

Workers' Compensation Appeal Tribunal

Decision #158

Claim No.: 98-1184

Date of Notice of Appeal: September 1, 2009

Date of Oral Hearing: October 16, 2009

Date of Decision: October 30, 2009

Appeal Committee Members appointed under s. 64 (1) of the *Workers' Compensation Act*, S.Y. 2008, c. 12

Committee Chair:	E. Sumner
Member representative of employers:	C. Alexander
Member representative of workers:	W.C. Gryba

In attendance: The Worker via telephone
The worker's representative – Joshua Paddon
Observer – Julie Docherty
Recorder - Vernna Johanson

Location: Room #201, 419 Range Road
Whitehorse, Yukon Territory

Introduction

The 43-year-old worker was employed in a permanent position for approximately six months as a furniture mover. On October 21, 1998 while moving a piano he suffered an injury to his back. His claim was accepted for a soft tissue injury by the Yukon Workers' Compensation Health & Safety Board (the "board") and he was provided with retraining, medical management and compensation benefits.

On November 27, 2008, a case manager (adjudicator) wrote to the worker explaining her decision regarding fitness for employment, deeming and entitlement to further medical management. The worker appealed this to a hearing officer. On March 3, 2009 the hearing officer rendered an interim decision directing the worker to undergo a current functional capacity evaluation (FCE). The adjudicator would use the FCE to determine options for management of the worker's claim. On May 29, 2009 the case manager issued a revised decision with respect to the worker's suitable occupation and earning capacity. The worker appealed the decision to the hearing officer. He rendered a decision on August 25, 2009 confirming the adjudicator's decision. The worker asks the tribunal to reverse the hearing officer's decision and asks for a recalculation of benefits to reflect his functional restrictions and limitations.

Jurisdiction

- [1] On September 1, 2009, the workers' advocate office representing the worker, filed an appeal of the hearing officer's decision with the tribunal under s. 53 of the *Workers' Compensation Act*, S.Y. 2008 (the "Act"). The review (appeal) must be determined according to the *Workers' Compensation Act*, S.Y. 2008, c. 12. Section 65(1) of the *Act* gives the appeal tribunal jurisdiction to hear and decide this appeal.
- [2] Compensation entitlement decisions are made pursuant to legislation in place at the time of injury. The worker filed a claim for an injury which occurred on October 21, 1998. In this instance the *Workers' Compensation Act*, R.S.Y. 1992 as amended to the date of injury, should be used to determine the issues of entitlement.
- [3] The board provided the following policies to the tribunal as relevant to this appeal under the authority of section 64 (4) of the 2008 *Act*:
 - Policy RE-02-1, Duty to Co-operate Part 1 of 4: Early and Safe Return to Work Plans
 - Policy RE-13, Determining Suitable Employment & Earnings Capacity Loss
 - Policy RE-10, Vocational Rehabilitation
- [4] The worker attended the hearing via telephone and testified by affirmation. He was represented by the deputy workers' advocate. The workers' advocate attended initially as an observer but also made submissions to the committee. The proceedings were recorded. The employer was notified of the appeal but did not participate.

Evidence

- [5] The appeal committee considered the following:
 - the deputy and workers' advocate's submission
 - the aforementioned policies
 - the entire claim record No. 98-1184 as provided by the board.

Hearing Officer's Decision

[6] The hearing officer issued an interim decision on March 3, 2009. This directed the worker to undergo a further functional capacity evaluation. Upon completion of the FCE, the adjudicator rendered a May 29, 2009 revised decision indicating that based on the worker's vocational assessment the suitable occupation for the worker was Survey Interviewer. This resulted in a pre-injury loss of earnings capacity and the worker was deemed.

The worker appealed the adjudicator's decision to the hearing officer. The hearing officer's August 25, 2009 decision confirmed the adjudicator's decision that the deeming was carried out fairly and in accordance with policy.

The deputy workers' advocate, representing the worker, disagrees with the hearing officer's decision because, he submits, based on the medical evidence on file, the worker is not fit to re-enter the workforce in this position. They are seeking reinstatement of compensation benefits until the worker is:

- returned to his pre-accident level of functioning or
- returned to a level of self-sufficiency and independence
- deemed to a position that accurately encompasses and reflects his current level of fitness and is suitable to his current functional ability, limitations and restrictions.

Evidence from the Record

We will not set out all the information from the beginning of the claim. WCAT issued a decision on September 23, 2004 stating the worker's current conditions were due to his work-related injury in 1998. Because this appeal concerns deeming in a suitable occupation we will set out the vocational options offered to the worker during the course of the claim.

[7] The record indicates the worker has not been employed in any capacity since 1999. The board provided training and scholastic options to him due to his inability to return to his pre-injury occupation of furniture mover.

[8] December 1999 – The worker stated he wished to return to school to obtain a certificate as a computer service technician. A one-year course was offered at Yukon College. The worker required three math modules as an entry requirement to this program. A December 23, 1999 Vocational Rehabilitation Report by a board rehabilitation counsellor recommends sponsorship for the math modules in preparation for admission into the computer service technician program. She states, "Should [the worker] be unsuccessful in obtaining math module one and two he will then be deemed as being capable of other jobs utilizing his transferable skills (shipping/receiving and retail.)"

[9] After taking some of the upgrading courses, the worker requested a change in programs and wished to enroll in a two-year Renewable Resource Management Program in order to become a conservation officer. The board authorized the program. An August 3, 2001 note to file by the adjudicator indicated the worker failed one of his math courses and his English mark was not high enough to continue to the next phase. The worker will need to continue to upgrade in

order to be ready for the renewable resource program. The rehabilitation counselor again notes the worker must successfully complete his courses and “if not he will be deemed employable and will go on a job search.”

- [10] On March 9, 2002 the worker underwent a psychological assessment which found he had a learning disability. One of the recommendations chartered psychologist Dr. Brodie made was that the worker obtain an updated functional capacity evaluation. This would aid in determining whether his current levels of physical limitation would allow him to cope with the physical demands of a conservation officer. The FCE indicated the worker’s physical abilities did not match the job demands of conservation officer; he was advised not to pursue this option.
- [11] In July of 2002 the worker completed an airbrakes course sponsored by the board. He reasoned that he could work driving water trucks for road crews while he contemplated other vocational career options.
- [12] In August of 2002 the worker enrolled in Math 040 at Yukon College sponsored by the board. An August 26, 2002 note to file by the adjudicator states the worker is aware that he will be able to work in light to medium jobs. The worker was not interested in a long course of study. The worker and adjudicator agree the best opportunity for him would be “something that requires a little upgrading followed by training on the job”.
- [13] In the fall of 2002 the worker approached a surveying company with respect to learning and practicing general surveying techniques to become a surveying assistant. In March of 2003 he began a training on the job opportunity. The surveying company agreed to cover the costs of training in anticipation the worker would follow through with additional training and certification in order for them to hire him in the future. The worker completed 2 of the 4 phases of the plan but cancelled the third phase as he reported he had a cold and did not feel well. Although the training was to be rescheduled, it never was.
- [14] In December of 2004 the worker moved to Alberta for personal reasons. [It was at this time that the worker began to see Dr. Lavallee. We will address medical reporting later in our decision.]
- [15] Due to the Workers’ Compensation Appeal Tribunal’s decision rendered on September 23, 2004, the worker was provided a letter from the board’s disability manager dated February 17, 2005. She notes there was never a period of time he was not in receipt of loss of earnings benefits and his medical accounts were continued to be paid. With respect to rehabilitation assistance, the disability manager notes, “We have already begun the process of conducting your vocational assessment and we will continue this process until a suitable occupation is identified.”
- [16] A functional capacity evaluation was done on March 10 and 11, 2005. Evaluation conclusions stated the worker demonstrated the ability to lift and carry within the “medium NOC (National Occupational Classification) category”.
- [17] In May 2005 the worker was accepted into the Corrections Studies Program through long distance education at the University of Lethbridge sponsored by the board. This was to be a

two-year program beginning in September 2005. The worker would seek employment as a correctional officer upon receipt of his diploma.

- [18] A November 16, 2005 note to file by the adjudicator states that she has spoken with the worker; he is struggling with his course load but is doing his best. He inquired why the board had not paid his internet fees. A further December 6, 2005 note to file states the worker expressed concern because he is falling behind in most of his five courses because the work load is more than he can handle. The worker spoke to his program advisor (at the University of Lethbridge) who recommended the worker complete two core courses and re-register for the other three.
- [19] In February of 2006 the worker's mother became ill. In a February 20, 2006 e-mail from the worker to the adjudicator he mentions that he is still struggling with his studies.
- [20] A September 6, 2006 note to file by the adjudicator states the worker is back in school for September. The adjudicator states she asked the worker to take three courses as it constitutes a full course load and "he is being paid full benefits". The adjudicator is "working on purchasing a basic computer" for the worker to help him with his studies. The file indicates that he was provided with a computer at a cost of \$1457.00.
- [21] A December 4, 2006 note to file by the adjudicator states:
- [The worker] called today about his corrections program he is taking at school. He is having quite a bit of personal conflict about what he is learning. He is concerned that he will be getting into a career path that he will disagree with. He said that he likes the social work aspect of the program and thinks that he would be better off working towards a social work career. I told him to go see a school counsellor about his career choice and to see how many courses that he had already taken can transfer to social work. I told him to talk to a counsellor before we make any decisions. Luckily he is only a few months into his current program.
- [22] An adjudicator's note to file of December 12, 2006 states the worker called to say that he has been researching courses at Lethbridge University and now thinks he would like to enroll in the two-year child and youth care worker program.
- [23] A note to file of January 12, 2007 reports the worker's internet fees in the amount of \$449. have been paid "to save us over time instead of being charged rental fees every month along with the internet service fees." The board surmises this will be more cost effective as the worker "will be in school for a few years."
- [24] On January 3, 2008 the adjudicator e-mails the worker about medication receipts. She states that the Co-op where he lives is hiring meat-cutters and inquires whether he would be able to do that. He responds that he does not believe he could stand up for very long but he is looking into "a pilot driving thing." The adjudicator tells the worker to look into what the course involves

and asks whether there is a job available in his area for this type of work. The worker responds that he is “just looking into how steady it will be” and if he will be driving other larger trucks. He states he will let the adjudicator know once he speaks to his friend.

[25] The adjudicator e-mails the worker on April 18, 2008 stating that a vocational rehabilitation counsellor will be contacting him soon about a new vocational assessment. She speaks about the need for the board to pay his internet fees when he is no longer taking long distance classes. The worker responds by e-mail on April 20, 2008 that “this is all good, but you seem to have forgotten the fact that the best thing for me right now is to get to see a doctor.” A further e-mail dated April 22, 2008 from the worker asks for a letter from the board to his mortgage company stating he is in receipt of WCB benefits and “that we are working towards getting me back into the work force which I can’t wait to do.”

[26] A vocational assessment is conducted by Vocational Rehabilitation Assessment Inc. resulting in a report dated June 16, 2008. The introduction to the report states that a vocational assessment involves a thorough analysis of an individual’s pre and post injury abilities, transferable skills, education, physical/functional abilities and limitations. Following is an excerpt from the report:

[The worker] participated in a telephone review of this report on June 10, 2008 with Don Bruin, Registered Vocational and Rehabilitation professional, and his case manager, . . . from the YWCHSB and agreed with the results of the assessment, including the list of occupations below that he can directly return to work at this time. He was most interested in the welding, brazing and soldering machine operator’s occupation.

[The worker] is employable via direct entry work on a full-time basis. Following a review of his direct and related skills and his complete occupational profile the following direct entry occupational clusters have been identified:

NOC 6611 Cashier
NOC 6421 Retail salesperson and sales clerks
NOC 1454.1 Survey interviewers
NOC 7265.2 Welding, brazing and soldering machine operators

The average wages are provided for both Alberta and Yukon for each of these occupations. The report notes that if the worker writes his GED, attaining his grade 12 equivalency, he would be qualified to work as a dispatcher, collector, court clerk, or customer service in retail outlets.

[27] A Labour Market Survey is conducted by Don Bruin, Registered Vocational/Rehabilitation Professional. A report dated June 20, 2008 is provided to the board. The introduction reads:

A Labour Market Survey provides objective information on job availability

within the person's geographical area. It provides valuable insights into labour market conditions and trends in general, as well as in specific regions or communities in the person's geographical area of the occupations that have been deemed appropriate for that person based upon an employability (vocational) analysis.

The report states that the unemployment rate decreased by 1.3 percentage points to 2.5% from May 2007 to May 2008 in the Camrose, AB area (which includes Drumheller). Mr. Bruin then lists employment prospects by option for the 4 occupations identified by the vocational assessment, including current/recent employment opportunities in the Calgary to Drumheller area.

[28] On November 27, 2008 an adjudicator writes to the worker explaining her decision with respect to fitness for employment and earning capacity (deeming) and his entitlement to further medical management. The adjudicator states that it has been decided the suitable occupation for the worker to establish his earnings capacity loss would be a retail salesperson and sales clerk. She explains that although he has been deemed in that occupation, it does not mean that he or the board needs to find a job for him as a retail salesperson. The vocational assessment indicated this job type is suitable to his physical and mental abilities. The adjudicator notifies the worker that he will be provided with a month of re-employment assistance at his current compensation rate while he begins a job search. The worker appeals this decision to the hearing officer.

[29] The adjudicator contacts Vocational Rehabilitation Services (VRS) on December 4, 2008 authorizing them to provide help to the worker for employment readiness. An adjudicator's note to file dated January 23, 2009 states the counselor from VRS called today saying she spoke to the worker about help with a resume, cover letter and job finding skills. The worker responded that he was not interested as he is going for surgery and was not planning on looking for work at that time. The adjudicator notes she had not received any recommendations for surgery.

[30] A February 4, 2009 letter to the worker explains his eligibility for a partial permanent impairment (PPI) award. The worker was found to have a 7% impairment of the whole person. He decided to receive this as a one-time lump sum payment in the amount of \$4,742.50.

[31] On February 23, 2009 the adjudicator writes to the worker via e-mail. She notifies him that she will be referring him to the Canmore Pain Clinic. Following are excerpts from her e-mail:

[Worker], the work readiness program is a program that will be of great benefit to you for when you decide to re-enter the workforce. This program teaches you how to prepare a good resume, and it teaches you skills for job searching, interviewing, etc. As you have been out of the workforce for such a long time, I felt that this program would be extremely helpful to you and give you a greater opportunity to be successful.

Your doctor has not provided any objective medical information as to why you are unable to work. His reports are mainly subjective. You suffer from

chronic pain and Dr. Lavallee has reported that you need to reduce your weight, increase your fitness and stop smoking. . . Dr. Burnham also reported that you need to be on a regular back fitness program, he does not feel that surgery would do anything for you. These are personal lifestyle changes that you need to make and though it may be difficult to begin and feel more painful at first, the better shape you get in, the better your back will feel. We explored the injections and it is now determined that they are not and will not be successful so it is time to address the chronic pain. I am sending you to a chronic pain program to help you deal with your ongoing pain and where they will also work with you to find the best medication prescription as you are on several medications that may do more harm than good. . . . I have deemed you at a light/sedentary type occupation that is lighter than what you were considered capable of doing. This occupation also allows you the flexibility to be able to manage your symptoms. I do not feel that you are completely unemployable.

- [32] The hearing officer issues an interim decision on March 3, 2009 varying the adjudicator's November 27, 2008 decision. The worker is to undergo a current functional capacity evaluation to be used by the adjudicator in determining options for claim management. Also, the board is to return the worker to full temporary total disability benefits from the time he was taken off and until the updated FCE has been completed and the adjudicator can make a further decision.
- [33] The worker attends the OrionHealth Canmore Pain Clinic. Following is a description of OrionHealth Rehabilitation & Assessment Centres' Pain Management Program:

OrionHealth's pain management program is provided by a multi-disciplinary team offering occupational therapy, physiotherapy, psychology, kinesiology, acupuncture, medical, pharmaceutical assessments, consultations and programs. Our program utilizes a holistic approach to assist with mood, decreasing reliance on medications and when possible, returning to employment. Our focus on research and outcomes has ensured our programs flex to meet changing needs and stay on top of new developments. This allows us to offer you the best program to meet your needs.

Program Description

The pain management program is a three to six week full day interdisciplinary pain rehabilitation program. The program starts with a two day multi-disciplinary assessment with a representative from each of the appropriate disciplines. The assessment team then meets to review your unique situation and ensure that the program is the right fit. You also have the opportunity to discuss your concerns and expectations of the program. A typical day in the program includes individual and small group sessions as well as independent stretching and exercise time in the gym.

- [34] A March 13, 2009 Summary of Interdisciplinary Findings is provided to the board. It notes,

“This report is an assessment regarding pain management, medications and appropriate treatment options for [the worker].” The assessment team consisted of:

Mary Lessing-Turner, B.Sc. PT, M.Sc. (Rehab Med), Clinic Director
Trevor Campbell, M.D., Medical Consultant, ABIME
Patricia Lavellee, M.Ed., Registered Psychologist
Heather Boyle, B.A./B.S.W., Case Coordinator
Christopher Applewhaite, M.Sc., Physiotherapist
Jen Meldum, B.Sc., O.T., Occupational Therapist

Following are excerpts from the report:

[The worker’s] replies to the Pain Disability Index placed him within the above average range for perception of disability compared to a chronic pain population, suggesting he viewed himself as more disabled by his injury when compared with a chronic pain client population.

His responses on Coping Strategies Questionnaire placed him within the above average range for catastrophizing when experiencing pain, and within the above average range for perception of control over his pain. The results suggest that he may overly emphasize his pain experience as being negative when compared with a chronic pain population and felt that he had more control over his pain than the comparable chronic pain population.

Psychological Recommendations

The treatment goals and program recommendations for [the worker] were as follows:

1. To provide [the worker] with daily group psychoeducational and self relaxation groups, as well as regularly scheduled education groups and individual sessions with the psychologist on an as needed basis, to learn how to manage chronic pain through non pharmaceutical methods utilizing self relaxation strategies, to understand concepts such as hurt vs. harm and fear of re-injury with increased activity in order to lessen their impact on functioning and to develop self pacing and cognitive behavioural strategies, such as self encouragement and reducing negative statements.
2. To provide [the worker] with individual sessions with the psychologist to monitor his mood and to encourage his progress in utilizing non-pharmaceutical pain management strategies for his pain.
3. To have [the worker] practice the strategies in the evenings and weekends to improve their implementation in daily life and to review his progress regularly.
4. To have [the worker] leave the pain management program with a set of psychoeducational strategies that he is likely to use once he returns home.

These would include a minimum of three self relaxation strategies and a full understanding of the concept of hurt vs. harm and fear based activity avoidance as it applies to him and to address these, as well as the ongoing stress of chronic pain.

Barrier to Return to Work

1. Perceived high average pain level with fear of re-injury.
2. [The worker] is unable to identify employment that would match perceived abilities.
3. Decreased tolerances to the following activities: prolonged sitting, standing, walking, manual handling, forward bending, and low level positions.

Plans and Recommendations

Based on the pain and medical management assessment, the interdisciplinary team believes that [the worker] would benefit from participation in a Pain Management Program.

1. [The worker] is to participate in a daily functional based therapeutic program to improve core and general conditioning and activity tolerances to sitting, standing, walking, manual handling, forward bending and low level positions.
2. [The worker] will be provided with an SI belt, as well as information to facilitate self trigger point release. Further, he will be given myofascial release treatment, a trial of acupuncture and trigger point needling.
3. [The worker] is to be provided with a daily psychoeducation, education and self-relaxation training sessions to learn and to implement non-pharmaceutical pain self management strategies.
4. Both in the group sessions listed in #2 above and in individual sessions with the team psychologist or other clinicians, particular emphasis with [the worker] will be given to identifying and overcoming his fear based activity avoidance, hurt vs. harm and focus on his pain.
5. [The worker] will be monitored by the team psychologist in individual sessions on an as needed basis regarding his pain and anxiety issues identified in the assessment.
6. [The worker] will be provided with group Sleep Hygiene education sessions.

[The worker] will begin the Pain Management Program on March 11, 2009 and it is anticipated that it will be six weeks in length. . . .

A gradual return to work will be considered at the time of the progress report. It is expected that on discharge [the worker] will be Fit with Limits, Modified duties.

- [35] A March 31, 2009 adjudicator's note to file states that she had a conference call with the worker and his physical fitness team. She asked the physiotherapist whether the pain the worker is suffering is due to his lack of physical fitness or because of a flare-up from the injury. The physiotherapist reported that his injury is flaring up due to lack of use and "protecting" the worker has been doing over the years including deconditioning. The physiotherapist stated that the worker should be capable of a light level of work when he leaves the clinic. The doctor is working on reducing the worker's medication use.
- [36] On April 2, 2009 a vocational counsellor from Vocational Rehabilitation Assessments Inc. writes to the worker explaining the employment readiness program to him. Sample resume and cover letters as well as seven different job advertisements reflected on the June 16, 2008 vocational assessment were e-mailed to him. The counsellor notes the worker contacted her via e-mail on February 18, 2009, attaching a letter from Dr. Lavallee, dated January 5, 2009, indicating his inability to return to work at the present time.
- [37] The adjudicator's April 23, 2009 note to file states she spoke to the worker and his pain clinic team. The functional findings indicate the worker had not improved and had deteriorated within the last two weeks due to a flare-up injury after stepping off a curb awkwardly. He was not able to progress due to his pain; his high blood pressure was also a factor that interfered with his ability to exercise.
- [38] A Discharge Summary by the OrionHealth Canmore Pain Clinic is provided to the board on April 29, 2009. Following are excerpts from that report:

The worker currently reported using the following medications:

Pariet – 20 mg – one daily

Captopril – 50 mg – ½ tablet daily

Labetalol – 100 mg – 2 tablets twice daily (increased dose back to the recommended dose family physician prescribed)

Citalopram – 40 mg – one tablet daily

Flexeril – 10 mg – one tablet three times a day

Hydromorph Contin – 12 mg twice daily

Tylenol #3 – one tablet three times a day

[The worker] reported sleep improved somewhat following a trial of amitriptyline 25 mg at bedtime. It is recommended that he remain on this medication.

Physiotherapy Summary

Therapeutic exercise in the program has been very limited by [the worker's] reported pain levels. He reports his pain had increased over the last two weeks and then markedly after an incident stepping off a curb outside of the clinic.

It was recommended that [the worker] follow up with his family physician regarding his increase in back pain. [The worker] will be given a home

exercise program and instructions on how to return to activity once his back pain is under control.

The worker completed seven psychological screening questionnaires. Following are responses to some of those:

Pain Disability Index: placed him within the above average range for perception of disability compared to a chronic pain population at both times of evaluation. These scores suggested that [the worker] viewed himself as more disabled by his injury pain when compared with a chronic pain client population.

Tampa Scale of Kinesiophobia: . . . at discharge this score increased to the above average range, suggesting that he had more fear of pain and re-injury with increasing activity when compared with a chronic pain population.

Coping Strategy Questionnaire: placed him within the above average range for catastrophizing when experiencing pain at assessment and discharge. . . . This score went down at discharge to below average range, suggesting that [the worker] perceived himself as having much less control over his pain than a comparable chronic pain population. The latter result is consistent with observations of [the worker] in the clinic and his self-report.

Pain Stages of Change Questionnaire: placed him in the contemplation stage at assessment present with respect to his readiness to engage in the non-pharmaceutical pain management components of the Pain Management Program at OrionHealth, Canmore Pain Clinic and in the Action stage at discharge.

The Functional Abilities and Demands section of the report notes the worker's participation was limited by self-reported pain level increase and high blood pressure.

Demonstrated ability at discharge: [The worker] continues to be in the LIMITED category according to NOC guidelines. [The worker] did not attempt heavier weights but was pain limited and only managed to tolerate 20lbs on a RARE basis that was not sustainable.

Outstanding Barriers

1. Perceived high average pain level with fear of re-injury.

Discharge: [The worker] continued to have a high level of perceived pain level and fear of re-injury, although he was aware how these might negatively impact the management of his pain.

2. Decreased tolerances to the following activities: prolonged sitting,

standing, walking, manual handling, forward bending, and low level positions. Discharge: Aggravation of back pain has been a major limiting factor in [the worker] being able to progress this barrier at this time. Based on [the worker's] status at the time of discharge, the following team recommendations are made:

1. [The worker] is recommended and encouraged to review his Pain Management Program binder and implement non-pharmaceutical pain management strategies on a daily basis upon his return home.
2. It was recommended that [the worker] follow up with his family physician regarding his increase in back pain.
3. [The worker] will be given a home exercise program and instructions on how to return to activity once his back [pain] is under control.

[39] A May 5, 2009 letter from the vocational counsellor, Vocational Rehabilitation Assessments Inc. states the worker resumed the Employment Readiness Program on April 30, 2009. Discussions included resume formats; sample job advertisements; using the internet for gathering information on a company; the importance of networking and making "cold calls" to companies; and interview preparation skills and techniques. The worker reported the program was informative and would be very beneficial when carrying out a job search.

[40] The board is provided a revised Labour Market Survey (see para. #27) for the worker on May 14, 2009. The adjudicator informs the worker of her revised decision regarding fitness for employment and determining earning capacity in a May 29, 2009 letter. Her decision states the worker is considered to be at maximum medical recovery although he still suffers from chronic pain. Based on his vocational assessment, a suitable occupation for him is a survey interviewer.

Medical Evidence

[41] The claim file is many volumes. Of particular notes is a report dated November 2003 by the board medical consultant who outlines the worker's history to date. He initially examined the worker in 1999 and reviewed the worker's file several times until November 2003. Clinical examination after the workplace injury in 1998 revealed obvious symptoms at the L3 level with leg pain on the left side. An April 1999 MRI revealed degenerative changes at the L5-S1 level and the worker began reporting leg pain on the right side. It is noted in the report that Dr. Miller was reluctant to perform surgery, preferring conservative treatment which the worker would not accept, instead pushing for surgery. Upon reviewing all the medical evidence, the medical consultant's opinion is that the initial injury resolved on its own and the worker's current condition (in 2003) is not related to the 1998 workplace injury. We will not set out all the medical information but will list procedures the worker has undergone with respect to his back:

April 7, 1999 – lumbar spine MRI and consultation with Dr. S. Miller, orthopedic surgeon

June 28, 1999 – consultation with Dr. M. O'Brian, specialist in orthopedic surgery

October 14, 1999 – lumbosacral discectomy with lateral foramenotomy L5 surgery

November 17, 1999 – follow-up visit with Dr. S. Miller who reports the surgery was a success

March 9, 2002 – psychological assessment by Dr. N. Brodie, chartered psychologist

August 16, 2002 – consultation with Dr. R. Loomer, orthopedic surgeon

January 24, 2003 – CT scan of the lumbar spine

May 20, 2003 - examination by Dr. I. Dommissie, orthopedic surgeon

October 15, 2003 – discogram injection of xylocane and cortisone to L4-5 by Dr. Dommissie

April 5, 2004 – lumbar spine CT scan

February 12, 2007 – MRI of the lumbar spine

June 28, 2007 – Dr. B. Frizzell conducts a right lumbar facet joint injection L4-5 and L5-S1

September 15, 2008 - consultation with Dr. G. Stanford for Dr. Burnham, Physical
Medicine & Rehabilitation

September 24, 2008 – left sacroiliac joint injection performed by Dr. Wiemer

[42] Dr. Lavallee, the worker's family physician, reported to the board on several occasions. We will not list all the reports. Following are excerpts from the most recent reporting:

September 27, 2008 – Dr. Lavallee reports the worker suffers from mechanical back pain, generated from the sacroiliac joint and possibly residual discogenic pain. Treatment recommendations include weight loss, fitness, smoking cessation and left sacroiliac joint intra-articular injection. The doctor relays that the worker has significant back pain and is unable to work at any type of physical labour; duration of disability will depend on the outcome of his present round of treatment and rehabilitation.

January 5, 2009 – Dr. Lavallee notes the worker continues to have significant back pain. "Presently he is unable to work due to pain-related complaints. He indicates he has mobility problems in the home." Dr. Lavallee suggests the worker will need ongoing assistance for the balance of the year to complete satisfactory rehabilitation, further retraining and he may need to relocate.

July 31, 2009 – Dr. Lavallee reports the worker was in to discuss his case regarding his new limited functional ability. The doctor "believes" the revision is premature at this time and repeats the worker should be provided further rehabilitation programs, weight loss, retraining and ongoing aggressive physiotherapy. The worker "remains quite inactive". Dr. Lavallee states the worker "feels that his attendance at the Canmore Pain Center did little to help his general condition."

October 6, 2009 – Dr. Lavallee states the worker was in regarding his upcoming appeal. Dr. Lavallee previously suggested the worker remain on long term indemnity benefits until he has had a complete neurological assessment and EMG studies. "He still has not had a fair chance at other rehabilitation programs or aggressive physiotherapy". The worker continues to report persistent pain in his lower back and sacrum; his condition continues to worsen.

The Worker's Testimony

- [43] The worker testified that a typical day for him begins at 9:00 to 9:30. He needs to take his medication immediately with food so he usually has toast or something quick. Daily activities are "very limited"; his 75-year-old mother does his dishes, housework, laundry and vacuuming. He usually does not eat lunch. For supper he usually prepares something fast such as soup because he does not have the tolerance to stand at the stove and cook for himself. He said he tries to do things around the house but it is very difficult; even getting in and out of the shower is tough. He tries to get outside and walk but this is limited to about 50 yards. He follows a "regular regiment of pain killers and medications". He testified it is a very unsatisfactory life he lives; it is boring and limited. He said if he were able to get out and do more and be able to work, he would. If it weren't for his family, he would have lost his house by now. He said he tries to rest as much as he can and do as much as he can but his limitations have decreased since he went to Canmore.
- [44] The worker said the physiotherapist at the pain clinic examined him and said he had lost more feeling and movement in his left leg. The physiotherapist took him to the Canmore Hospital. When the doctor assessed him, he was told to stop what he was doing. The worker said the pain was bad before attending the pain clinic - it has become worse. He said the physiotherapist tried acupuncture on his back but things were so bad in his back that it bent the acupuncture needles.
- [45] When questioned what happened at the Canmore Pain Clinic, in the worker's opinion, which caused his condition to worsen, he said that the daily stretching, lifting weights, and riding the bike aggravated his condition to the point where he cannot function. Everything has been limited, reduced. Anything to do with his lower extremities flared things up. He said it got to the point where he was losing function in his leg, it would drag behind him. When he went out for a coffee break, he went to step off the curb and he could not lift his foot far enough so he stumbled, causing jarring to his back. The use of his leg has diminished since the pain clinic. The worker said this is one of the reasons he was taken to the hospital in Canmore. The reflexes in his leg had worsened.
- [46] When the worker was questioned whether he would undergo aggressive physiotherapy as suggested by Dr. Lavallee, he said if he had an opportunity to do it, he would "give it his all". He said this is what the Canmore Pain Clinic was attempting to do but he was not able to do it. When questioned what the difference between then and now with respect to aggressive physiotherapy, the worker responded that he would do anything to try and get better.
- [47] The worker said he able to drive a vehicle. He lives in a small town in southern Alberta. Drumheller is 23 kms. from his home which should only be about a 25 minute drive; however, he has to stop, get out and move around, so it takes him 40 minutes or more. The extent of his gardening is to mow the lawn with a riding lawn mower, purchased by his mother.
- [48] When questioned why his family physician stated in his reports that the worker has had no opportunities for retraining, the worker said that his doctor does not have his complete file. He

said he told the doctor that he has done some studies at Yukon College but he is not able to sit very long.

- [49] His medication makes him “hazy” most of the time. Presently he is taking morphine, percocet and anti-inflammatories. He has taken morphine for approximately three years. He is also taking sleeping pills because he does not sleep very well and can only lie down for a couple of hours at a time. These are not very effective. He takes his medication four times daily.
- [50] The worker said that he has not undergone any physiotherapy since the surgery on his back because WCB did not offer it. He does not have the funds to undertake physiotherapy sessions on his own.
- [51] The worker spoke about several attempts at retraining provided to him by the board. He said that sitting for long periods of time and trying to complete assignments is too difficult. The most difficult task is trying to focus because his pain overrides everything else.
- [52] Referring to Dr. Lavallee’s letter with respect to relocating, the worker said if he had to he would consider relocating, depending on where it was.

The Workers’ Advocate’s Submission

- [53] The deputy workers’ advocate provided the following policies as applying to this claim:
Policy CS-05 – Rehabilitation, revoked January 1, 2005
Policy CS-07 – Vocational Rehabilitation, revoked January 1, 2005
Policy CS-09 – Return-to-Work Programs, revoked January 1, 2005
Policy CS-10 – Graduated Return-to-Work Program, revoked January 1, 2005
- [54] The advocate says the Preamble and Objects of the 1992 *Act* as well as sections 3(1), 5 and 30 should apply to this worker’s claim. He also used the following excerpts from Terence G. Ison’s, *Workers’ Compensation in Canada*, 2nd ed. in his submission:
Pg, 21, section 3.2.7, Pain, and
Pg. 58, section 3.7.1, Eligibility principles
- [55] The deputy workers’ advocate used Yukon Work Futures criteria for Survey Interviewers as part of his submission. (Survey Interviewer is the selection of a suitable occupation used by the board to deem the worker.)
- [56] He relies on Dr. Lavallee’s reporting to strengthen his submission [see para. #42]. The advocate says that when comparing the worker’s physical restrictions to the physical requirements of the chosen job, it is obvious the functional requirements of the position far exceed the worker’s current functional abilities. He asks the appeal committee to review the occupational tasks of the Survey Interviewer position against the medical evidence detailing the worker’s physical condition. He contends that based on the medical evidence, the worker is not fit to re-enter the workforce in this position.
- [57] The advocate submits the worker has not been returned to his pre-accident level of functioning

or to a level of self-sufficiency. They request that the committee find in the worker's favour and request re-initiation of the rehabilitation process until the worker is returned to his pre-accident level of functioning.

[58] He maintains the worker would not be in his current position if not for the work-related injury in 1998. The evidence on file shows he is still struggling and suffering with both recovery and rehabilitation. Further, the worker clearly suffers from chronic pain. Through the treatment process, the worker has always been willing and cooperative for the sole purpose of recovery and return to work.

[59] The advocate on behalf of the worker is seeking reinstatement of compensation benefits until he is:

1. returned to his pre-accident level of functioning, or
2. returned to a level of self-sufficiency and independence;
3. deemed to a position that accurately encompasses and reflects his current level of fitness and is suitable to his current functional ability, limitations and restrictions.

Issue: Was the deeming carried out fairly and in accordance with policy?

Answer: Yes

Analysis

[60] We have considered the advocate's submission and find the workers' advocate has misapplied the focus of what the worker must do. The advocate is asking that the worker be returned to his pre-accident level of functioning and to a level of self-sufficiency. They are also asking that the worker be deemed into a suitable occupation. The board has established, through further functional capacity evaluation and by utilizing recognized guidelines, the worker has reached maximum medical recovery and is capable of working in an occupation in a limited capacity.

[61] The advocate provided policies and based their submissions on former policies of the Board of Directors. This is incorrect. Board Policy IN-03, Transition Policy – Amendments to the *Workers' Compensation Act 2008*, directs decision-makers to apply policies of the Board that were in force at the time of the worker's injury, unless a subsequent policy states otherwise. As noted in paragraph #3., Policy RE-02-1; Policy RE-13, and Policy RE-10 - policies the board considered relevant to the appeal, state the application of the policy applies to all employers and workers covered by the *Act*, [commencing July 1, 2008] regardless of the date of injury.

[62] The advocate used Yukon Work Futures criteria. This is incorrect. Yukon Work Futures is an outdated document, last updated in 1999. The board and organizations that undertake vocational assessments follow the guidelines with respect to education, training/experience and functional abilities contained in the NOC Handbook to determine suitable occupation.

From Human Resources and Development Canada Website:

The National Occupational Classification (NOC) is the nationally accepted reference on occupations in Canada. It organizes over 30,000 job titles into 520 occupational group descriptions. It is used daily by thousands of people to compile, analyze and communicate information about occupations, and to understand the jobs found throughout Canada's labour market.

[63] Policy RE-02-1, Duty to Cooperate, Part 1 of 4: Early and Safe Return to Work Plan states, in part:

3. Suitable employment is work that meets all of the following criteria:

- a) the work is within the worker's functional abilities;
- b) the worker has, or is reasonably able to acquire, the necessary skills to perform the work;
- c) the work does not pose a health or safety risk to the worker or co-workers; and
- d) the work restores the worker's pre-injury earnings if possible.

Policy Statement

The YWCHSB recognizes that injured workers can benefit from returning to work in some capacity before full recovery is achieved. Returning to work can improve a worker's physical and mental health, while easing the transition to full or maximized duties. Statistically, injured workers who participate in early and safe return to work plans return to work more quickly than workers who do not have return to work plans as part of their recovery.

[64] Due to a non-work-related injury while participating at the Canmore Pain Clinic, the worker was unable to perform a complete functional evaluation. However, his demonstrated ability at discharge continued to be in the limited category according to the National Occupational Classification guidelines. The board used the occupation of survey interviewer (NOC 1454.1) as a suitable occupation for the worker. Physical activities required for the job include sitting, standing and walking; requiring only limited strength. Employment requirements are given as: completion of secondary school may be required; experience using a computer; on-the-job training is usually provided; and a driver's license may be required. We find, by applying the criteria contained in Policy RE-02-1, the worker has the required skill sets as well as the physical and mental abilities for suitable employment as a survey interviewer. This occupation would allow the worker to pace himself and change positions frequently, especially if he could work from home. [The board has provided him with a computer.]

[65] Policy RE-13, Determining Suitable Employment & Earnings Capacity Loss, states in part:

2. Identification of a Suitable Occupation

The worker's suitable occupation will generally be identified through the vocational assessment process, as per YWCHSB policy, "Vocational Rehabilitation". This is in cases where the worker is unable to fully recover from a work-related injury and also unable to return to his or her pre-injury job.

In all cases, except where the worker is considered capable of earning minimum wage, the occupation that the worker has chosen (or a default option, if applicable) must meet the definition of “suitable occupation” set out in policy, “Duty to Cooperate Part 1 of 4: Early and Safe Return to Work Plans”.

- [66] Two comprehensive labour market surveys were conducted for the purpose of deeming this worker. The May 14, 2009 revised labour market survey conducted by Vocational Rehabilitation Assessments Inc. indicated that work prospects for the survey interviewer position were considered “fair” in the Calgary to Drumheller area. The survey explained the “fair” rating as:
- Employment growth rate will likely be average because organizations should continue to require on-line assistance to clients.
 - Although the retirement rate will likely be average, the number of retiring workers should contribute to job openings.
 - The number of job seekers will likely match the number of job openings.

The board does not have to find the worker employment as a survey interviewer, nor does the worker have to obtain a position in that occupation. The vocational assessment indicated he is capable of working as a survey interviewer, there are positions readily available in his area and the position carries an earning capacity close to the worker’s pre-injury rate of pay. We conclude the board identified survey interviewer as a suitable occupation for the worker; his estimated earning capacity was determined pursuant to Policy RE-13. Labour market surveys indicate there are jobs available in his area.

- [67] Policy RE-10, Vocational Rehabilitation, states in part:

1. Vocational Assessment

A vocational assessment is completed when the early and safe return to work (ESRTW) process with the pre-injury employer or an alternate employer has not restored the worker’s pre-injury earnings capacity; and the worker has or is expected to reach maximum medical improvement without fully recovering from a work-related injury.

This assessment will take into account the worker’s aptitudes, skills, interests, culture and gender, labour market opportunities, loss of earning benefits and employment profile. The assessment will be used to determine whether the worker needs additional skills, training or education in order to work and earn at the pre-injury earnings level taking into account the worker’s functional abilities as a result of the work-related injury.

4. Conclusion of Vocational Rehabilitation Services

Vocational rehabilitation services shall be concluded by YWCHSB, with input from the case management team, based on the following factors:

- b) The injured worker is not going to benefit from continued vocational rehabilitation as determined by the case management team.

- c) The injured worker fails to cooperate with and/or abandons the vocational rehabilitation plan; or
- d) The injured worker's choice to relocate to a place which significantly limits the ability of the YWCHSB to continue with the provisions of the vocational rehabilitation plan.

The conclusion of the vocational rehabilitation plan may lead to further steps in the compensation process, such as:

- a) Employment Readiness
- b) Suitable Employment and Earnings Capacity Loss; . . .

[68] The worker has not been employed since 1999. At the time of the injury, he was employed as a furniture mover making \$12 per hour. The board sponsored the worker in several vocational pursuits as follows:

1. Computer service technician one year course at Yukon College in December 1999. The worker needed upgrading in math to complete the course. The board sponsored the math upgrading courses.
2. The worker requested a change of programs to the Renewable Resource Management Program in order to become a conservation officer. The board authorized this in August of 2001 as well as further upgrading courses in Math and English. A functional capacity evaluation later revealed the worker was not physically capable of being a conservation officer. The course was not completed.
3. In July of 2002 the board sponsored an air brakes course in order for the worker to drive water trucks for road crews while he contemplated other vocational careers. He did not gain employment in this occupation.
4. In August of 2002 the worker enrolled in Math 040 at Yukon College.
5. In March of 2003 the worker began a training-on-the-job as a surveyor's assistant. He completed 2 of 4 phases but stopped due to illness. He never completed the training. The surveying company assumed the cost of the training.
6. In May of 2005 the worker enrolled in a two-year Corrections Studies Program through long distance education. In December of 2005 the worker notified the board he was falling behind in his courses.
7. September of 2006 the worker is advised to take a full course load of three courses. The board provides a computer to the worker and pays his internet fees.
8. On December 6, 2006 the worker relays his concerns to the board that he is getting into a career that he will disagree with. He did not complete the Corrections Studies Program.

9. On December 12, 2006 the worker inquires about enrolling in a two-year Child and Youth Care Worker Program. There is no indication that he began this or the board sponsored him to take this course.
10. The worker inquires about a “pilot [car] driving thing” but when the adjudicator asks that he look into what courses are needed and whether there are jobs available, the file indicates nothing is provided.

We conclude that if the worker would have completed any of the programs the result would better position him to function in an occupation at a more beneficial level of earnings than his pre-injury position.

- [69] File documents indicate the board has funded the worker’s vocational rehabilitation efforts at the cost of \$29,119. The worker has been provided with 2429 days of retraining allowance resulting in a cost of \$146,882. The file shows the worker has completed only one of the vocational options the board has sponsored, i.e. air brakes course; he did not obtain employment in that occupation.
- [70] We do not give any weight to Dr. Lavallee’s reporting as we do not consider it objective medical reporting. He is repeating subjective complaints made by the worker. Dr. Lavallee “believes” the worker should be provided further rehabilitation programs, weight loss, retraining and ongoing aggressive physiotherapy. The worker testified Dr. Lavallee does not have his complete file. As noted above, the worker has been provided many retraining opportunities, he was admitted to the OrionHealth Canmore Pain Clinic in order to aid him in managing his pain, provide him with appropriate treatment options focusing on increasing his core strength and coordination. At discharge the worker was recommended and encouraged to review the pain management program, implement non-pharmaceutical pain management strategies, and undertake a home exercise program. He was to attend his family physician regarding increased back pain.
- [71] We find the worker has done nothing to carry through with these recommendations. He testified that he is inactive, takes multiple medication and painkillers and has not attempted to find employment. By moving to a smaller centre in Alberta, there are minimal opportunities for him to gain employment or to undertake physiotherapy treatments.
- [72] The worker testified he would do anything to try and get better. However, evidence on file points to the worker either removing himself from or refusing avenues that have been provided to him by YWCHSB or recommended by his past and current physicians. This contravenes section 14 (1)(a) of the 2008 *Act* and Policies RE-02-1 and RE-02-2 (section 3. Role of the Worker).
- [73] We conclude the functional capacity evaluation indicated the worker was capable of working in a “limited” strength occupation according to NOC guidelines is fair and reasonable. The chosen occupation of survey interviewer fulfills the requirement of a “suitable occupation” as defined in Policy RE-02-1.

Decision

The worker’s appeal is denied. The hearing officer’s August 25, 2009 decision is confirmed.

The selection of suitable occupation (deeming) was conducted fairly and in accordance with policy

Dated this **30th day of October 2009** in the City of Whitehorse, Yukon Territory.

C. Alexander, Member

E. Sumner, Committee Chair

W.C. Gryba, Member

Committee Members:

E. Sumner	Committee Chair
C. Alexander	Member
W.C. Gryba	Member