

# Workers' Compensation Appeal Tribunal

## Decision # 41

**Claim No.:** 97-1438

Date of Notice of Appeal: May 3, 2002

Date of Hearing by appeal committee: July 4, 2002

Date of Decision: October 17, 2002

Date last document received: August 12, 2002

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

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

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

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

## **Summary for the Reader**

**Decision under review:** Internal Review Committee (“IRC”) decision dated September 10, 1999

**Sections of Act considered or applied by IRC:** Not stated

**Policies considered or applied by IRC:** Not stated

**Issue addressed by the IRC:** Whether the worker was entitled to a program of vocational retraining as a result of her workplace accident.

**Decision made by IRC:** Not to sponsor academic training

**Appeal Committee decision summary:** The worker was not capable of returning to her pre-injury employment when benefits were terminated, however is not entitled to vocational rehabilitation because other options were required to be exhausted before retraining could be considered.

**Sections of the Act considered or applied by appeal committee:** 17.(1), 19.5, 30 of the *Workers’ Compensation Act* S.Y. 1992.

**Policies considered or applied by appeal committee:** CS-07, CS-09

### **Issue addressed by appeal committee:**

1. What legislation and policy should be used to determine the worker’s entitlement in this appeal?
2. Was the worker capable of returning to her pre-injury employment when benefits were terminated?
3. Is the worker entitled to vocational rehabilitation?

### **Decisions made by appeal committee:**

1. The legislation and policies used to determine the worker’s entitlement in this appeal are the *Workers’ Compensation Act*, SY 1992 and Board policies CS-07 and CS-09.
2. The worker was not capable of returning to her pre-injury employment when benefits were terminated.
3. The worker is not entitled to vocational rehabilitation.

## Introduction

By her Notice of Appeal dated May 3, 2002, the worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Internal Review Committee ("IRC") dated September 10, 1999.

In the decision under appeal, the IRC upheld the July 3, 1998 decision of a board adjudicator that the worker was fit to return to her pre-injury employment and that vocational training would not be provided by the board.

The worker and her representative, the deputy workers' advocate, say that the adjudicator was wrong to terminate benefits because the worker was not physically capable of returning to her pre-injury occupation and required training in a more sedentary line of work in order to become employable.

The deputy workers' advocate asks that the appeal committee find that in light of evidence prior and subsequent to the IRC decision, the worker is entitled to further benefits, including reimbursement of training costs incurred by the worker in changing her occupation to a less physically demanding one, and additional rehabilitation.

The hearing was held on July 4, 2002 before an appeal committee of the tribunal established by the tribunal Chair under section 18.3 (1) of the *Workers' Compensation Act*, 1992, as amended by SY 1999. C.23, s.11 (the "*Act*").

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

The worker attended the hearing and gave evidence under oath. The employer representative was connected to the hearing via telephone conference and provided evidence by affirmation.

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

CL-02 Personal Injury by Accident;  
CL-10 Referrals from One Medical Practitioner to Another;  
CL-17 Physiotherapy Treatment;  
CL-30 Suspension, Reduction and Termination of Compensation;  
CL-31 Cumulative Trauma Disorders;  
CL-40 Disability;  
CL-42 Arising Out Of and In the Course Of Employment;  
CL-43 Recovery of Overpaid Compensation;

CL-46 Permanent Impairment;  
CL-47 Pre-Existing Conditions;  
CL-50 Claims Cost Relief and Claims Cost Transfer;  
CS-02 Re-employment Assistance Allowance;  
CS-05 Rehabilitation;  
CS-07 Vocational Rehabilitation, Fitness for Employment, Suitable Occupation, Deeming;  
CS-09 Return-to-work Programs, and;  
CS-10 Graduated Return-to-work Program.

During the hearing, the appeal committee accepted as Exhibit 1, the worker's x-ray report dated June 16, 2002.

### **Issues**

1. What legislation and policy should be used to determine the worker's entitlement in this appeal?
2. Was the worker capable of returning to her pre-injury employment when benefits were terminated?
3. Is the worker entitled to vocational rehabilitation?

### **Background**

- (1) The worker was employed as an assistant front-end supervisor at a local retail store. On October 17, 1997 she slipped on a freshly waxed floor and fell, landing on her knee. She continued working through the day, however experienced tenderness and soreness by the end of the day. Over the next few days she experienced sharp pains in her knee when she tried to bend it and on October 17, 1997 she sought medical attention.
- (2) Over the next several months the worker attended physiotherapy but experienced no significant improvement in her symptoms. In January 1998 an arthroscopy was performed by Dr. B., an orthopaedic surgeon, who found that the worker had a permanent pre-existing condition which could have been aggravated by the direct blow to the knee when she fell. He attributed her symptoms to the injury at work.
- (3) In February 1998 the worker was examined by Dr. P., another orthopaedic surgeon. It was Dr. P.'s opinion that the worker's symptoms would be

aggravated by prolonged walking, negotiating stairs, lifting, kneeling and squatting, all of which activities were required in her job. The worker continued to attend physiotherapy, with slow progress, and in May 1998 underwent a functional capacity evaluation (FCE). A vocational rehabilitation assessment was also done in May 1998. The worker was found fit to return to her pre-accident work, with some job modifications.

- (4) In June 1998 the worker returned to work on modified duties, continuing to experience pain in her knee, and continuing to attend physiotherapy for her knee.
- (5) In October 1998 the worker resigned her position with the retail store and in 1999 she attended the Yukon College Office Administration program.

### **Analysis of the Issues/Reasons**

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

- (6) We find that the worker was injured in a fall at work in October 1997.
- (7) 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."
- (8) 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 in October 1997.
- (9) 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 those dealing with the issues of fitness to return to work and rehabilitation are relevant to this appeal. Accordingly, we will not examine the application of Policies CL-02, Personal Injury by Accident; CL-10, Referrals from One Medical Practitioner to Another; CL-17, Physiotherapy Treatment; CL-30, Suspension, Reduction and Termination of Compensation; CL-31, Cumulative Trauma Disorders; CL-40, Disability;

CL-42, Arising Out Of and In the Course Of Employment; CL-43, Recovery of Overpaid Compensation; CL-46, Permanent Impairment; CL-47, Pre-Existing Conditions; CL-50, Claims Cost Relief and Claims Cost Transfer; CS-02, Re-employment Assistance Allowance; CS-05, Rehabilitation, and; CS-10, Graduated Return-to-work Program because the issues that they address are not ones that are under appeal.

**Issue #2:** Was the worker capable of returning to her pre-injury employment when benefits were terminated?

- (10) On October 20, 1997 the physiotherapist recommended that the worker discontinue working and her doctor agreed. Over the next several weeks the worker attempted to return to work several times, with a recurrence, or increase, in symptoms each time. The physiotherapist and the worker's doctor continued to report ongoing pain and swelling.
- (11) In January 1998 she was referred to Dr. B., an orthopaedic surgeon. In his examination report of January 28, 1998 Dr. B. states "For this diagnoses of post-traumatic chondromalacia of the patella symptoms, she has been through appropriate rehabilitation and it is not improving at all and she is limited considerably with this. I have discussed management options including arthroscopic surgery for this which has approximately 50% to 60% chance of reducing her symptoms, although it will not improve the long term outlook for her knee."
- (12) On February 16, 1998, Dr. Pate, an orthopaedic specialist , expressed doubt that the worker would ever have an entirely pain free knee, and says "Certainly her symptoms would be expected to be aggravated by activities with prolonged walking, especially lifting, climbing and descending stairs and kneeling and squatting. She likely would be best served with more sedentary work activities."
- (13) On May 5, 1998 the worker was referred to Program of Work Evaluation and Rehabilitation (POWER) for a functional capacity evaluation (FCE), due to her inability to perform all aspects of her job. That FCE was performed May 12 and 13, 1998, at which time the worker was working approximately 6- hour shifts, with some adjustment to her duties to accommodate her injury. With regard to work, the FCE recommended that "while improvements in strength are being attended to with programming and supervision, minor adjustments to work activities will reduce the stress on the sore knee to allow increased productivity.

- Work below 14 inches from the floor at the present time are contraindicated. This restriction will likely be reduced as strength increases due to the current range of motion that the client has.
  - The use of a wheeled cart to reduce loading for distance carrying will reduce stress on the affected knee. This will allow short distance carries or lifts to occur as compared to long distance carries.
  - Ascending and descending stairs one at a time as is currently being done is a safe and appropriate way to modify this task until strength and gait pattern improvements are achieved.
  - Walking is not a contraindication, but the duration, speed, must be controlled to encourage carry over from therapy programming into regular daily activities.
  - Standing is also not a contraindication, but education on the frequent change in posture, minimizing knee hypertension and regular changes from sitting to standing postures and positions would assist with reducing stress on the joint by increasing the support from the muscular work.”
- (14) The deputy workers’ advocate has argued that the results of the FCE are unreliable as no formal job description was provided. We disagree. We find that the results of the FCE are not rendered unreliable by the lack of a “formal” job description. A worksite assessment was done and the actual duties required of the position were observed and were confirmed by another incumbent in the same position.
- (15) A May 29, 1998 vocational rehabilitation assessment by the board’s rehabilitation counsellor found the job to be “light to medium” and concluded that the worker was capable of performing her job as assistant supervisor, with the implementation of the FCE recommendations. [Emphasis added]
- (16) Board Policy CS-09, “Return-to-Work Programs” states:

**A. Goal of Return-To-Work Programs**

The principal goal of return-to-work programs shall be to rehabilitate workers so that they can safely return to work as soon as possible.

To meet this goal, the sequential hierarchy of vocational rehabilitation objectives, sections (a) to (e), shall be followed:

- a. return to the same work with the same employer;
- b. return to similar or comparable work with the same employer;
- c. return to different, but suitable work with the same employer;
- d. return to similar or comparable work with a different employer; and
- e. return to different, but suitable work with a different employer.

- (17) On the basis of the FCE and the rehabilitation assessment, the worker appeared to meet the requirements of either option (a) or (b) of the hierarchy of objectives of the Return-to-Work policy. The worker returned to work, with the understanding that the modifications recommended by the FCE would be implemented.
- (18) On June 16, 1998 the worker was advised that her claim for compensation was “at finality and is now closed”.
- (19) The worker has testified that upon her return to work most of the recommended modifications were never implemented satisfactorily. Some of her duties were removed and substituted with less fulfilling ones. For example, rather than make changes that would permit her to do her pre-accident job, but in a manner that made fewer physical demands on her knee, she was given baskets to clean and otherwise “occupied”. The “back-up” essentially did her job. When she required a chair in order to be able to work “on the floor” she had to ask her union for assistance to get that, and then was reprimanded by her supervisor for sitting on the chair. She was also reprimanded for taking her medication while at work. The fact that she couldn’t ascend and descend stairs was not well accommodated. The fax machine was upstairs but her work was performed downstairs. Her duties required her to go up to get faxes to fill orders, but she was unable to climb and descend the stairs often or quickly enough, to perform this part of her job. Further, staff were required to leave personal belongings upstairs during the day. Thus, in order for her to get a cigarette during her break she had to ascend the stairs to get the cigarette and then go back down to the ground floor to have her break. It was not possible for her to do this in the 15 minutes allowed, but management was unwilling to accommodate a different arrangement for access to her cigarettes during the day.
- (20) The worker also testified that her condition and situation affected her relationship with her peers. She was not as fast as before her injury, and was often “grouchy” due to pain. Her co-workers had to work harder because of her. She felt that co-workers didn’t understand this, and that they resented her. She believed that her supervisor thought she should be “OK” now. She felt ridiculed and harassed by the manager and other staff. On one occasion she asked for the key to the handicapped washroom, which is on the ground floor and would not have required her to ascend and descend the stairs, and was told by her supervisor to “go find one”. She found it ever more stressful to go to work and she was “becoming an emotional wreck”. She resigned due to the stress at work.
- (21) The employer representative testified that he had no information on some of the issues raised. He had spoken with the supervisor who advised that all the modifications had been followed, and that, contrary to the worker’s testimony, he

- had offered to let the worker keep her personal items on the ground floor. He believed the modifications required were minor and were implemented in accordance with the FCE. He supported the decision that the worker could return to work and pointed out that in October 1998, before the worker's resignation, her doctor reported "OK overall" with no mention of problems with the work.
- (22) We placed more reliance on the worker's testimony with regard to the work modifications. She gave her evidence in a straightforward and believable manner, and she was the person who was working with the modifications. The employer's representative works at the store's head office located in Edmonton, not at the store where the worker was being accommodated, and offered only hearsay evidence about the implementation of the job modifications.
  - (23) We have therefore accepted the worker's testimony that the modifications were not fully implemented.
  - (24) It is clear from the FCE, the rehabilitation assessment, and the medical reports at the time that the worker was considered fit to return to her job, if the recommended modifications were made. This would meet Objective (b) of the sequential hierarchy of vocational rehabilitation objectives, a return to similar or comparable work with the same employer.
  - (25) However, we find that the board was premature in advising the worker that her claim was "at finality and... closed" when the success of her return to work depended upon job modifications that required the support of the employer and co-workers. We believe the board had a responsibility to work with the parties and monitor the progress of the modified return to work, and to intervene as necessary to facilitate its success. It does not appear that meaningful attempts were made by the employer or by the board to ensure the success of the return to work plan.
  - (26) We find that, in the context of all the facts of the case, the worker was not capable of returning to her pre-injury employment when benefits were terminated in June 1998.

**Issue #3:** Is the worker entitled to vocational rehabilitation?

- (27) Board Policy CS-07, "Vocational Rehabilitation" states:

**D. Vocational Rehabilitation Hierarchy of Objectives**

Although the hierarchy of objectives is sequential in nature, it is fluid in its application. Subsequent objectives are only undertaken once all preceding

options have been examined. The hierarchy of vocational rehabilitation objectives is as follows:

- a) Return to the same work with the same employer.
- b) Return to similar or comparable work with the same employer.
- c) Return to different, but suitable work with the same employer.
- d) Return to similar or comparable work with a different employer.
- e) Return to different, but suitable work with a different employer
- f) New skills training-on-the-job
- g) Re-education and/or self-employment.

Items (a) to (e) inclusive, upgrading of existing skill sets may be considered within these areas. Upgrading may include training or re-education.

- (28) The worker was discharged from POWER June 12, 1998 with a work capacity of “medium”. A May 29, 1998 vocational rehabilitation assessment by the board’s rehabilitation counsellor found the worker’s job to be “light to medium” and concluded that the worker was capable of performing her job as assistant supervisor, with the implementation of the FCE recommendations.
- (29) The worker returned to modified work with her pre-injury employer. The return to work was not successful, however, primarily as a result of the stressful situation with her supervisor and co-workers, and the failure of the employer to effectively implement the job modifications. Despite the stress she was experiencing, the worker successfully returned to work for 5 months. Time records indicate that she was able to work more or less full time from her return in late May 1998 through to her resignation in October 1998.
- (30) Policy CS-07 requires that all the options of the vocational hierarchy of objectives be exhausted before considering option (f), retraining. There is nothing on file to indicate that a return to modified work with the same employer could not have been successful had support been available from the employer and the board.
- (31) Likewise, there is nothing to indicate that, even if option (b) was unsuccessful, that options (c), (d), and (e) would also be unsuccessful. In fact, it appears likely that she could have done the same work with a different employer, where the emotional stress and some of the physical impediments, such as the stairs, were absent.
- (32) A report from Dr. D., the worker’s family physician, dated October 11, 1998 states, under Capacity for Work, “As present – no change” and describes the worker as “overall doing OK”. It is reasonable to expect that, since she was physically able to perform in the work for 5 months, and her doctor reported her capacity for work near the end of that time as “no change”, she should have been

able to successfully return to the modified job, or a similar job, if the other factors were removed.

- (33) We recognize that it is possible that all the options identified in the policy might have been attempted without success, and the board may have considered retraining at some point. However, there remained several viable options short of retraining when the worker resigned her position in November 1998 and returned to school.
- (34) We note that, in deciding that academic training would not be sponsored, the IRC concluded that the worker had recovered from her injury to the point where her remaining symptoms were related to the pre-existing condition. We disagree with that conclusion, which we do not find supported by the medical reports on file. Dr. B. diagnoses “post-traumatic” chondromalacia in January 1998 and clearly attributes the worker’s symptoms and condition to the injury, and the board medical consultant acknowledges the condition and makes reference to “a continuity of symptoms” in April 1998. There is no medical report on the file that suggests that the worker’s remaining symptoms are a result of her pre-existing condition.
- (35) Although we disagree with the IRC’s conclusions with respect to the pre-existing condition, we believe it is likely that a successful return to work would have been achieved without retraining, for reasons explained in the preceding paragraphs.
- (36) We find that the worker is not entitled to vocational rehabilitation.
- (37) Notwithstanding that we find the worker is not entitled to vocational rehabilitation under board policy, we believe she made the best choice for herself by taking matters into her own hands and moving on. The worker had been placed in a work situation that was very stressful for her, with insufficient follow-up from the board to ensure the return-to-work plan was successful. The employer does not appear to have been committed to the return-to-work plan at the local level. The worker was essentially found fit to return to a modified job, returned to her job, and then abandoned by the board, who advised her that at that time her claim “is at finality and is now closed” In addition, the worker does have a pre-existing condition and at least one specialist has stated that “she likely would be best served with more sedentary work activities”.

## **Conclusion**

The decision of the IRC is upheld. The worker is not entitled to vocational rehabilitation assistance in the form of retraining.

1. The legislation and policies used to determine the worker's entitlement in this appeal are the *Workers' Compensation Act*, SY 1992 and Board policies CS-07 and CS-09.
2. The worker was not capable of returning to her pre-injury employment when benefits were terminated.
3. The worker is not entitled to vocational rehabilitation.

Dated this **17th** day of **October, 2002** in the City of Whitehorse, in the Yukon Territory.

---

Jan Stick, Member

---

Janet Wood, Presiding Officer

---

Joseph P. Radwanski, Member