

Workers' Compensation Appeal Tribunal

Decision #167

Claim No.: 2006-0590

Date of Notice of Appeal: December 2, 2009

Date Notice of Appeal Received at Tribunal: December 3, 2009

Date of Oral Hearing: February 24, 2010

Date Hearing Closed: March 26, 2010

Date of Decision: May 10, 2010

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
The worker's representative – Mr. Gregory Bruce
Observer – The worker's partner
Recorder - Vernna Johanson

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

Introduction

This 43-year old woman was the sole proprietor of a daycare as well as Officer/Director of an incorporated company providing consulting services for education, marketing, film industry production, and tourism promotion. On May 31, 2006 she filed a report of injury with Yukon Workers' Compensation Health & Safety Board (the "board") indicating she suffered an injury to her right shoulder in Tokyo, Japan on April 28, 2006 while carrying a file box with her "early childhood curriculum" for several days using her right arm. The claim was accepted by the board; however in October 2008 the worker was notified by a board adjudicator that she was not entitled to benefits with respect to her left shoulder and neck symptoms.

The worker appealed this decision to a hearing officer. On April 15, 2009 the hearing officer rendered a decision denying the worker's appeal and concluding that her neck and left shoulder problems were degenerative in nature and not work-related. The worker asks the tribunal to reverse the hearing officer's decision and to find that the problems associated with her left shoulder and neck pain were caused by rehabilitation and that she be granted entitlement to compensation benefits.

Jurisdiction

- [1] On December 3, 2009, the worker's legal counsel 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 April 28, 2006. In this case the *Workers' Compensation Act*, R.S.Y. 2002, as amended to the date of injury must 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 IN-03 – Transition Policy *Workers' Compensation Act* 2008
 - Policy CL-47, Pre-existing Conditions, effective 94-04-01
- [4] The worker attended the hearing and testified by affirmation. She was represented by Mr. Gregory Bruce, barrister & solicitor. The worker's partner attended as an observer.

Evidence

- [5] The appeal committee considered the following:
 - the worker's counsel's submission
 - the worker's testimony
 - Dr. Blaney's testimony
 - the aforementioned policies
 - the entire claim record No. 2006-0590 as provided by the board.

Hearing Officer's Decision

- [6] The hearing officer confirmed the adjudicator's October 20, 2008 decision that the worker's neck and left shoulder problems were not related to the original work-related injury; he found the problems were degenerative in nature.

The worker is appealing the hearing officer's decision. She is seeking a decision which finds the previously asymptomatic neck and left shoulder symptoms were activated and aggravated by the treatment for the compensable right shoulder injury.

Evidence from the Record

- [7] The worker filed a Worker's Report of Injury/Illness dated May 31, 2006 stating that on April 28, 2006 she injured her right shoulder while carrying a file box "on my early childcare curriculum several days using my right arm". The report notes she is the owner/operator of a preschool program, estimating her total earnings for the past 12 months at \$25,000. The report states she did not seek medical attention immediately because she thought resting it may reduce the pain and swelling. [The worker was on a promotional tour in Tokyo, Japan. At the time of injury, the worker was the sole proprietor of a consulting business as well as an owner/operator of a day home. We will address this in the Analysis section.]
- [8] Dr. Djearam completed a Doctor's First Report on May 26, 2006. The worker described the injury as "While carrying a file box of 70 lbs., pulled the muscles of right shoulder". The worker complained of pain in her right shoulder. On examination there was no swelling, the bone alignment was normal with tender muscles around the shoulder and abduction was painful between 50 - 160°.

Compensation coverage for consulting business/day home

- [9] An adjudicator's June 27, 2006 note to file states, "Worker does not wish to pursue claim as she had a variety of meetings the day she injured her arm and was working in the capacity of her consultant business, which she does not have personal coverage for." The adjudicator e-mails a form to the worker asking her to sign stating that she does not wish to pursue the claim. However, the form was never completed and returned to the board.
- [10] A November 20, 2006 note to file by the case manager states as follows:

On Friday November 17th I discussed this claim with employer services officer, . . . [The employer services officer] explained that the worker, [worker's name] was required to have coverage for herself in her consulting business because it is a limited company and therefore she is considered to be a worker under the *Act*. The coverage is in place now so [the worker's] shoulder injury could be re-considered. She did not want to take out coverage for loss of earnings, so she got the minimum coverage, but she would be entitled to medical benefits if it were decided that her shoulder injury was work-related. Claim reopened for consideration.

[11] On January 13, 2007, a note to file by the case manager states:

Spoke with [the worker] this morning. Her trip to Japan was for two purposes.

1. Negotiate with tour companies to sell cultural tours. She was with a group of carvers who displayed their carvings and info on cultural camps.
2. Promote her video on early childhood care. The interpreters were child care developers.

[The worker] is still having problems with her shoulder . . . I advised [the worker] that I would speak to the director of assessments to determine whether her employer at the time of injury was [the daycare] or her consulting company. I suggested it would be the consulting company because it appears that the purpose of her trip was promotional and consultative.

[12] A February 6, 2007 adjudicator's note to file indicates she met with the director and manager of claimant services to discuss the file. "We agreed that although [the worker] states that the trip to Japan was funded by the daycare business, the purpose of the trip was for the consulting business." The claim is accepted for a right shoulder injury "as a result of carrying a heavy file box while traveling to meetings to promote her film and negotiating with tour companies to promote Yukon cultural camps and carvers".

[13] Dr. R. Hawkins, orthopaedic specialist, reports on February 14, 2007. The worker reported the injury as follows:

[The worker's] trouble began in an incident in April 2006. She was in Tokyo doing a big fashion show. She was in a hurry and she grabbed three heavy garment bags with her right hand. As she was lifting them she strained her shoulder. She was not aware of any sense of dislocation but it was extremely painful and immediately the shoulder started to "click in and out". The pain has continued.

The maximum discomfort is in the posterior lateral shoulder cap and is worse with slight abduction. She says the shoulder clicks in and out multiple times per day. She can function easier if her elbow is at her side. The neck gives her trouble and she gets a lot of massage. She has no trouble in her hand.

. . . There were no difficulties in the left shoulder.

[14] Two notes to file dated February 15, 2007 by the adjudicator state in part:

I explained that she would not receive loss of earnings benefits as she only has \$1500 per year in director coverage for wages.

I advised [the worker] that I had spoken with my manager, who reminded me that she did not have coverage in place at the time of her injury, as the employer, she would be responsible for ½ of the claims costs related to this claim. [The worker] stated that the work she was doing in Japan was to promote her childcare curriculum, and that she was working for the [day home] at the time.

- [15] On February 19, 2007 an employer services officer writes to the worker in her capacity as proprietor of the consulting business. Following are excerpts:

This letter is to advise [consulting business] that an additional assessment of \$79.10 has been levied against the account. To date this amount represents 50% of the compensation costs paid by the board for injured worker [worker's name] on April 28, 2006. The additional assessment has been levied pursuant to section 87 of the *Workers' Compensation Act*.

. . . [Consulting business] became a registered corporation May 17, 2005 and did not register with Yukon Workers' Compensation Board until November 14, 2006. As a director of the corporation you are deemed to be a worker of your corporation, therefore registration with WCB was required within 10 days. A letter was sent to [consulting business] November 8th, 2006 explaining this requirement. This requirement has been in effect since 1992.

The employer services officer sets out section 76(2), 78 and 117 (1)(d) of the *Act*. The letter continues:

What all of this means is if the corporation does not register within 10 days of engaging a worker then the employer is responsible for claims costs up to a maximum of \$10,000.

- [16] A February 22, 2006 note to file by the adjudicator states the worker called the manager of claimant services and wanted to know particulars regarding her claim. The worker was asked for details on how the injury occurred because she reported differently on her Workers' Report of Injury/Illness than what she relayed to Dr. Hawkins. The worker became angry and stated that she was carrying her luggage and running for the plane in Tokyo. A second telephone call resulted in the worker stating that the injury happened over a 2 week period of running around Tokyo attempting to sell her childcare curriculum and carrying a 40 lb. box of childcare curriculum and luggage.

The purpose of the Tokyo, Japan trip

- [17] The file contains several documents with respect to the trip to Tokyo. These include a 12-page summary report/itinerary prepared by the worker and two newspaper articles discussing the trip.

[18] The summary report and accompanying itinerary prepared by the worker states:

Abstract

The following report outlines the market research work conducted by . . . team members in the cities of: Tokyo and Fukuoka, Japan during the weeks April 18, 2006 – May 1st, 2006. The objectives of this initiative were the following:

- the promotion of cross cultural awareness between Yukon First Nations and the people of Japan
- to encourage and develop relationships that will foster shared economic benefits focusing on sustainable environments and preserving of culture and art.

This report focuses on the activities, meetings, exhibitions and demonstrations of this initiative. Funding for this project was provided by [the worker's consulting company], . . .

The organizational efforts of the non-profit group formed in Japan, . . . were due to the tireless efforts of . . . Based on personal experiences with Yukon First Nations People these team leaders assembled a world stage for the promotion of Yukon First Nations culture, history, art and promotion of traditional lifestyle practices.

Background

The intent of the initiative had been to establish capacity building and economic development options between Yukon First Nations heritage, trade and culture with Japanese markets.

The itinerary includes outcomes and recommendations from daily presentations, most dealing with culture, arts, tourism, and marketing Yukon First Nations clothing and accessories, including a fashion show and film presentation.

The “Recommendations and Outcomes” for Friday, April 28, 2006 indicate, “Meetings with traditional doctors and educators may open opportunities to market Yukon herbal products and educational [daycare best practice] film.”

[19] Two newspaper articles dated March 22 and May 19, 2006 state:

The Yukon's First Nation culture and crafts are unique, and it's time to sell them to the world, said [the worker], who heads a Whitehorse-based consulting company.

Next month, [the worker] and three traditional carvers will spend 10 days in Japan promoting Yukon crafts and tourism.

[The worker] organized the trip to promote First Nations arts and crafts, and sell the Yukon as a travel destination.

[20] The file contains a letter dated July 6, 2009 by the worker. Following is an excerpt:

I injured my right shoulder and neck on a trade mission to Japan. During that same timeframe I had surgery on my left knee (Employer: [Consulting company]/ cooking series]). I had very heavy luggage and brief cases while on business in Japan and in the 'instant' I was aware that my right shoulder muscle was tearing in my right shoulder and I was feeling a compressed pinching sensation in my neck I had to keep running with my luggage. . . . To make a long story short we *all ran at break neck speed* to catch our flight back to Canada. (Italics added by the worker.)

The right shoulder injury

[21] On March 1, 2007 the adjudicator notifies the worker that her claim for a right shoulder injury has been conditionally accepted. The worker is eligible for approved medical expenses.

[22] An MRI of the right shoulder completed on April 5, 2007 reveals an "extensive full thickness tear of the supraspinatus tendon at its insertion which appears to be for all intents and purposes to be complete". Also, "There are mild acromioclavicular joint degenerative changes without significant subacromial stenosis."

[23] Orthopaedic surgeon, Dr. Robert Hawkins, writes to the board on April 19, 2007 stating that he saw the worker at the Specialist Referral Clinic in Vancouver on April 5, 2007. Dr. Hawkins states that he discussed arthroscopic rotator cuff repair with the worker (today) and she is now on the list for the surgery. The worker's case manager authorizes the surgery for the worker with Dr. Hawkins at the Specialist Referral Clinic in Vancouver.

[24] She undergoes arthroscopic rotator cuff repair surgery to her right shoulder on May 10, 2007 by Dr. Hawkins. The worker is provided with physiotherapy treatments.

[25] A letter from the worker to the board dated May 29, 2007 states that she tripped over her son's shoes the previous evening and fell on the arm she recently had surgery on. In the same letter she requests the board provide her with a paid assistant to help with household maintenance requirements.

[26] The case manager writes to the worker on June 12, 2007 explaining benefit entitlement. Following are excerpts from this letter:

Your claim was accepted for an injury that you sustained while conducting business for your consulting company. Your coverage under this company does not include loss of income, but it does cover medical treatment.

You also run a licensed preschool program out of your home. . . . In order to keep the program running while you are unable to work, you need a replacement worker to perform the duties you are not able to do. I have

estimated you need someone to replace you in the program for approximately 5 hours per day or 25 hours per week.

Your benefit rate is based on your annual income of \$30,000. The weekly rate works out to \$575.34. The board pays 75% of gross earnings so your bi-weekly benefit payment is \$863.01. Since you are self-employed, this benefit is being used to pay a replacement worker or workers for the hours you would normally work in your program, or the hours you would normally spend maintaining your facility to meet program requirements.

I am approving up to \$500 per week, representing 25 hours of assistance per week at \$20 per hour. The expectation is that these funds are being used for your own personal needs and to care for your own home and children. Your program needs are being covered by your loss of earnings benefits.

[27] Dr. Hawkins reports on November 5, 2007:

[The worker] is now 6 months post-op. She reports an unpleasant dislocation sensation. I doubt she is truly unstable. She has probably spent too much time on conditioning & strengthening making her shoulder sore. She needs instead to focus on stretching her frozen shoulder.

[28] Dr. Hawkins reports on February 8, 2008 that when he saw her in November her shoulder was quite stiff and he thought she had frozen shoulder. He asked her to focus more on stretches and less on strengthening, which she did. Dr. Hawkins reports that the worker has overcome the stiffness and she is now ready for a "more vigorous strengthening program."

[29] An initial assessment before commencement in functional restoration is completed on March 7, 2008 by Dr. Adam Humphrey. An orthopedic and neurological examination was completed which indicated "Cervical spine ranges of motion were slightly limited with discomfort on lateral flexion bilaterally, worse on the left. Motion palpation revealed multiple very tender restrictions on the cervical spine." Clinical impressions note "Her symptoms are fitting with a post-surgical shoulder although she does display signs of dysfunction in her cervical spine which can affect the mechanics and function of her shoulder". The worker is to begin participating in a functional restoration program 3 times per week. Passive care will include electro-acupuncture, interferential current, ultrasound, laser modality, myofascial release (massage), shoulder mobilizations and spinal manipulations.

[30] A discharge report from Physio Plus dated March 25, 2008 notes the worker is able to return to work with no restrictions. Objective findings indicate her shoulder flex range on the right of 135 and 170 on the left. "[The worker] still tries to hike up her shoulder and arch through her back once she's reached the end of her available range."

[31] The worker was seen at the Specialist Clinic by Dr. R. Woods. He reports the worker is a year post-surgery for right shoulder rotator cuff repair. The worker indicated she feels that her motion is good but her arm is weak with lifting it away from the side of her body. "She sees the physiotherapist intermittently. She feels that the exercises were too intense and hard on her shoulder and since cutting back it has been quite a bit more comfortable." Dr. Woods opines that the worker's main problem is weakness of the shoulder. "This may not fully recover."

[32] Dr. Humphrey provides a progress report on May 12, 2008 after attending treatment at the Summit Centre for approximately 3 months. The report indicates that the worker's perceived "neck pain intensity" has decreased from moderate to very mild. Following are excerpts from Dr. Humphrey's report:

Objective Improvement:

[The worker] demonstrated a noticeable improvement on a variety of objective measures. The greatest improvement appears to be in her cervical spine, which is no longer restricted and severely tender on motion palpitation. Range of motion testing of her neck appears full and pain-free while palpitation of the cervical musculature is no longer uncomfortable.

Grip strength testing revealed the right, affected shoulder had improved from 84 lbs. to 100 lbs. The left, unaffected shoulder had improved from 86 lbs to 90 lbs.

Clinical Impression

It appears that [the worker's] right shoulder condition continues to improve at a desirable rate. She should begin attempting more intense strength and endurance training of the right upper extremity, particularly the supraspinatus muscle. . . . I recommend that she avoid lifting and carrying heavy loads as well as operating vibrating heavy equipment such as her rototiller at this time.

[33] A June 4, 2008 e-mail to the manager, claimant services, from the worker states that she is seeking advice on her claim as she feels she is not adequately being supported by the board. She states that the board is underestimating her job description and putting her at risk of re-injury. She writes, "If I reinjure myself in the next couple of months because of the lack of support I am receiving I will take no responsibility." Following are excerpts from the worker's e-mail:

I have shown Adam [Dr. Humphrey] my requirements of lifting logs, rocks, erecting fences and greenhouses. All of these functions should ordinarily fall under landscaping and gardening not daycare provider however I have a preschool program that is nationally recognized as a 'model program

for children'. I have no one working with me today in the program because my staff ordinarily do not work on Wednesdays so today I am not only erecting fences for keeping children in the front yard I am in addition providing all childcare related duties.

- [34] The adjudicator's June 10, 2008 note to file relates the worker wants to find a new therapist. In the following the adjudicator refers to Dr. Humphrey as "Adam":

[The worker] felt Adam was not providing the service she wanted or needed. She wants and needs him to come to her home to provide treatments there. I told her it is not likely he would agree to that as she is to be doing a strengthening program. [The worker] also stated that Adam refused to offer treatment in the evenings.

I spoke to Adam about these issues. He said [the worker] had never asked to be treated in the evenings and that he does this frequently for his clients. He said [the worker] had him over and she wanted him to show her how to lift heavy things and perform heavy work safely. He was advising her against heavy work as she is not ready for this yet. (In my conversation with [the worker], she described Adam as not being solution-focused.) Adam does not want to provide advice and/or treatment at her workplace and I agreed with him that this is not what she requires. Adam said he would offer her evening appointments at his clinic and reiterated that he will not treat her in her workplace or offer her assistance with performing or instructions on performing heavy tasks. He will also remind her that she is at risk of re-injuring her shoulder if she does not heed the treatment recommendations to avoid the heavy gardening tasks this season.

May 26 – Adam wrote indicating he was getting frustrated with [the worker's] tendency to be very late or to not show up. He felt his time and WCB's money would be better spent elsewhere.

May 26 – I wrote to Adam indicating that I would not be opposed to him discharging [the worker] if she was not complying with treatment recommendations nor consistently showing up for appointments. I wrote that [the worker] had informed me that she was working on strength training exercises and did not need to be supervised.

- [35] An internal memorandum, dated June 16, 2008, from the adjudicator to the Manager, Return to Work Services, notes the worker continues to work although she has been provided with loss of earnings benefits to hire someone. The adjudicator writes, "She is not supposed to be doing this work but may be doing it anyway – need to follow up with her and with Adam Humphrey regularly to ensure she is still progressing." Medical Management notes, "Requires constant follow-up to ensure she is not risking re-injury".

[36] Dr. Hawkins reports on July 7, 2008 as follows:

She has been back at work running her children's gardening program and is having quite a lot of symptoms in her shoulders especially with any of the heavy work if it is overhead.

Her shoulder continues to be sore although she feels that her motion has recovered fairly well.

It appears to me that at 14 months her shoulder is still not up to the high level of physical demand that she is aiming for. I have told her I can only offer her medical advice and we both agree that it is not appropriate to start over again and re-image her shoulder with a view to further surgery. Surgeries of this nature are not perfect and she may experience continuing difficulties on into the future.

[37] The worker undergoes a Functional Capacity Evaluation on November 3, 2008. The summary report prepared by Anne Milton, physiotherapist, notes the worker demonstrated functional abilities which matched the functional requirements for Early Childhood Development classification of light. However, functional abilities to perform the job classification of Gardener, additional experimental activities the worker included in her daycare program, involved medium functional abilities. The worker was not able to meet the requirements of this classification due to limiting neck and left arm pain dysfunction. Ms. Milton reports the worker has "demonstrated full functional recovery from her rotator cuff surgery".

The neck and left shoulder problems

[38] An August 28, 2008 report by registered massage therapist Jennifer Johnson provides an assessment and a course of treatment. She writes:

I found that although the left shoulder has good strength there is some strain in through pec major and pec minor as well as the anterior, middle and posterior scalene muscles. I believe this strain has occurred due to the exercise program that has been prescribed to [the worker].

The worker is treated to release some of the tension. She is advised not to weight lift or to decrease the weight being lifted significantly so the muscles can rest. Ms. Johnson reports:

I believe the left shoulder complex is compensating due to the injury to the right side.

[39] On September 4, 2008 Dr. Djearam's progress report states that the worker complained of left shoulder pain which started after lifting 60 lbs over her head as part of her fitness program. Dr. Djearam diagnoses: "Rotator cuff tear? Deltoid strain."

[40] Dr. Humphrey completes a Return to Work Functional Abilities form on September 24, 2008 which indicates no restrictions for the worker with respect to walking, sitting, stair and ladder climbing, and ability to grasp. A restriction of 21 to 50 lbs is noted for lifting floor to waist; and a restriction of 1 to 10 lbs for the right (arm) and 11 to 20 lbs for the left (arm) for lifting waist to shoulder. Dr. Humphrey notes the rehabilitation goal is to “increase the strength, endurance and stability of right shoulder “.

[41] An October 10, 2008 adjudicator’s note to file states the worker called requesting an MRI of her left shoulder because she wants to know what is wrong with it. Then she spoke about not wanting an MRI because of the radiation she would be exposed to. The worker also stated she has a problem with her neck which she thinks is due to “tension and pain”. Her neck never bothered her right after surgery, but started while in rehabilitation for her shoulder. When questioned when her left shoulder pain started, the worker said it “must have been the beginning of August (second week), when she pushed weight over her head on Adams’ request.” The worker believes her right shoulder is 85 – 90% recovered; the pain in her neck and left shoulder are creating her incapacity.

[42] On October 10, 2008 the adjudicator poses six questions to Dr. Humphrey regarding the worker’s treatment at the Summit Centre. Following in part are questions, numbered 1. through 5. in bold, followed by Dr. Humphrey’s response:

1. From August to today, dated October 10, 2008, what was involved in the treatment provided to [the worker]?

The treatment plan for [the worker] from August to present included both active and passive measures. The focus however was active strengthening and conditioning as the main symptom of her shoulder, as demonstrated during objective testing was weakness. . . .

[The worker] was scheduled for appointments of one hour in duration on August 1, 5, 7, 11, 13, in keeping with her treatment plan of three times per week with one day off between each treatment. According to my records she attended on August 5th and 7th, and then did not call or show up for the remaining appointments. No further treatments were scheduled because of her lack of compliance. On August 5th and 7th the usual passive care was given as described above.

2. What exercises was [the worker] asked to perform and what was the weight she was using during her exercises for strengthening?

The active rehabilitation that [the worker] participated in was structured with an unsupervised 5-10 minute warm-up on a piece of cardiovascular equipment followed by shoulder pendulum exercises. She was then instructed and supervised completed 2-3 sets of cable internal and external shoulder rotation with the elbow bent at 90 degrees. The same cable apparatus was then used to complete 2-3 sets of specific shoulder abduction exercises for the

suprapspinatus muscle. The weight loads used for these cable exercises ranged from 3-5 lbs.

Next a weighted exercise bar was used for forward shoulder flexion. The bars ranged from 8-15 lbs in weight and 2-3 sets of 10-12 repetitions were usually performed. Shoulder press was completed next for 3-5 sets using either dumbbells or a shoulder press machine. The weight on the machine was usually 30 lbs and the dumbbells ranged from 10-15 lbs. The remaining shoulder exercises included lateral dumbbell raises with 5-8 lbs and shoulder shrugs with 15-20 lbs.

General strength exercises for the upper body included seated chest presses, seated back rows and lat pull-downs. These exercises were preformed with weights up to 55 lbs.

3. Did [the worker] complain about pain in her left shoulder and neck in this period of time, and if so, did she receive treatment for the neck or the left shoulder?

[The worker] had claimed some degree of neck discomfort throughout her entire course of treatment. It was usually very mild until palpated, which revealed numerous tender fixations in her cervical spine, much worse on the right. This neck pain and joint dysfunction was always treated when [the worker] attended therapy unless she refused massage or spinal manipulations that day due to painful touch or apprehensive feelings. The muscles of the uninjured left shoulder girdle had been massaged on occasion as part of the treatment of the right shoulder. These included the upper trapzius, levator scapulae, scalenes, and rhomboids for the purpose of improving the mechanics of her cervical and upper thoracic spine with the goal of thereby improving the function of her right shoulder.

4. The information provided to the Board is that the left shoulder pain started after lifting 60 lbs over [her] head as part of the fitness program.

[The worker] has never been asked to attempt, nor been observed lifting 60 lbs overhead. The heaviest weight that she has ever lifted overhead as part of her shoulder strengthening program are 15 lb dumbbells (total of 30 lbs), and approximately 40 lbs on the shoulder press machine. For other exercises the greatest amount of weight used at any time was 55 lbs, and this was during seated chest press and seated back rows. For both of these two exercises the hands are kept below shoulder height.

5. Were you supervising her exercises in the gym?

She was always scheduled to be supervised for her entire program except her cardiovascular warm-up of 5-10 minutes. All of her strength training was

supervised when possible as she had difficulty remembering the correct technique for her exercises. Unfortunately there were very few treatments in which [the worker] attended on time so that her entire rehabilitation program could be supervised following her hands-on treatment. There were also a number of occasions over the course of her therapy where she arrived early or at unscheduled times and performed her gym exercises without waiting for her appointment. I was unable to supervise her at these times as I was with other patients who were attending their scheduled appointments.

. . . Over the course of her therapy I discussed many times with [the worker] that her rehabilitative exercises were best completed at our gym because she could be supervised and the facility has the proper equipment. It was communicated to her that her program was designed to stress the muscles in a controlled manner three days per week with one day of necessary rest in between. It was her opinion that the best rehabilitation for her shoulder was participating in her regular physical activities at home including her gardening chores. The only other discussion about a home program was when [the worker] brought me out to her truck in the clinic's parking lot to show me a rock of approximately 5 lbs which she stated was her new medicine ball. I again communicated my opinion that she would likely benefit from performing her exercises on a regular basis in our facility rather than at home.

[43] The adjudicator writes to the worker on October 20, 2008, relaying her decision for the left shoulder and neck symptoms. She notes Policy EN-10 which states in some cases an injured worker who has suffered a work-related injury may develop – as a direct consequence of that injury – subsequent disorders or conditions that may be compensable. The adjudicator states:

Subjective medical evidence suggests that you have recovered from your workplace injury with some strength deficit in your right shoulder. You described the limiting factor in your function as your left shoulder and neck pain.

The description of your exercise program and treatments in general, did not indicate that lifting 60 lbs overhead was part of the prescribed program. 15 lbs were the maximum weights for overhead lifts as part of your strengthening program. More weight up to 55 lbs was used in different exercises, where the hands were kept below shoulder height.

There is no clear event documented in the rehabilitation records that would indicate an injury of your left shoulder or your neck during rehabilitation exercises.

You are entitled to benefits related to your right shoulder injury only. The WCHSB will not compensate you for your conditions of your left shoulder and neck.

[44] A Functional Capacity Evaluation was completed on November 3, 2008. Following are excerpts from a summary of that report:

Summary of Findings

[The worker] demonstrated functional abilities of the right upper extremity and shoulder that are consistent with the Dictionary of Occupational Titles category of light. The demonstrated ability of the right shoulder represents her minimum ability. All of the upper extremity and material handling tests were limited by neck and left shoulder pain and dysfunction. Her right shoulder maximum functional ability was not determined as a result.

Limitations and restrictions in right shoulder

Musculoskeletal evaluation did not reveal any limitations/restrictions or impairments in [the] right shoulder. There is no ongoing physical dysfunction or pain in the right shoulder. All of the identified limitations and restrictions were related to the neck and left shoulder.

Recovery from Rotator Cuff Surgery

[The worker] has demonstrated full functional recovery from her rotator cuff surgery. Based on my experience it is my opinion that her surgical recovery is better than typical of this type of surgery. . . . There is mild loss of full active and passive range of motion which is consistent and common with the nature of the surgery. The loss of range is within normal limits for full functional range of motion and does not represent an impairment. [The worker's] grip strength is 96 lb (above average for her gender and age) and is indicative of full upper extremity functional strength and excellent recovery.

The results of this evaluation were reviewed with [the worker] at the conclusion of the evaluation. She remains concerned that her neck and left shoulder pain and dysfunction is ongoing and limiting her work ability. She has stated that these problems did not exist prior to the right shoulder injury.

[45] The worker attended Dr. Hawkins on November 6, 2008. He reported the worker had been having a lot of neck trouble recently. Dr. Hawkins notes that she was having neck trouble when he first saw her in February 2007, "but the chiropractor that she was sent to in Whitehorse has been snapping her neck with forceful manipulations without benefit over several months". Dr. Hawkins reports:

He [the chiropractor] also had her using a 60 pound weight while she was in his office under his supervision. He was giving her the weights and then showing her what to do and then leaving her to do that during these treatments sessions using both arms. On one occasion, she had a burning shearing pain in the cap of her left shoulder. This is the first time that her left shoulder started to hurt. She naturally refused to go back to him.

Her neck is now still sore and her shoulder is sore.

In the left shoulder there is tenderness over the shoulder cap with crepitus but no palpable rotator cuff gap. She had 140 degrees of elevation and 50 degrees external rotation and all of the testing was painful.

She was having a prior neck problem but it seems it has worsened with chiropractic manipulation. It also appears that [she] has suffered a strain to her left shoulder in the course of her chiropractic treatments and under the direction of a chiropractor and I am worried that she may have a rotator cuff tear.

[46] In a November 21, 2008 letter to the adjudicator Dr. Humphrey clarifies comments made by the worker to Dr. Hawkins in which she claimed her neck problems resulted from forceful manipulations. He also addresses treatment of the worker's neck when the injury occurred to her right shoulder. Dr. Humphrey responds, in part, as follows:

[The worker] was first assessed by myself on February 13, 2008 for a primary right shoulder complaint. As with all patients with shoulder complaints it is standard protocol to assess the cervical spine, thoracic spine, periscapular muscles and perispinal muscles in addition to the "shoulder" specifically. Many condition's symptoms are only perceived in the "shoulder" however the cause is located in the cervical spine. A common example of this is degenerative disease of the cervical spine.

According to my records [the worker] had her neck complaint addressed with hands-on therapy intermittently which depended on her symptoms and findings from each treatment. Initially her neck was a major complaint and was treated accordingly on most visits. Since her progress assessment on May 8, 2008 [the worker's] neck complaint was minor and infrequent, which was reflected in the infrequent treatment of her neck with manual therapy. According to my records and my personal recollection, [the worker] had her neck complaint treated with spinal manipulative therapy approximately once every 3-4 visits following her progress assessment.

In summary, I believe that [the worker's] secondary complaint of right-sided neck pain was appropriately and successfully addressed as part of her treatment for a post-surgical right shoulder. Through the treatment protocol listed above [the worker's] neck complaint improved subjectively from moderate to very mild while objectively improving dramatically in motion and tenderness on palpation. My records show that her neck condition was negligible throughout the last few sessions with her therapy in August 2008. It is possible that [the worker] has injured her neck since our last treatment or regressed due to a lack of treatment since August but another assessment would be needed to objectively evaluate whether this problem exists.

[47] Dr. Humphrey contacts Dr. Hawkins via e-mail on November 23, 2008 with respect to subjective reporting by the worker as mentioned in Dr. Hawkins November 6, 2008 report. Dr. Humphrey queries, "Her case manager and I are concerned with certain paragraphs of your report as it reads to be factually stated and not simply the patient's subjective narrative history." He notes that some of the claims the worker has made have not been substantiated by evidence to be fact.

Dr. Hawkins responds on December 3, 2008, "You are quite correct that the statements contained in my consultation report of November 6, 2008 regarding our mutual patient's chiropractic treatment were based on the history she provided. Clearly, I was not present during any of the treatments."

[48] A December 2, 2008 note to file by the adjudicator states the worker is attending Anne Milton, physiotherapist, for treatment. The adjudicator notes that Anne Milton called on November 27, 2008 stating that from their records the worker complained of neck pain on July 5, 2007 after doing a lot of housework. "She described a pinching in her neck after doing +++ housework ([the worker's] words)."

[49] A December 8, 2008 letter to the worker from the adjudicator explains her decision to close the worker's claim. She addresses two issues: Whether the decision for neck and left shoulder pain of October 20, 2008 stands; and determination of eligibility for loss of earnings benefits according to policy EL-01. She determined that the October 20, 2008 decision stands; the neck and left shoulder is not a compensable injury. Symptoms were noted prior to right shoulder surgery and linked to non-work-related activities. The Functional Capacity Evaluation (FCE) report indicated the worker was functionally able to perform the activities of a early childhood educator. Loss of earnings benefits will be terminated as of December 17, 2008.

[50] An MRI of the cervical spine undertaken on December 10, 2008 indicates no underlying bony anomaly or fracture. Findings reveal "At the C5/6 level the degree of disc space narrowing is seen. This is associated with a moderate circumferential disc bulge/osteophyte which is indenting the thecal sac and perhaps slightly flattening the cord. There is also mild narrowing of the foramina bilaterally at this level. Impression: Degenerative disc changes at the C5/6 level with a moderate sized broad based disc bulge/osteophyte indenting the thecal sac and causing mild narrowing of the foramina bilaterally."

[51] An MRI of the left shoulder also completed on December 10, 2008 reads "Impression: Evidence of some tendinopathy in the supraspinatus tendon with a possible very small partial-thickness tear at the musculotendinous junction".

[52] The board medical consultant reviewed the MRIs. She reports on January 5, 2009:

The MRI report of the examination dated the 10th of December 2008 concludes that there is degenerative disc changes at C5-6 level with a moderate sized broad-based disc bulge/osteophyte indenting the thecal sac and causing mild narrowing of the formina bilaterally. Degenerative disc disease at this level is quite common and usually unrelated to any shoulder injury.

. . . My impression of the this left shoulder MRI is that there is no significant rotator cuff tear on the shoulder. In fact what exists is a tendinopathy of the supraspinatus tendon which in fact is a common disorder in people who have the tendency to have rotator cuff disease.

. . . I do not think that the findings of both MRIs are related to her workplace injury in 2006 involving the right shoulder.

[53] Dr. Hawkins responds to the worker's e-mail in a letter of January 27, 2009. He states in part as follows:

You have asked my opinion regarding the neck and I believe the degenerative disc at C5-6 is indeed degenerative in nature and has come on as an aging process. Such areas of arthritis, as is also true of other joints, can sometimes be painful and can often be easily made sore by activities or events in every day life. Similarly, therapeutic manipulation of the neck will sometimes make symptoms worse, but can also make symptoms better.

My own opinion is that you have an underlying degenerative problem in the neck and symptoms have been activated in the course of your various activities. This is generally the way arthritic neck conditions present themselves.

[54] The worker attended Dr. Hawkins on February 3, 2009. He reports:

I again discussed with her the results of the MRI of her neck and left shoulder essentially going over what I had detailed in my letter of January 27th. I think that she has evidence of degenerative disc disease at cervical 5-6 as well as evidence of degeneration albeit fairly minor in the left rotator cuff. We talked about all of this.

Dr. Hawkins completes neurological testing of the worker's upper and lower extremities resulting in "subjective tingling in her hand presently" but in the "lower extremities the subjective tingling in the lateral aspect of the left foot is not present today".

[55] The worker provides further documentation to the board. On January 9, 2009 the adjudicator writes to the worker explaining her decision on the documents. She states the file was reviewed in its entirety and the findings of both MRIs indicate degeneration; her neck and left shoulder pain is not related to the workplace injury. The December 8, 2008 decision stands. The worker appeals this decision to the hearing officer.

[56] The worker submits a 6 page Affidavit to the appeals assistant dated February 10, 2009. Following are excerpts:

6. The date of the accident which resulted in the Claim is April 18, 2006. I had travelled to Tokyo, Japan as part of a trade delegation from Yukon. My principal objective on the trip was to promote my [child care] curriculum. [The Worker's Report of Injury/Illness, completed by the worker, lists the accident date as April 28, 2006.]
7. I spent a week in Tokyo, during which time I frequently needed to move pieces of luggage. These (sic) including a large suitcase in which I carried the six binders of material which made up my curriculum. On the day we were leaving, at the Tokyo airport, I injured my shoulder. It suddenly became extremely painful and afterwards it felt unstable – as if it was dislocated. I had to endure a very uncomfortable 14 hour plane ride back to Canada.
13. I began attending twice-weekly physiotherapy sessions at the Thompson Centre. Yukon Insured Health Services paid for these. The physiotherapy did not help me at all however, and was time-consuming and painful; eventually I discontinued it.
14. My condition did not improve. Further, I began to experience neck pain. I thought that this was related to my shoulder injury and that it might have resulted from my favouring my right arm and shoulder.
34. Beginning in July 2007 I started to notice a pinching sensation in my neck. Prior to that I had experienced neck pain, but July 2007 was the first time I noticed neck pain which did not seem to originate in my injured shoulder. This was also around the time that my shoulder was recovered enough for me to start to move naturally. It feels like a sharp pinch on the back of my neck and pain radiates out from it. This pain has become a regular part of my life.
36. I was willing to do anything that would help me to recover faster. That included my physiotherapy and massage, acupuncture, stretching exercises, yoga and swimming. These things did help my shoulder to recover, but increasingly I suffered neck pain. Further, many of the activities left me sore and tired.
39. Unfortunately, I did not develop the same relationship or have the same satisfaction with Adam Humphrey that I'd had with Jocelyn [Kutcher, physiotherapist]. Adam wanted me to come three times a week, which I thought was too much; I would not have recovered from one session prior to the next one. As well, the weights Adam thought I should be able to lift seemed to me to be too heavy. I was worried about re-injuring myself.

[57] Physio Plus provides a complete Functional Capacity Evaluation report to the hearing officer on April 14, 2009. This assessment was completed on November 3, 2008 (see para. 37). After the sub-heading "Assessment of Cervical Spine", Anne Milton reports:

Cervical and left shoulder symptoms and dysfunction are consistent with cervical spine nerve root irritation and possible C5/C6 nerve impingement. She has mild indications of left rotator cuff tear and altered mechanics. The most likely cause of these symptoms is underlying pre-existing and

longstanding non-symptomatic osteophyte degenerative changes that have been aggravated by altered mechanics related to activities at home, work and post-op rehabilitation. Xray findings or MRI findings should be correlated with this provisional physical diagnosis. In the absence of degenerative changes the cause of symptoms would probably be mechanical dysfunction again related to post-op activities.

- [58] The hearing officer renders a decision on April 15, 2009. He agrees with the adjudicator's October 20, 2008 decision that the worker's neck and left shoulder problems were degenerative in nature and not work-related.
- [59] A May 26, 2009 note to file from a meeting with the worker, President of the board and General Counsel notes the worker spoke about what she was doing in Tokyo. "She advised us that she was not over there on behalf of [her consulting business] but rather her day home [name of day home.]
- [60] On June 2, 2009 board General Counsel writes to the worker responding to several questions the worker posed. Documents on file indicate the worker questioned:
1. Who authorized what Dr. Humphrey did in his sessions;
 2. Whether the doctors authorized the chiropractic treatments, specifically Dr. Hawkins, Dr. Djearam and Dr. Williams;
 3. Who supervised those sessions.

General Counsel responded as follows:

A note to file indicates you telephoned your case manager on September 25, 2007 advising that you were frustrated. You felt plateaued at physio and wanted to work on more muscle groups besides always focusing on your shoulder. It was agreed that you would work with a yoga practitioner with a caution that you avoid excessive use of the recovering arm. You stated you understood the limitations of your body and felt you needed to do more activity in order to complete your rehabilitation.

. . . The next note to file indicated that your physiotherapist moved away and you report being referred to Adam. It stated you planned to see Adam so that he could do an assessment.

You were referred to the Summit Centre. The purpose of this Centre is for an assessment and treatment of injuries for functional restoration. Because Dr. Humphrey is a kinesiologist, a chiropractor, and a personal trainer, he does both assessment and treatment. In your case, he was used for an assessment and treatment, but not specifically for chiropractic.

Summary

In order to treat YWCHSB clients, all external service providers must be certified. In Dr. Humphrey's case, he is a chiropractor, a kinesiologist and a personal trainer.

He was authorized to assist you in assessing your physical limitations resulting from a work-related injury and working with you to overcome those issues.

There does not appear to be any evidence the doctors you mentioned authorized the chiropractic treatment, nor is there a requirement for such authorization, nor is there evidence that Dr. Humphrey only acted as a chiropractor.

The YWCHSB does not supervise sessions with any medical practitioners or medical service providers such as physiotherapists, doctors, specialists, or chiropractors, including Summit Centre. These practitioners practice under their own certification and professional standards.

[61] A September 12, 2009 report to the worker's family physician by Dr. Greg Blaney, M.D. contains the following excerpts.

[The worker] consulted me on August 21, 2009 with regards to persistent right sided neck pain which arose as a consequence of a work-related injury on April 18, 2006 [should be April 28, 2006].

She recovered well from the surgery and with resolution of some of her shoulder related symptoms and increased activity, her neck injury became more symptomatic. This was recognized and treated by Adam Humphrey, D.C. who used high velocity thrust manipulation. She also participated in a strengthening program which included above shoulder presses and using weights of up to 60 lb.

[The worker] did not experience any significant improvement in her pain or function with this therapy and in fact suffered a rotator cuff injury to her left shoulder as a consequence of her weight training. She stopped treatment in August 2008. She consulted Dr. R. Hawkins who suspected a new injury to her left rotator cuff and that the manipulative therapy had aggravated her neck pain. Subsequent scans confirmed a likely partial thickness tear of the left supraspinatus muscle and disc protrusion at the C5-C6 level.

Examination on August 18th revealed a vascular impingement of the subclavian artery by the right pectoralis minor muscle (positive Wright's sign), crepitus of the right acromioclavicular joint with passive mobilization, reduced external rotation of the right glenohumeral joint, reduced external and internal rotation of the left glenohumeral joint accompanied by significant pain, right scalene muscle spasm and trigger points and multiple joint restrictions of the upper rib mechanics and group restriction of the cervical vertebrae to the left side bending and rotation.

These findings strongly support the diagnosis of persistent myofascial trigger point pain syndrome involving the right scalene, petoralis minor and levator scapula muscles with associated loss of normal joint mechanics of the upper

thorax and neck. This condition arose as a consequence of the initial injury and has been aggravated by the inappropriate use of high velocity manipulation of the neck vertebrae and certain strengthening exercises especially over the head shoulder presses with high weights.

This condition requires non-thrust mobilization of the restricted articulations in her thorax and neck and trigger point injections of the affected muscles. I initiated treatment on August 21st and with reported success in lessening her pain.

She will require further therapy over the next few months, 6 to 8 treatments delivered by myself which will hopefully result [in] a full restoration of function, elimination of her chronic pain with the avoidance of surgery.

[Myofascial pain syndromes of the upper extremity are common causes of pain that may follow trauma and are associated with acute or chronic musculoskeletal stress. The syndromes are characterized by the presence of the myofascial trigger point, a physical finding that is reliably identified by palpation. Local and referred pain are hallmarks of the syndrome, and the referred pain patterns may mimic such conditions as radiculopathy and nerve entrapment syndromes. Treatment is directed toward inactivating the myofascial trigger point, correcting underlying perpetuating factors, and restoring the normal relationships between the muscles of the affected functional motor units. Gerwin RD. - Pain Treatment Center, Johns Hopkins University Medical Institutions, Baltimore, MD, USA.]

[62] On October 28, 2009 the chief medical consultant reviews Dr. Blaney's report. Following are excerpts from his review:

Dr. Blaney describes persistent myofascial trigger point pain and reports on a vascular impingement of the subclavian artery by the right pectoralis minor muscle. From a medical perspective he is describing a Thoracic Outlet Syndrome although does not specifically provide that diagnosis. This condition is primarily related to motor vehicle crashes, but can also be due to overhead activity and structural abnormalities. Often no specific cause is found.

Unfortunately the tests used to try to identify an impingement of the subclavian artery are notoriously inaccurate. . . . The Wright maneuver used by Dr. Blaney simply involves having the patient hold the arms up next to the ears and the patient reports numbness or tingling on the inside of the shoulder blade.

Dr. Blaney reports "there was considerable delay in diagnosis and therefore treatment." However, when reviewing the initial reports, [the worker] initially decided that she did not to pursue a Workers' Compensation claim. There was one medical visit on May 26, 2006, but the next time that she sought medical attention was December 8, 2006. At that time, Dr. A. Williams specifically evaluated the neurovascular system and described it as being normal. Also, Dr. Hawkins found only a rotator cuff tear without any evidence of

neurovascular injury. There is also no evidence of the incident producing an injury to the neck and thoracic spine, but this is the area for which Dr. Blaney is proposing treatment.

Many conditions, particularly in the cervical spine can produce prolonged symptoms, but the initial reports do not identify any injury to the cervical spine.

The treatment may be helpful for the generalized muscle spasm, although treatment guidelines recommend against passive therapies and generally emphasize active, patient directed treatment for these long-standing symptoms.

[63] Dr. Blaney provides a report to the worker's legal counsel on February 14, 2010, reiterating his September 12, 2009 report. Following is an excerpt from that report:

It is my opinion that [the worker's] right neck pain and left shoulder injury were caused solely by the inappropriate therapy provided by Summit Centre under the supervision and direction of Adam Humphrey, DC. There was no clinical indication for cervical spine manipulation. There was insufficient evaluation of her cervical spine prior to the initiation of spinal manipulation and this falls below standard of care medically and possibly chiropractically. She had pre-existing symptoms and signs highly suggestive of the presence of myofascial trigger points in her scalene and levator scapula muscles if present would have contraindicated the use of high velocity, large amplitude manipulation. The repeated use of thrust manipulation, despite complaints of neck pain by [the worker], continued to aggravate and perpetuate the myofascial pain disorder. The repeated manipulation potentially destabilized her C5-6 disc causing the disc protrusion and accelerating the osteophyte formation by increasing inflammation in the area as this is a known consequence of this type of manipulation.

The Worker's Testimony

[64] The worker testified that she was injured while in Japan. Following is her testimony:

She said she went to Japan on a trade mission with three First Nations carvers. They were not provided funding for the trade mission because they were inexperienced in tourism marketing. They were on a shoestring budget. The opening was held at the Canadian Embassy in Tokyo. She said they had taken over about 600 lbs. of regalia from around the territory.

[65] At the same time she was doing "a little bit of environmental work" concerning the tar sands as an activist. She was asked to be a speaker at Earth Day in Tokyo. She took over her curriculum, which she said is a gardening curriculum – a multicultural curriculum. She said she had taken 200 lbs. of her curriculum to market to the Japanese. She employed 9 translators; most of them were working in education. She initially started a company in Japan at that time to bring her children's curriculum from Canada into other countries. The worker said she was not just a family day home. She had many, many other business initiatives going on.

- [66] When they got to Customs, they did not know they would be charged. No charge was levied going into Japan but when leaving, Customs charged them. They were also fined about \$900 for their weight capacity. They had no money so they were calling friends with credit cards asking them to pay their fines so they could run to the plane. When they were running to the plane, "it" was too heavy. The worker said she feels that she was penalized (by the board) because she should have used a trolley; however she did not know where they were located in the airport. She had no choice, she had no money and so she had to run for the plane. She said she got on the plane and her whole neck and shoulders had swollen up. No one had any painkillers. She considered getting off the plane and going into Tokyo because she had Red Cross; she was going to stay in Tokyo, but she had no money so she returned to Canada.
- [67] She said it took the board one year to make a decision. She had a full tear; she could not move her arm. She started using her left hand. At that time she started doing a lot of work around the territory. The board would not pay for someone to drive her.
- [68] The board decided she just had a little injury so she was put into physiotherapy. She said that did not do anything. It actually felt like it was making it worse. She flew to Vancouver and saw some experts that she knows. They told her she needed surgery, this is something that will not be alleviated by acupuncture or alternative medicine. She said she returned to Whitehorse and threatened a lawsuit against the board because they would not accept her claim. It was accepted within two weeks.
- [69] The worker said she saw Dr. Hawkins. He suspected that she had torn her shoulder but he thought it was just a little tear. He thought that when he did her shoulder surgery it would resolve her neck symptoms. She disagreed with him because she said she told him she did not know if she had a bigger pain in her neck or in her shoulder, but she felt like "it was all moving up into her neck."
- [70] The worker was sent for an MRI and ultimately had surgery. She testified that it took one year to resolve.
- [71] She said she never took a pay cheque for 3 ½ years because she was not provided any funds for replacement staff in the first year. She had to hire her Manager on full-time because she could not pick up children if they fell down. She said although they are young children, some of them weigh up to 60 lbs. She needed someone with her all the time to work in the daycare. She had no ability to pick up a child. She changed her whole day care.
- [72] The worker said three months after her shoulder resolved her neck was bigger than her shoulder. When she returned to the board, she was told her shoulder injury had nothing to do with her neck. Then her shoulder froze. She said the neck symptoms were exactly the same as her shoulder symptoms. She had total restriction in her arm and she could not put her arm behind her back or above her head. The worker said that Dr. Hawkins really believed that if he fixed her shoulder, the neck should resolve.
- [73] The worker said that Dr. Hawkins did not think she would regain full function of her arm. She disagreed and told him that she knew her body better than anyone else; give her the exercises

she needed to do and she would have full rotation within a year. She said she did gain full recovery of her shoulder within a year. However her shoulder froze for a little while. She attributes this to the 12 lb weights she was told to use.

- [74] She said she has always been totally dedicated to recovery. She testified that before the accident in 2006, she had absolutely no problems with her neck or her shoulder. She is really fit; she makes a point of being fit. She eats good food. She was 39 years old and she was not deteriorating any place. She has never had a broken bone. She said she really believes in preventative care. Her son did not attend a doctor until he was 12 years old. As a family she took care of her health and her kids' health. She said that the board's decision collapsed her ability to earn money and it collapsed her ability to keep her family together.
- [75] The worker said that the board did not provide her with a wage loss. She was only provided with a "replacement cost" for her daycare. It required her to employ two people. One person was working in the daycare and then another group of people helped her to dress, acted as her driver, and pushed her grocery cart. She said the board provided the costs to replace her but then she had no income. The only income she had was from her advocacy company.
- [76] Some of her work involved keyboarding and writing letters to organizations. She could not keyboard because of her shoulder so the board provided her with Dragon Speak. [This is speech recognition software that is activated by voice.] The worker said that it was so difficult to train her laptop for efficiency, she ended up hiring people to dictate letters to and she also used secretarial services companies.
- [77] She testified she worked in the daycare from Monday to Friday and worked at literature production and consulting work at other times during the day and in the evening. The board compensated her for the loss of her ability to work during the daytime, but she said she worked "24 hours a day". She then said after her daughter went to bed in the evening, she worked until 1:00 a.m. and was up again at 6:30 a.m. She told the board that all of her money was going to keep her daycare going.
- [78] The worker testified that although she had almost full recovery of her right shoulder a year after the surgery, her neck was bothering her. She said she started re-integrating herself into her gardening program at the daycare approximately 5 months post-surgery, although if she tried to lift anything such as a tray of bedding plants, she would get pain in her neck. With respect to her consulting business, she had to hire consultants which she paid at a rate of \$500 per day.
- [79] The worker said the pain in her neck persisted. Although documentation on her file indicates that she was doing excessive housework, this was not the case. She did not do any housework; she had a housekeeper, cook, and gardener. She told the board she could not even move her arm, she was not capable of doing excessive housework.
- [80] She started rehabilitation with Dr. Humphrey in February 2008. She said she had neck pain but it was manageable. She had limited ability to turn her neck and every time she tried to do overhead work, she felt a pinching sensation in her neck. The worker testified that

Dr. Humphrey said she had a lot of tension in her neck and realigning her spine would help. She said she notified the board that she did not want any chiropractic intervention. She said that he was making her neck worse. She was suffering more neck pain and started to develop migraine headaches. It caused her to grind down her teeth. She said she cannot take pain medication because it bothers her stomach.

- [81] The worker said that treatments with Dr. Humphrey would start out with him telling her to relax and then he would “reef around” on her neck. After the fourth session she started to experience numbness in her lower lip and tingling in her fingers. She also noticed when she was outside that the circulation in her hands was not good. Both her hands and feet would get really cold. When she mentioned it to Dr. Humphrey, he equated it to her “type A” personality.
- [82] When she asked for an examination by the board medical consultant, she was refused. She returned to her family doctor; she started to experience trembling in her legs in July of 2008. This included pins and needles in her feet and a “wobbliness” that made it difficult for her to ascend stairs. When she again returned to her family doctor with her concerns, she was told that she had to continue with treatment that the board had authorized.
- [83] She travelled to Vancouver for a couple of weeks. During this time she did not suffer any tension headaches or numbness in her legs, hands or lips. When she returned home she told Dr. Humphrey that it was the chiropractic interventions that were “screwing up” her neck. The worker said that he had her lie down and “did what he always did” which was “crack her neck”. It made her feel dizzy. She said that she decided to do her weights. It was only when Dr. Humphrey was increasing her weights did he observe or supervise her. While doing her weights, her neck froze. When she got into her vehicle afterwards she could not look in her rear view mirror. She attended her doctor. For 5 weeks afterwards she could not lay down and had to sleep in a semi-reclining position. The worker told the board that she would no longer have Dr. Humphrey working on her. This was in August of 2008.
- [84] She testified she took a little rock ball to show Dr. Humphrey the weight she should be working with; it weighed about 5 lbs. From the beginning she told Dr. Humphrey the weights were too heavy for her. In addition to having to do push-ups she was also made to do leg push-ups with weights of up to 140 lbs. This caused pain to radiate from the bottom of her feet right up to her neck. When she told WCB that Dr. Humphrey was hurting her, she felt that they just wanted to process her claim to get her off compensation. She said she “hounded” the board about the chiropractic treatment and having them send her for an MRI on her neck. She knew there was something wrong.
- [85] She believes she attended Dr. Humphrey approximately 23 times. He did not record the number of times he was causing her pain. She did not refuse on just a few occasions; she told him every single time that he was hurting her neck. She said told WCB and Yukon Health but no one would protect her from “the idiot”.
- [86] In December of 2008 she travelled to Vancouver for other reasons. She paid \$1700 for an MRI herself. She said the MRI indicated that she had a pinched nerve in her neck and also she had torn her arm in rehabilitation. The dizziness and numbness in her fingers and toes persisted.

She was also having trouble walking.

- [87] The worker said that because she was not getting any help from WCB or her family doctor she sold her family home and sought a private specialist in Vancouver. She said she felt betrayed by WCB because she had two corporations, with coverage as an employer for both corporations. The worker said that she lost custody of her daughter because she had to sell her house and move away from Whitehorse.
- [88] She said the financial implications from the injury have affected her greatly. She has spent \$1700 for an MRI; \$1000 for acupuncture; she was penalized by the bank for selling her house before the mortgage had reached its term; and she had to hire people to replace her at the daycare. In addition she traveled to Vancouver in the summer of 2009 to undertake hyperbaric treatments which cost \$500 for each treatment. She had three treatments but was told she would need 42 treatments to fix her neck.
- [89] She met a woman while in Vancouver that told her about Dr. Blaney. When she inquired about an appointment, she was told that there was a 3-month waiting period. However, another patient cancelled so she was slotted in. Dr. Blaney completed an assessment and also provided a treatment. Initially, when she saw Dr. Blaney in the summer, she could not walk because her legs were so wobbly. She noticed immediate improvement in her neck. She returned in November of 2009 for more treatments. The cost of treatments she said was approximately \$5000. She said after treatments by Dr. Blaney she was “perfect”; she returned to work immediately, although she still has some minor symptoms in her left arm.
- [90] The worker testified that today she has no neck or shoulder symptoms. She said Dr. Blaney totally changed her life; he gave her back her life.

Dr. Blaney’s Testimony

- [91] Dr. Blaney explained that osteopathy is based on the analysis of the integrity of joint motion and includes the whole body. He explained chiropractic is based on the physical alignment of the spine, so-called subluxations of the spine that results in the disruption of the nervous system as well as the blood supply and can therefore create spinal conditions. Chiropractic is based on a two-dimensional alignment diagnosis versus osteopathy being based on a three-dimensional movement model. He said a lot of the osteopathic techniques are based on the characteristics of soft tissue mechanics and physiology.
- [92] Dr. Blaney testified that when he examined the worker she was showing a number of existing joint restrictions with respect to the shoulder mechanics bilaterally. She had a number of restrictions through her upper rib cage as well as a “group” restriction in her neck where she resisted movement to the left. On palpation she had numerous tight, tender muscles particularly in the right scalene muscles and also involving the right shoulder mechanics. The left was much more acutely painful which appeared as more of a problem associated with a recent injury to the rotator cuff versus the right which was indicative of more chronic myofascial pain disorder.

- [93] Dr. Blaney said his initial diagnosis was myofascial pain disorder with somatic dysfunction, which he says is the osteopathic term for a loss of the normal joint motion and play. It was basically in the cervical thoracic area and the pelvis. When the worker returned three days later, he completed an osteopathic treatment on her although he never expected it to have a long term effect because he believed the problem was mostly involving the trigger points.
- [94] He explained that the “restrictive patterns” were treated that were contributing to the perpetuation of the myofascial trigger point in the right side of the worker’s neck and shoulder. He said this originated from the original injury when her supraspinatus tendon was torn. Dr. Blaney said the initial injury placed a certain amount of strain on her neck area. With not being able to utilize the arm due to the rotator cuff injury, she was probably not suffering from acute symptoms in that area but the whole right side area would have been sore from the rotator cuff. He said the sensory nerves (mechano-receptors) that are determining the response of the muscle independent of the nervous system were up-regulated; those muscles would be latent trigger points easily provoked by either irritation to the trigger points through massage, any sort of rapid stretching or manipulation of those muscles, or utilizing of those muscles.
- [95] Dr. Blaney stated it was his impression that, as the worker was starting to rehabilitate and started to increase the use of her right arm post-surgical, she started to provoke irritation into those muscles. From the worker’s history, the worker’s symptoms were not becoming symptomatic until she started receiving cervical spine manipulation. He found that at the time he saw her she was displaying classical signs of myofascial trigger points. Dr. Blaney said when a combination of correcting the underlying joint mechanics as well as releasing the scalene muscles and associated right-sided muscles, the worker experienced a very rapid and consistent improvement in that area. Her neck symptoms and problems resolved.
- [96] Dr. Blaney said that initially the worker’s neck would have been mild to moderately symptomatic as a result of the right shoulder injury. She would have had a significant amount of pain emanating from the right rotator cuff. Because of the limitations that would have created in terms of the use of her right arm, as well as the amount of pain messages coming from the right shoulder, they would have masked any kind of pain from the other muscles. In his experience, when there is that degree of trauma to the rotator cuff, it is highly likely that other muscles in that area were also aggravated but may not have initially been symptomatic. These would not show up until the area was passively treated or actively rehabilitated.
- [97] He said from his reading of the other medical reports, the August ’08 symptoms, was the “straw that broke the camel’s back”, particularly in the left shoulder. Prior to that and confirmed by chiropractor’s notes, was that the worker was experiencing pain and aggravation of her neck pain throughout the treatment process where she was getting cervical spine manipulation. He said that her neck problems, as relayed by the worker and contained in the notes, would fit with the worker doing high-velocity manipulation of the cervical spine where there were scalene and levator scapula trigger points. Dr. Blaney said rapid rotation of the neck is classical aggravation of trigger points. High velocity thrust of the neck is standard chiropractic treatment. He said the worker had a pre-existing condition that was contraindicated to cervical spine manipulation.

- [98] Dr. Blaney said historically the worker had an injury that was “highly likely” to have created myofascial pain disorder in the right side of her neck and shoulders. Examination confirmed the presence of continued restrictive patterns away from the spine in the shoulder mechanics and upper rib mechanics which fit with the original type of injury. With appropriate treatment her symptoms resolved and she restored her original range of motion of her right shoulder, upper ribs and neck.
- [99] When questioned what Dr. Blaney thought about Dr. Hawkins and the medical consultants’ opinions that the worker’s symptoms were caused by degenerative changes, Dr. Blaney said there is no objective proof of this. In relationship to the left shoulder injury being a manifestation of the aging person to develop tendonopathies, he said that is totally speculative in terms of the fact that there were degenerative changes found in the neck. A mild disc protrusion was “mild and central” and there was no evidence of radiculopathy. He said that 40% of healthy individuals who have MRIs or scans will show some degree of disc protrusion. There are many asymptomatic 40 and 50-year-olds that will show some degree of degeneration when x-rayed. Dr. Blaney stated there was nothing pre-rehabilitation that indicated the worker had any significant spinal pathology. If there was something present that was not diagnosed, he said there would not have been any significant response to the interventions he performed.
- [100] Dr. Blaney said the last time he saw the worker her neck motion and cervical spine motion issues had all resolved. Her right-sided trigger points were resolved. The remaining concern was definite reaction in the left-sided shoulder rotator cuff which was affecting the left trapezius and levator muscles. Symptomatically she may have some neck issues relating to the left shoulder. He said there is nothing permanent or degenerative in her neck biomechanics or skeletal structure that is of any consequence which should cause her any long term consequence or problems as long as she does not receive inappropriate therapy.

The Worker’s Representative’s Submissions

The worker was represented by legal counsel. We will refer to him as counsel for the purposes of this decision.

- [101] The worker’s counsel says the April 15, 2009 hearing officer’s decision surmises other causative factors led to the worker’s continuing problems rather than the injuries the worker suffered during her rehabilitation program.
- [102] Counsel contends that the worker had significant concerns with respect to the chiropractic treatment. He says the April 15, 2009 decision does not draw a distinction between contemporaneous evidence and evidence submitted later. When the worker was receiving therapy from Dr. Humphrey, nothing was noted at that time which indicated that she was doing her exercises improperly. Counsel says an explanation was provided later by Dr. Humphrey. This should be given less weight in his opinion.
- [103] He says the hearing officer’s decision revealed errors regarding the kinds of activities the worker was engaged in during 2008. Activities were very limited; she was not undertaking

gardening or any other activity that was causative in the injury which subsequently developed. Counsel says that Dr. Blaney addressed the motion that caused the injury in August 2008 and it is not a motion that would happen if the worker was using a child's weight or doing Tai Chi with a 5 lb rock ball. Dr. Blaney explained that the muscle group that was injured could have only been injured by a weight lifting group.

- [104] Counsel says there is some dispute whether she was properly supervised when completing her weight lifting exercises. There is no contemporaneous evidence from Dr. Humphrey in this regard. He says the worker told both the board and Dr. Humphrey but her concerns were not heeded. From the worker's perspective her symptoms were worsened by the chiropractic treatment leading up to a re-injury doing weight lifting. Her symptoms continued until she saw Dr. Blaney.
- [105] Counsel submits that Dr. Hawkins' initial opinion with respect to the cause of the worker's injuries was based on what he believed to be standard practice for chiropractors. His view changed when it was challenged by Dr. Humphrey.
- [106] Counsel says the findings that the worker's symptoms and problems are degenerative in nature only shows that most people as they age do show signs of degeneration which is not usually symptomatic. In this worker's case, she was not symptomatic in any way before she was injured in 2006. The scans contained on file do not reveal a very significant degenerative change. The changes are not consistent with the worker's symptoms which are quite significant and include numbness of the hands and loss of muscle control in her legs, indicating much more impingement in her neck. In his view, degenerative changes do not go from a lack of symptoms in 2006 to extreme symptoms, such as the worker was having, by 2008-09 followed by treatment and then complete resolution.
- [107] He says that after treatment with Dr. Blaney the worker's neck symptoms resolved completely which clearly refutes the presumption that the neck symptoms were degenerative in nature.
- [108] Counsel spoke about Dr. Blaney's credentials and stated that essentially he is a general practitioner. In a technical sense he is not a specialist. He does however have specialized skills and knowledge. Counsel submits the worker found a doctor who could provide resolutions to the problem with her neck and that resolution clearly indicates the problems have a treatment origin rather than a degenerative changes origin.

Changes being sought:

- [109] Counsel asked that the appeal committee find the worker's problems did not arise from degenerative changes, rather she suffered a disability because of the right shoulder injury initially and from the therapy-induced left shoulder injury.
- [110] They are requesting compensation for the duration of this disability including:
- direction to the board that the worker be compensated for expenses she incurred to find a doctor who could resolve her medical problems;

- reimbursement of expenses related to obtaining an MRI including the cost of the MRI, and associated travel costs;
- losses associated with the bank penalties with respect to having to sell her house;
- the cost of travelling to Vancouver twice for three hyperbaric treatments and the cost of treatment;
- costs for acupuncture treatments;
- initial assessment costs and resulting treatment by Dr. Blaney;
- from the worker's evidence and Dr. Blaney's evidence the worker be compensated for her inability to work from December 2008 until November 2009.

[Legal counsel did not address the worker's concerns that because of her injury, her child is no longer living with her.]

- [111] Counsel summarized the expenses because he thinks it is appropriate the board compensate the worker for her expenses on the basis that she was doing all she could appropriately to deal with this matter and address it. The fact the board presumed it was degenerative and it was upheld at the hearing officer level does not relieve them from compensating the worker for her costs, particularly the costs for Dr. Blaney. His treatment resolved the issue which is what the goal of the board should have been. It was by the worker's own initiative that she found someone to provide the proper treatment.
- [112] Counsel says there is an issue about what the rate of compensation should be considering she was injured while she was a worker to some degree but also a business person. She did have insurance coverage with Workers' Compensation for two of her businesses, but not for the third. Counsel maintains that the worker's financial losses were not properly remedied although he agrees there is some complexity to the claim because the worker was generating a gross income and then re-investing it in her activities, primarily in the daycare. [Note: There is no evidence of a third business at the time of the 2006 injury. See the Analysis.]
- [113] Counsel asked for 30 days in order to give Dr. Hawkins and Dr. Djearam time to comment on Dr. Blaney's report.
- [114] WCAT provided Dr. Hawkins with Dr. Blaney's February 14, 2010 report. He was asked to review the report and respond to whether or not his opinion as stated in his January 27 and February 3, 2009 reports had changed. Dr. Hawkins responded on March 4, 2010. Following are excerpts from his report:

You are asking whether my opinion of January 27 and February 9 (I think you mean February 3), 2009 has changed. You have rephrased it to say my opinion is that [the worker] was suffering from an underlying degenerative neck problem brought on by the natural aging process rather than activated by treatment which she received with respect to her left shoulder.

This is not my opinion at all.

As I stated in my letter to [the worker] of January 27, 2009, I believe that she has degenerative changes in her neck which have come on in the process of natural aging. I feel that all joints, necks included, that have such areas of degenerative arthritis are vulnerable to stresses and strains, which could include neck manipulation, therapeutic or otherwise. So it is quite understandable that a previously non-symptomatic neck can be rendered painful and can often be easily made sore by such events or activities. I have sometimes found that therapeutic manipulation of the neck can make symptoms worse, but of course, can sometimes make them better.

My opinion, based upon what she related to me, remains that she has an underlying degenerative problem in her neck and the symptoms in her neck have been activated in the course of the treatments she has received.

- [115] Dr. Hawkins report was provided to counsel. Counsel advanced written submissions on Dr. Hawkins response. No further reports were received from Dr. Djearam. The hearing was closed on March 26, 2010.

Analysis of the Issues

Issue : Were the neck and left shoulder problems related to the work-related injury of April 28, 2006?

Answer: No.

We will also address whether the worker had proper compensation coverage in place.

- [116] Section 3 of the 2002 Act states that a worker who suffers a disability is entitled to compensation unless the disability is attributable to conduct deliberately undertaken for the purpose of receiving compensation.
- [117] The worker submits that her neck and left shoulder problems occurred because of the chiropractic treatment she received during rehabilitation for her right shoulder injury. She maintains that she had no symptoms whatsoever prior to the 2006 right shoulder injury.
- [118] The worker underwent right shoulder surgery on May 10, 2007. File documents indicate she started complaining about neck pain in July of 2007. An initial assessment was completed on February 13, 2008 by Dr. Humphrey which indicated that "a thorough orthopedic and neurological examination' was completed. Findings note that "cervical spine ranges of motion were slightly limited with discomfort on lateral flexion bilaterally, worse on the left." This indicates the worker was having cervical spine discomfort before undertaking treatment from Dr. Humphrey.
- [119] A Functional Capacity Evaluation conducted on November 3, 2008 at Physio Plus noted the following:

- the worker demonstrated full functional recovery from her rotator cuff surgery;
- functional abilities of the right upper extremity and shoulder that are consistent with the Dictionary of Occupational Titles category of light;
- musculoskeletal evaluation did not reveal limitations/restrictions or impairments in the right shoulder.
- No ongoing physical dysfunction or pain in the right shoulder.

[120] We find the worker had recovered from the original right shoulder injury and surgery by November 3, 2008. She had the functional ability to perform the job demands as an early childhood educator.

[121] An MRI of the cervical spine completed on December 10, 2008 revealed “degenerative disc changes at the C5/6 level with a moderate sized broadbased disc bulge/osteophyte indenting the thecal sac and causing mild narrowing of the foramina bilaterally”.

[122] Dr. Hawkins renders a consultation report on January 27, 2009 in which he states:

I believe the degenerative disc at C5-6 is indeed degenerative in nature and has come on as an aging process. Such areas of arthritis, as it also true of other joints, can sometimes be painful and can often be easily made sore by activities or events in every day life. Similarly, therapeutic manipulation of the neck will sometimes make symptoms worse, but can also make symptoms better.

[123] Dr. Blaney provides his opinion on two occasions. Following is an excerpt from his February 14, 2010 report. His testimony explained his findings further:

It is my opinion that [the worker’s] right neck pain and left shoulder injury were caused solely by the inappropriate therapy provided by Summit Centre under the supervision and direction of Adam Humphrey, DC. There was no clinical indication for cervical spine manipulation. There was insufficient evaluation of her cervical spine prior to the initiation of spinal manipulation and this falls below standard of care medically and possibly chiropractically. She had pre-existing symptoms and signs highly suggestive of the presence of myofascial trigger points in her scalene and levator scapula muscles if present would have contraindicated the use of high velocity, large amplitude manipulation. The repeated use of thrust manipulation, despite complaints of neck pain by [the worker], continued to aggravate and perpetuate the myofascial pain disorder. The repeated manipulation potentially destabilized her C5-6 disc causing the disc protrusion and accelerating the osteophyte formation by increasing inflammation in the area as this is a known consequence of this type of manipulation.

[124] Policy CL-54, Merits and Justice of the Case notes that every decision must be based on the merits and justice of the case. The presumption of work-relatedness exists from the outset of the claim. Following are excerpts from Policy CL-54:

When the Presumption Does not Apply

If the decision-maker determines that, after the information gathering process is complete, the evidence weights more against the disability being work related than for it, then the “contrary” in presumption clause has been shown. The decision-maker is not required to identify an alternative explanation for the disability, supported by evidence of greater weight, in order to make this decision.

Conflicting Medical Evidence

The following general principles shall be applied by decision-makers in situations where conflicting medical evidence must be weighed for the determination of entitlement.

1. When addressing conflicting medical evidence, decision-makers will not automatically prefer the medical evidence of one category of physicians or practitioners to that of another. However, the opinion of a specialist concerning her/her area of specialty should generally be preferred to the opinion of a general practitioner.
2. Subject to paragraph 1. above, decision-makers shall consider all of the following criteria in deciding what weight to give to medical evidence:
 - (a) the expertise of the individual providing the opinion,
 - (b) the opportunity of the individual providing the opinion to examine the worker,
 - (c) the timeliness of the examination and report relative to the issue,
 - (d) the correctness of the facts and assumptions relied upon by the provider of the opinion,
 - (e) any issues of bias or objectivity with the opinion,
 - (f) objective versus subjective medical evidence,
 - (g) the findings of any relevant scientific studies referenced by a medical practitioner, as defined by the Act.

[125] We give most weight to Dr. Hawkins’ opinion rather Dr. Blaney’s findings. Dr. Hawkins is an orthopaedic specialist and a clinical professor of orthopaedic surgery with a specialty in shoulder and elbow surgery whereas Dr. Blaney is a medical doctor with training in osteopathy and acupuncture.

Dr. Hawkins is an Orthopaedic Surgeon duly qualified and licensed to practice in the specialty of orthopaedic surgery. He received his Doctor of Medicine degree from Queen’s University in 1969 and interned the following year at Vancouver General Hospital. He completed his residency training program in orthopaedic surgery in 1975 and received certification in the Royal College of Surgeons (Canada). Dr. Hawkins began practice in the specialty of orthopaedic surgery in 1976. In 1995 he was elected associate membership in the American Shoulder and Elbow Surgeons and in 2004, was elected to active membership. Dr. Hawkins currently practices in Vancouver; he is also a Clinical Professor of Orthopaedic Surgery at the

University of British Columbia. He is considered a recognized authority in orthopaedics.

Dr. Blaney is duly licensed as a medical doctor with training in osteopathy practicing in British Columbia. He graduated from the University of Ottawa in 1974 and completed postgraduate training in biomechanics and osteopathic manual therapy at Michigan State University continuing as a teaching assistant for their Continuing Medical Education program from 1987 to 1990. He has been practicing osteopathy for more than 27 years. He has also completed training in Acupuncture.

[An Osteopathic Physician (D.O. - Doctor of Osteopathy) must complete the same comprehensive medical education as their MD colleague as well as comprehensive training in biomechanical assessment of the musculoskeletal system and treatment including osteopathic manipulative therapy.

Following graduation from 4 years of intensive medical education, osteopathic physicians must further complete residency training in a specialty field of their choosing. They must then complete specialty certification examinations as well as medical licensure examinations required for registration with a provincial college of physicians and surgeons. - Canadian Osteopathic Association]

[The Royal College of Physicians and Surgeons of Canada is the national professional association for specialty medicine in Canada. The Royal College is the voice of specialty care in Canada. It ensures the highest standards for the training and evaluation of medical and surgical specialists in 65 specialty disciplines of medical, surgical and laboratory medicine including two special programs. The Royal College requires Fellows worldwide to maintain their competence throughout their careers; it acts and speaks out in support of the most appropriate context for the practice of specialty care and the best patient care. The Royal College is not a licensing or disciplinary body; its mission is educational and dedicated to setting standards. - Royal College of Physicians and Surgeons of Canada.]

Osteopathy as a specialty is not recognized as a certified medical degree by the Royal College of Physicians and Surgeons of Canada. Dr. Blaney is a licensed medical doctor with training in osteopathy; Dr. Hawkins is qualified and licensed to practice in the specialty of orthopaedic surgery and a recognized authority in orthopaedics.

[126] Policy CL-47, Pre-existing Conditions states, in part:

There may be circumstances when a work-related disability may aggravate a pre-existing condition. This policy provides guidelines in assessing whether a pre-existing condition shall be considered compensable or non-compensable.

(c) A non-compensable pre-existing condition is a condition that did not arise out of and in the course of employment. It is not work-related.

[127] We conclude that the degeneration in the neck and left shoulder is a non-compensable pre-existing condition. Evidence on file clearly indicates the worker was functionally able to return to her position as a day care worker. There is no evidence which conclusively indicates the right rotator cuff condition and treatment aggravated the left shoulder and neck functioning other than the worker's testimony. There is also evidence that she could have injured her neck and left shoulder while undertaking heavy gardening tasks such as erecting fences, shoveling and rototilling.

[128] Policy CL-54, Merits and Justice of the Case, addresses credibility as follows:

E. Definitions

- (a) Objective: Perceptible to the senses of another person or a readily observable result.
- (b) Subjective: Pertaining to or perceived only by the affected individual but not to the senses of another person or a result which is not readily observable.

Appendix A

C. Credibility

- 1.) When faced with contradictory evidence the decision-maker may have to assess the credibility of individuals, statements or documents.
- 2.) Assessing credibility may involve judging the sincerity of the individuals providing information. It may involve judging whether it is plausible that an event or series of events unfolded as recalled.
- 3.) Credibility is highly subjective, so it must be remembered that this is just one aspect of the investigation and must be considered in the context of all the evidence.
- 4.) Because a decision-maker concludes that someone is not credible in relation to an isolated fact or memory, this does not mean that the individual's credibility is always in question. For example, someone may honestly believe that what they are saying is the truth, but the weight of other evidence does not support their belief.

[129] Dr. Hawkins clarified his opinion on the worker's subjective reporting. He states in his March 4, 2010 report to WCAT:

My opinion, based upon what she related to me, remains that she has an underlying degenerative problem in her neck and the symptoms in her neck have been activated in the course of the treatments she has received.

All of these events and the symptoms described are what [the worker] has related to me and the opinion I am offering is based on the timeline and the description she gave me.

[130] Further documentation reveals Dr. Hawkins responds to a query from Dr. Humphrey on December 3, 2008 with respect to subjective reporting by the worker (see para. #47).

[131] The worker provided several different versions of how the original injury to her right shoulder occurred:

1. Worker's Report of Injury – injured shoulder while carrying a file box for several days with early childcare curriculum. File box weighed 70 lbs.
2. Dr. Hawkins February 14, 2007 report states the worker told him she was doing a big fashion show in Tokyo and grabbed three heavy garment bags and strained her shoulder.
3. Note to file of February 22, 2007 by the adjudicator states worker told her over a 2-week period running around Tokyo attempting to sell her childcare curriculum and carrying 40 lbs. of curriculum and luggage.
4. The worker testified at the hearing that she had taken 200 lbs. of her multicultural early childhood gardening curriculum to Japan. They were delayed in Customs when returning to Canada so had to run to catch the plane. Her shoulder was injured while running to meet the plane and carrying heavy luggage.

[We note the worker completed the Worker's Report of Injury/Illness as the injury occurring on April 28, 2006. The itinerary contained on file, prepared by the worker, reveals they were in Japan until May 1, 2006 before returning to Canada.]

[132] There are also discrepancies with respect to the purpose of the trip to Japan:

1. Originally the worker did not wish to pursue a claim "as she had a variety of meetings the day she injured her arm and was working in the capacity of her consultant business." (She did not have compensation coverage in place for the consulting business at that time.)
2. A January 13, 2007 note to file by the adjudicator states she spoke to the worker and was advised the purpose of the trip was to negotiate with tour companies to sell cultural tours and promote First Nations arts and crafts and promote her video on early childhood care.
3. February 6, 2007 meeting with the worker – the worker stated the trip was funded by the daycare business; the purpose was for the consulting business.
4. Reported to Dr. Hawkins on February 14, 2007 she was doing a fashion show.
5. Itinerary/summary report prepared by the worker for the weeks April 18 to May 1, 2006 lists objectives of the trip was the promotion of cross cultural awareness between Yukon First Nations and the Japanese and to encourage and develop relationships that will foster shared economic benefits.
6. Two newspaper articles dated March 22 and May 9, 2006 state the trip was organized to promote First Nations arts and crafts and sell the Yukon as a travel destination.

[133] We do not accept the worker's statements nor her testimony in some instances. As provided by Policy CL-54, and considering the numerous discrepancies in the worker's subjective reporting starting with the time and mechanism of the 2006 injury, her conflicting reporting throughout the file of her activities and activity levels during recovery, and the disparity in her version of

treatment as opposed to the records of Dr. Humphrey, the worker's credibility is questionable.

[134] Section 4 (2) deals with optional coverage of a sole proprietor as follows:

Despite any other provision in this Act, the board may, on the application of a sole proprietor and subject to any conditions that it may establish, deem the applicant to be their own worker.

[135] Section 7(1) states:

If a work-related disability is caused while the worker is employed outside of the Yukon, compensation is payable only if

(c) the worker's employment outside of the Yukon is a continuation of the employment by the same employer in the Yukon.

(3) A worker or the worker's dependant must notify the board within 30 days of the date the worker's disability arose or their intention to claim compensation under this section.

[136] The worker filed a claim with the board on May 31, 2006 stating that she was injured on April 28, 2006. This contravenes section 7(3) of the Act. Also, file documents strongly indicate the purpose of the Tokyo trip was for the consulting business. This too, is in contravention of section 7(1)(c) of the Act.

[137] Section 78 states:

When an employer commences or recommences in an industry, the employer shall provide, within 10 days of commencement or recommencement, to the board the statements required under subsection 76(1).

[138] The worker's consulting business was incorporated and became a registered company on May 17, 2005. As noted by section 78, registration with the board was required within 10 days from that date. It was not until November 17, 2006, 7 months after the injury, and 2 ½ years after it became an incorporated company, the worker registered her consulting business. Coverage became effective retroactively to January 1, 2006. She was charged assessments for the full year in addition to a late filing penalty of \$25. As a worker of a limited company, the appellant provided a value of service of \$1500. At no time did the worker inform the board that she was working outside of Canada in a consulting capacity. This contravenes sections 78 of the 2002 Act.

[139] The hearing officer addressed this in his April 15, 2009 decision, saying:

If a person drove an automobile without having auto insurance coverage and had a motor vehicle accident, the person would have no medical or financial assistance from any insurance company. (If that person was injured, his/her

provincial or territorial medical plan would likely still apply, however.) In a comparative sense, [the consulting company] had not notified the board of the incorporation status and that [the worker] was a director. That put the business into a default position, however by Yukon law [the worker] was defined as a “worker” under the *Workers’ Compensation Act* at any rate – whether the business was in default or not. Being a worker entitled her to benefits under the *Workers’ Compensation Act*.

[140] Initially the worker did not wish to pursue a claim because, by her own admission, she was working in the capacity of her consulting business when she was injured. She did not have personal coverage for this company. A February 19, 2007 letter to the worker indicates the board advised her that an additional assessment of \$79.10 was levied against the consulting business account to pay for 50% of the compensation costs paid by the board for the April 28, 2006 injury. Section 87 states:

If an employer

(b) refuses or neglects to pay any assessment, or the provisional amount of any assessment or installment or part thereof,

in addition to any penalty or other liability to which the employer may be subject as a result of their refusal, the board may, in respect of each disability incurred by a worker in their employ that occurs during the period of default, require the employer to pay to the board an additional assessment of up to one-half of the cost, as determined by the board, of the compensation payable in respect of each claim to a maximum of \$10,000.

[141] There is no indication the board levied further assessments, other than the \$79.10 in February 2007, to cover the cost of the claim up to a maximum of \$10,000 as provided in Section 78.

[142] The worker was provided with loss of earnings benefits from May 9, 2007 to December 17, 2008 in the amount of \$36,720. In addition, medical costs of the claim incurred to date amount to \$38,896. We find the worker has been provided compensation in the amount of \$75,616 for the right shoulder injury that occurred in April 2006.

[143] Section 42 of the 2002 *Act* addresses medical aid as follows:

(1) The board may provide a worker with any medical aid, including services, devices or equipment, necessary to grant relief from a work-related disability.

(2) All questions as to the necessity, character and sufficiency of any medical aid shall be determined solely by the board.

[144] Although the worker underwent and paid for several treatments (acupuncture, massage therapy, hyperbaric chamber treatment, and ultimately osteopathy) of her own accord, resulting in relief of her pain symptoms, section 42 does not allow workers to determine their course of treatment, nor does it provide financial relief to workers who choose their own course of treatment. The original injury was to the worker's right shoulder. By November 3, 2008 documentation indicates the worker had full functional capacity of her right shoulder.

Conclusion

[145] The workers suffered from neck pain beginning in July 2007. She was provided with treatments to release the tight right-sided scalene muscles in 2008. A functional capacity evaluation of November 3, 2008 revealed the worker demonstrated full functional recovery from her (right) rotator cuff surgery and no ongoing physical dysfunction or pain in the right shoulder.

[146] An MRI indicated the presence of degeneration in the cervical spine, left shoulder and left rotator cuff, confirmed by Dr. Hawkins. Although he opined that these conditions could be worsened by manipulation/treatment, he also said symptoms could be alleviated by the same treatment. The original injury was to the right shoulder.

[147] Although the worker believes she was injured during treatment by Dr. Humphrey which she reported involved lifting weights in excess of 60 lbs. over her head, there is no evidence contained on file to indicate the worker was directed to lift, pull or push 60 lbs. of weight. However, the record indicates the worker was cautioned several times not to complete tasks during her recovery period which would overstress her right shoulder, including gardening activities for her daycare.

[148] There is no conclusive evidence of an acute injury or high velocity trauma to the worker's neck which would result in a painful neck and left shoulder injury.

[149] It appears errors occurred in allowing the worker to adjust her coverage between the daycare and the consulting businesses (see paras. #9 through #12). The director and manager of Claimant Services agreed the worker was in Tokyo on consulting business but did not have coverage for that company. As stated previously, the worker did not register nor pay workers' compensation assessments on the consulting business until November of 2006; seven months after the injury, yet her coverage became effective January 1, 2006.

Decision

The worker’s appeal is denied. The hearing officer’s April 19, 2009 decision is confirmed.

The worker’s neck and left shoulder problems were not related to the original work-related injury.

There is no conclusive evidence to support the worker’s claim that chiropractic treatments received to alleviate her right shoulder injury caused an injury to her neck and left shoulder.

Dated this **10th day May 2010** 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 |