86) Dr. T.’s report dated December 15, 2000 states the worker has recurrence of pain in his right shoulder and neck area that occurred the previous week after doing some heavy overhead lifting and then driving for approximately 6 to 8 hours. Dr. T. also reports occasional recurrent strain and pain in the right trapezius/right shoulder area since a MVA awhile ago. [We note that this report does not clearly identify whether this reference is to the 1999 motor vehicle accident or the June

2000 one.] Dr. T. recommends warm compresses, medication and time off work for a day or two when flare-up occurs.

- (87) The medical consultant's report is dated January 15, 2001. He does not examine the worker. He says:

I have previously reviewed this worker's claim . . . My conclusion at the time was that the worker had a tiny rotator cuff tear of the left shoulder along with prominent acromioclavicular degenerative joint disease. The degenerative joint disease is not a result of the work-related condition. I anticipated a full recovery as a result of the work-related incident.

IMPRESSION:

I believe that the injuries from the incident in December 1999 have resolved. The report of December 15, 2000 suggests a new incident as it involves the right shoulder where as the previous incident involved the left. [Emphasis added, but see para. 76 where we note that the medical consultant's April 2000 report indicates pain in both shoulders just after the 1999 accident, but more significant pain on the left.] I therefore cannot attribute the December 15, 2000 visit to the claim 2000-0017.

If the heavy lifting occurred at work, I would suggest that it be considered a new incident as heavy lifting can produce a muscle strain.

. . . Since soft tissue injuries generally fully resolve, I suspect that the recent flare-up is related to the heavy overhead lifting rather than to either of the motor vehicle accidents.

- (88) A doctor's note dated January 19, 2001 states, "Patient off from work Wednesday January 17, 2001 and January 19, 2001 secondary to muscular sprain in neck".
- (89) The adjudicator writes the worker on February 16, 2001 giving a brief summary of the claim and denying further entitlement for physiotherapy "with respect to the motor vehicle accident of December 30, 1999". The adjudicator relies on the medical consultant's opinion (above) that the injuries from the December 30, 1999 accident have resolved.
- (90) The worker's lawyer writes the board on March 5, 2001 saying "On reviewing this matter with [the worker], it is our understanding that the previous incident

caused significant injury to both [the worker's] left shoulder and right shoulder as well as both his left and right elbows".

- (91) Dr. T.'s progress report of April 6, 2001 says the worker has ongoing pain in the neck and both shoulders radiating from the shoulders to the trapezius and also along the clavicles, with the tenderness along the supraspinatus at the humeral head but especially over the acromioclavicular joint. His assessment is persisting neck and shoulder pain secondary to soft tissue trauma, tear of tendons as mentioned, as well as osteoarthritis of the acromioclavicular joints. [Emphasis added.]
- (92) Dr. T. also notes that the worker says his December 15, 2000 visit was for aggravation of shoulder pain which was aggravated at work but was a result of "the original injury from his motor vehicle accident over a year ago". Dr. T. says in this report to the board that the worker asked that Dr. T. "clarify this with WCB". [We understand this to mean Dr. T. agrees with the worker that his shoulder pain originated with the December 30, 1999 accident.]
- (93) An x-ray of the cervical spine dated April 11, 2001 reports early degenerative changes in the worker's neck vertebrae.
- (94) The adjudicator writes the worker's lawyer on May 22, 2001 (this is the decision letter appealed to the hearing officer) giving a brief summary of the claim and stating:

In summary, the first medical reporting of [the worker's] right shoulder was six months after his work-related injury and shortly after his second motor vehicle accident. [We note this date would be end of June 2000 but see reports of both shoulders as early as April, 2000 at para. 76.] The next reporting was in December 15, 2000 after doing some heavy overhead lifting at work.

In the absence of further medical investigation it is difficult to relate [the worker's] right shoulder problem to his work-related injury of December 31, 1999 [should be December 30]. In light of the complexities produced from multiple motor vehicle accidents some aggravation of a pre-existing condition is possible . . . [The worker] will continue to have problems with both his shoulders, especially doing overhead work or driving, due to the arthritic conditions of his shoulders. An aggravation to a pre-existing condition is not a bar to compensation although it does limit board responsibility.

[We note there is no analysis or discussion of “aggravation” with respect to the medical evidence nor of how a pre-existing condition can limit board responsibility.]

- (95) An orthopaedic specialist, Dr. L., examines the worker’s shoulders and reports on July 31, 2001 tenderness over both AC joints which are prominent but none in the trapezius. He finds no evidence of instability and good strength in all the worker’s shoulder muscles including the rotator cuff. He concludes that the problem with his shoulder is due to his AC joints where he has osteoarthritis bilaterally.
- (96) Dr. T.’s report of November 16, 2001 notes the worker’s ongoing pains in his shoulders “as he’s had in the past”. This recently improved as he was off work because of a hernia repair, which has healed well; and he is now finding with his heavy work and driving 6 to 7 hours that his shoulders become quite sore the next day.

Dr. T. reports as objective findings enlargement and tenderness at the AC joints bilaterally, but especially on the left with some pain in the trapezius muscle; neck shows full range of motion.

His assessment is recurring pain in AC joints as well as trapezius bilaterally: “this recurring pain dates from his work accident of December 1999 and is related to heavy work”. Dr. T. also says the worker has some ongoing soft tissue injuries as well as degenerative joint disease. These are aggravated by the heavy work he must do. [Emphasis added.]

- (97) The medical consultant’s report dated November 29, 2001 notes that the specialist, “Dr. L., could find no tenderness around the neck or trapezius area and there was no evidence of muscle wasting. Strength was good. Consequently there was no evidence of permanent impairment in his neck nor back”.
- (98) Dr. H.’s report dated May 10, 2002 says the worker has pain, “especially the right shoulder” that has flared up after playing baseball. The worker presents with tenderness over the supraspinatous insertion and some tenderness on resisted abduction.
- (99) Another report by Dr. H dated May 17, 2002 says the worker “threw a

soccer ball” and the pain flared up in both shoulders with some tenderness over both AC joints, full range of motion in the shoulder but some pain over the supraspinatus on resisted abduction.

**Analysis of Issue # 1 - Did the hearing officer err in finding that the evidence does not indicate that the worker's right shoulder problem resulted from the work-related motor vehicle accident on December 30, 1999?**

(100) In her decision, the hearing officer reviews the medical evidence in the record, particularly with respect to the right shoulder. She notes that the early medical reports do not note right shoulder symptoms until April, 2000, more than three months after the workplace accident. She says, “I can see no reason why [the worker] would not describe all of his symptoms, including his right shoulder, to his health professionals on January 4, 17, and 27 or at any other time before April 5, 2000 if symptoms were present.” She then states: “I believe that **if** [the worker] was experiencing symptoms in his right shoulder from the accident of December 30, 1999, he was visiting professionals about the pain in his left shoulder and the right shoulder issue would have revealed itself before April 5, 2000.” We note that the hearing officer emphasized the word “if” in this last sentence. This indicates to us that she concludes that the worker was not experiencing right shoulder symptoms after the accident and that is why these symptoms are not noted in the first three months of medical reports. For reasons we shall explain, we do not find this is a reasonable inference to make.

(101) In his testimony at the appeal hearing, the worker said that both shoulders were painful after the accident, but the left more than the right. There are only two doctor’s examination reports in the month following the accident and these only discuss pain in the left shoulder. (We note that the record indicates the worker was working night shifts and this made it difficult to arrange and keep medical appointments as he would be sleeping during the day.) However, the next doctor’s report, three months later in April, does note pain in both shoulders and describes it as “ongoing”. As we said earlier, the use of the word “ongoing” indicates the

pain in both shoulders was going on before the April examination. In addition, there are subsequent reports by the worker’s treating physician as well as the medical consultant’s report of April 12, 2000 linking pain in both shoulders to the

worker's efforts to free the other motorist from her car just after the December 30, 1999 accident.

- (102) We also note that when the medical consultant views the MRI report of April 2000 (left shoulder imaged only), he attributes the small tendon tear (supraspinatus/infraspinatus) to the December 30, 1999 accident.
- (103) It is true that Dr. T.'s report of December 15, 2000 does not clearly state to which motor vehicle accident he attributes "recurrent" right shoulder pain (see para. 86). However, he does "clarify" on April 6, 2001 that it is the December 30, 1999 accident resulting in soft tissue trauma. Dr. T also concludes that the worker's persisting shoulder pain is due to both [acute] tendon injury as well as [chronic] osteoarthritis in the AC joints of the shoulders.
- (104) On November 16, 2001 Dr. T. examines the worker due to ongoing pains in his shoulders. With respect to objective findings, he notes enlargement and tenderness at the AC joints bilaterally [meaning both sides] but especially on the left." Dr. T. then states "recurring pain in AC joints [we note this refers to both shoulder joints] dates from his work accident of December 1999".

In the review of the medical evidence in her decision, the hearing officer does not discuss or analyze this report from Dr. T. In our view, this comment supports our view of the first two medical reports - - that the failure to mention the right shoulder in two early doctor's reports should not be interpreted as indicating no right shoulder symptoms. It is likely an oversight or perhaps just indicates attention to the more prominent symptoms in the left shoulder.

- (105) Other than the two pre-April doctor's reports, there are two physiotherapy reports, prior to April 2000. The one in January only discusses symptoms in the left shoulder. The one in February does not discuss symptoms and only records cancellation of February physiotherapy appointments [explained in the record elsewhere as due to the worker's shift schedule.] It notes "uncertain of current status" and that the worker contacted the physiotherapy office on February 22 [presumably by telephone] to say he "had re-injured" and was "too sore to attend". We note that at this point the worker is continuing to work.
- (106) In light of the worker's testimony that both shoulders were sore but the left shoulder "popped" painfully as he raised his arms undressing at the pool several days after the 1999 workplace accident (see para. 29), we find that the most

reasonable inference to make from the doctor's two January reports, as well as the first physiotherapy report is that the left shoulder is at that point the more aggravated one and is therefore the predominant focus of the worker, the treating physician and the physiotherapist. We do not infer that there is no injury to the right shoulder as a result of the 1999 accident - - only that it is receiving little attention. By April, it is clear that the treating professionals are reporting pain in both of the worker's shoulders. Further, there is nothing to indicate that these professionals attribute the right shoulder pain to something different from the origin of the left shoulder pain - - that is, the 1999 accident.

- (107) In the medical consultant's April 12, 2000 report, he describes the 1999 accident and notes the connection the worker makes between pulling on the door of the other vehicle and the painfulness of his shoulders subsequently. The medical consultant also notes that the most significant problem is in the left shoulder: "his chief complaint is that of pain in his left shoulder but he does note pain in the right shoulder and in the back of the neck. He also has discomfort in both elbows".
- (108) Therefore, we do not agree with the hearing officer when she finds that there is no evidence that the worker's right shoulder problem resulted from the December 1999 accident. We think it is an error that the hearing officer did not consider Dr. T.'s November 16, 2001 report that the worker has recurring pain in both shoulders dating from the December 1999 accident. This report should have been considered relevant evidence in determining whether or not the worker in fact had right shoulder problems due to the 1999 accident. We find he did.
- (109) We therefore reverse the hearing officer's finding of fact that the worker's right shoulder problems did not result from the December 1999 accident. We find there is continuity of symptoms in the right shoulder from just after the 1999 accident (which persists into 2001): we base this finding on the worker's testimony in this regard, and the reports of ongoing right shoulder pain by both the treating physician and the medical consultant in April 2000 and Dr. T.'s report of November 16, 2001.
- (110) It appears that the hearing officer's finding, that the worker's right shoulder pain was not a result of the 1999 accident, was also based on a comment by the medical consultant in his April 28, 2000 report which states the worker's tenderness over his AC joint is consistent with the prominent AC degenerative joint disease identified on the MRI. The consultant explains that this is a chronic condition which does not develop acutely. He also unequivocally states that the degenerative joint disease cannot be attributed to the December 30, 1999 accident.

- (111) It appears that the hearing officer attributes the worker's right shoulder problems to a pre-existing condition of osteoarthritis. However, there is no reference to the soft tissue tendon injury in the left shoulder also noted by the medical consultant in his April 28, 2000 report which he does attribute to the December 1999 accident. There is also discussion of a possible similar right shoulder injury. In other words, this worker had acute injuries as a result of the December 30, 1999 accident in addition to and superimposed on pre-existing degenerative changes: both must be considered. There is also no analysis of subsequent reports by Dr. T. reviewed above which discuss soft tissue injuries from the December 1999 accident as a source of the worker's persistent or recurrent right shoulder pain into 2001. As we have stated this is relevant evidence that should be considered.
- (112) We note the hearing officer also does not discuss the terms of a relevant policy [Policy CL-47 "Pre-existing Conditions"] in her decision even though she appears to attribute the worker's ongoing shoulder problems to pre-existing osteoarthritic changes in his shoulders.
- (113) In our view it is reasonable to infer on the basis of the worker's testimony and subsequent medical reports of April 2000 (reasonably close to the date of the accident) that there was damage to the right shoulder as well as the left shoulder as a result of the worker's efforts to free the driver trapped in her car as a result of the worker's accident on December 30, 1999. We will deal with the issue of pre-existing condition in our analysis of Issue #2.

**Analysis of Issue #2** - Is the worker entitled to further benefits under the *Act* and relevant policies?

- (114) There does not appear to be any dispute on the objective findings of osteoarthritic changes to the worker's shoulders nor to the characterization of this as a chronic condition which had developed prior to the 1999 workplace accident.
- (115) We find that the degenerative changes in the worker's shoulders fit the definition of a pre-existing condition in Policy CL- 47 as follows: "a pre-existing condition means a known or unknown abnormal physical . . . state of health that existed prior to the compensable disability". [Emphasis added.]
- (116) The worker and his wife both say that he was symptom-free prior to the 1999 accident: that is, he did not have any kind of disabling shoulder pain. There is nothing in the medical evidence available to us to suggest otherwise. We accept the worker's testimony on this point (no symptoms prior to accident).

- (117) In this case, we find that the worker's shoulder (and elbow) injuries are likely due to the force he exerted with his arms trying to free the other motorist. (It is also possible that the impact of the accident could have had some role in his injuries -- especially the sudden deceleration when the blade of the plow imbedded into the highway.) We find that this worker was able to bend a heavy steel car door frame because of the abnormal strength he used which he was able to summon because of the adrenaline coursing through his body, no doubt as a result of what must have been a terrifying accident.
- (118) We also note that the worker expressed considerable anguish in the hearing over his "fault" in injuring his shoulders and over his "mistake" and "bad judgment" in not telling the board sooner (than April 2000) about his attempts to free the other motorist with nothing but his bare hands and the extraordinary strength he exerted. We point out to the worker that Policy CL-42 makes it clear that a worker's disability can arise out of and in the course of employment where "xii) the worker was acting as a 'good samaritan' based on the premise that an employer would expect the worker to provide help in emergencies". (The record also shows the medical consultant tried to reassure the worker on this point.) Helping the other motorist was to the worker's credit and is not something that rules out compensation for any resulting injury.
- (119) The next question that we must address is whether the worker has a work-related disability which aggravates his pre-existing condition.
- (120) Disability is defined in section 101 of the Act as "a work-related incapacity". It is also defined in Policy CL-40 as "the limiting, loss or absence of the capacity of the individual to meet occupational demands" and is to be assessed by non-medical means.
- (121) Therefore, the question arises as to whether the worker as a result of the 1999 accident has limits on or loss of his ability to meet all the occupational demands of his job. We find there is evidence that some of the worker's recurrent right (and left) shoulder pain has diminished his ability to meet all occupational demands during times when his shoulder "flares up" with heavy (weight-bearing) work [see for example para. 32, 38, 54, 86, 91, 92, 96]. We also find that this disability is due to damage to tendons and (probably) muscles that occurred during the 1999 accident. The small tear (and possible other SLAP tear) is well documented in the left shoulder MRI. We are now over two and a half years from the 1999 accident - - and we are without the benefit of a right shoulder MRI at

the relevant time. There is no dispute that the worker injured more than was imaged

by the MRI (for instance, the bilateral elbow epicondylitis is frequently mentioned in medical reports after the 1999 accident but there was no MRI of the elbows).

In the circumstances, we find it is likely that there was also injury to the right shoulder during the accident: we accept the worker's evidence that he pulled on the car door frame with all his might and both arms (including elbows and shoulders).

- (122) We have already found that the lack of medical reporting of bilateral shoulder pain in several early medical reports until April 2000 is not because there was no pain or injury to the right shoulder, but rather because the left shoulder was more painful and therefore more notable for the treating professionals.
- (123) There is also evidence from the worker, which we accept, that after, and as a result of the 1999 accident, he had to modify work tasks, especially ones requiring heavy lifting in his job because of ongoing vulnerability to pain, strain and sprain in his shoulders.
- (124) Therefore, we find the worker does have a compensable disability arising from the soft tissue injuries to his shoulders during the 1999 accident.
- (125) In addition to soft tissue injuries, there is the worker's osteoarthritis to consider. Policy CL-47 "Pre-existing Conditions" states that "if it can be shown that a pre-existing condition is worsened by the compensable condition, the pre-existing condition shall be considered compensable to the extent that the pre-existing condition has deteriorated as a result of the compensable condition".
- (126) We find that what was an asymptomatic and non-disabling pre-existing condition (osteoarthritic changes in the shoulder joints), just before the 1999 accident, thereafter "deteriorated" or "worsened" due to the accident because the worker began to experience some disabling shoulder pain due in part to his osteoarthritis with which he had never before had to contend. We find that it is likely that if he had not stressed his shoulders as he did so extraordinarily the night of the accident that he would still be living and working with no symptoms of arthritis as a vigorous man in his thirties.

- (127) Therefore, we find that his pre-existing condition was aggravated as a result of compensable injury to his shoulders which occurred during the 1999 accident and its immediate aftermath.
- (128) It thus follows that the worker is entitled to compensation for his right shoulder work-related disability under the *Act*.

## Conclusion

The appeal is allowed. The hearing officer's decision is reversed as follows:

1. The worker suffered and continues to suffer a work-related disability as a result of his December 30, 1999 workplace accident which caused soft tissue injuries to his shoulders as well as aggravated his pre-existing osteoarthritis in his shoulder joints.
2. The worker is therefore entitled to compensation under the *Act*.

Dated this **13<sup>th</sup>** day of **August, 2002** in the City of Whitehorse, in the Yukon Territory.

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Joseph Radwanski, Member

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Heather MacFadgen, Presiding Officer

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Donald Inverarity, Member