

# Workers' Compensation Appeal Tribunal

## Decision #168

**Claim No.: 3000-1724**

Date of Notice of Appeal: April 22, 2010

Date Notice received at the Tribunal: April 28, 2010

Date of Oral Hearing: May 12, 2010

Date of Decisions: June 14, 2010

**Appeal Committee Members appointed under s. 24(1)  
of the *Workers' Compensation Act*, R.S.Y. 2002, c. 231**

Committee Chair:	H. Leenders
Member representative of employers:	H. Hermanson
Member representative of workers:	M. McCullough

**In attendance:** The Worker via telephone  
The worker's representative - Derek Holmes  
Vernna Johanson, Recorder

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

## Introduction

The worker was employed as a construction labourer on a seasonal/casual basis. On January 14, 2008 he filed a claim for compensation to the Yukon Workers' Compensation Health and Safety Board (the "board") indicating he injured his left shoulder while slipping and falling from a ladder at work on November 27, 2007. The worker was provided with compensation benefits and medical aid. A vocational assessment was performed on March 12, 2009 in order to determine a suitable occupation for establishing earning capacity. He was deemed as a welding/brazing soldering machine operator. The worker disagreed with the case manager's chosen occupation and appealed it to the hearing officer who also denied the appeal and confirmed the case manager's decision.

The worker asks the tribunal to reverse the hearing officer's April 9, 2010 decision and to find that he continues to be incapable of work.

- [1] The worker attended the hearing via telephone and testified by affirmation. He was represented by the workers' advocate. The employer was notified of the appeal but did not attend. The proceedings were recorded.

## Evidence

- [2] The appeal committee considered the worker's testimony, the advocate's submissions, board policies as noted below, and the entire claim record as provided by the board.

## Jurisdiction

- [3] On April 28, 2010 the worker forwarded an appeal of the hearing officer's April 9, 2010 decision with the tribunal under s. 53 of the *Workers' Compensation Act*, S.Y. 2008 (the "Act"). The review (appeal) should 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.
- [4] The worker filed a claim for an injury which occurred on November 27, 2007. Compensation entitlement decisions are made pursuant to legislation in place at the time of injury. In this instance the *Workers' Compensation Act*, R. S.Y. 2002 as amended to the date of injury, should be used to determine the issues of entitlement.
- [5] The board provided the following policies to the tribunal as relevant to this appeal under the authority of section 64 (4) of the 2008 *Act*:
- Policy RE-02-1, Duty to Co-operate, Part 1 of 4: Early and Safe Return to Work Plans
  - Policy RE-10, Vocational Rehabilitation
  - Policy RE-13, Determining Suitable Employment & Earnings Capacity Loss

## Evidence from the Record

- [6] The Worker's Report of Injury/Illness completed on January 14, 2008 states that he injured his left shoulder when he slipped on ice while on a ladder which caused him to fall. The worker reported that he was employed as a carpenter's assistant on a permanent basis working 60 hrs. per week earning \$21/hr. in addition to room and board. He estimated his total earnings

for the past 12 months at \$50,000. There are discrepancies in the worker's and the employer's report of injury.

The Employer's Report of Injury/Illness states the worker injured his left knee, left side of his ribs and left shoulder while he was on the third rung from the top of the ladder and frost caused him to slip off and hit his ribs on a wall brace while falling. The worker landed on his left knee and shoulder. The employer reports the worker had been employed as a construction labourer since August 21, 2007, on a seasonal/casual basis, working 40 hrs. per week at a rate of \$21/hr. No room and board was provided in addition to the worker's wage. In the previous 12 months the worker's estimated total earnings were \$13,047.

- [7] The worker attends the Destruction Bay Health Centre on November 27, 2007 and is then seen at the Whitehorse General Hospital by Dr. Tirschmann also on November 27<sup>th</sup>. The diagnosis is "Soft tissue injury/concussion chest wall & left knee, ? fracture scapula". Dr. Tirschmann notes "no" factors that might complicate recovery and "no" permanent impairment is likely.
- [8] X-rays of the left shoulder and left knee undertaken on November 27, 2007 indicate no acute fracture or dislocation of the left shoulder and no "acute osseous injury seen" in the left knee.
- [9] Dr. Tirschmann's progress report dated December 18, 2007 states the worker needs physiotherapy. He is going to his hometown of Terrace, BC "tomorrow" and will follow-up with his family doctor. Dr. Tirschmann reports the worker is fit for light duties that do not involve the use of his left shoulder.
- [10] The worker returns home and sees his family physician, Dr. Brown, on December 28, 2007. The worker attends with his arm in a sling. Dr. Brown advises the worker to remove the sling whenever he can and start exercising it or he will be at risk for a frozen shoulder.
- [11] Dr. Brown reports on February 4, 2008 that the worker is improving but "feels that he is not able to do the work that will be asked of him when he goes back north". Dr. Brown encourages the worker to do his physiotherapy at home.
- [12] An adjudicator notifies the worker by letter on February 5, 2008 that his claim for injuries to his left shoulder, chest wall and left knee have been accepted.
- [13] A February 13, 2008 progress report by Dr. Brown states the worker was progressing well but was doing some snow shoveling and after ½ hour his left shoulder was quite painful. Dr. Brown notes the worker is not fit to return to work at this time. The worker is referred for physiotherapy.
- [14] Two progress reports by Dr. Brown dated May 6 and May 20, 2008 note the worker continues to have problems with his shoulder "although he says he is gradually improving" and has fairly good range of movement.

- [15] An MRI of the left shoulder is completed on May 27, 2008. The Impression reads, "Evidence of a supraspinatus tendinopathy through the critical zone. No definite rotator cuff tears are identified."
- [16] Orthopaedic surgeon Dr. Jordan Leith examined the worker on May 27, 2008 and provided the following assessment. "Based on this evaluation, I think that [the worker] has a biceps tenosynovitis and irritation of the short head of the biceps as well." Dr. Leith "highly recommends" the worker undergo physiotherapy and consider a cortisone injection. There is no indication that surgery is required.
- [17] Physiotherapist Mallory Glustein, Cedar River Physiotherapist Corporation, completes a physiotherapy report on June 10, 2008. Current objective findings indicate the worker's left shoulder range of motion has increased from 25-50% to 60-70% and his strength has increased from 50% to 70%. Ms. Glustein reports the worker can perform modified or regular duties concurrently with physiotherapy treatment beginning June 10, 2008.

A July 3, 2008 physiotherapy report states the worker's current objective findings indicate his left shoulder range of motion has increased to 75-80% and his strength to 85%.

- [18] An August 25, 2008 note to file by the adjudicator states the worker's accident employer contacted him. The worker was employed as a construction labourer; he did not do any welding at the time of accident. "He swung a hammer and did other labourer duties."
- [19] On September 5, 2008 Dr. Brown responds to the adjudicator. Following are excerpts from this report:

In your letter you suggest that we should get some objective reporting with regards to function to determine whether he can return to his injury occupation.

As noted on the enclosed letter I saw him a couple of days ago and I asked him how he is doing once again subjectively he stated that he felt about 70 to 75% better.

On examination he has got good range of movement of his left shoulder. There is a slight area of tenderness over the anterior part of his shoulder near the lateral part of his clavicle. The problem seems to arise when he does any activity involving the shoulder. He put it to the test recently and stated that after 5 minutes of moderate activity his left shoulder became very painful and took about ½ hour to recover.

He has good range of movement of shoulder when examined. There is no loss of power, tone or sensation in his left upper or lower arm.

[20] The worker completes a Functional Abilities Assessment at the Cedar River Physiotherapy and Rehabilitation Centre. On September 16, 2008, Mallory Glustein, Registered Physiotherapist completes a report. Recommendations include a general aerobic conditioning program; continue with home shoulder exercise program; hamstring strength and stretching program and a follow-up visit with Dr. Leith. Following is an excerpt from the recommendations:

Regarding [the worker's] current ability to return to work as a Carpenter's Assistant; according to the information provided (the Jobs Demands Analysis for Carpenter, and CSC for Carpenter) [the worker] does not currently meet the Job Demands. Specifically, he does not meet the requirements for lifting, lifting and carrying, and overhead reaching.

[21] Dr. Brown reports on September 17, 2008 that the worker is still having problems with his shoulder. He suggests a steroid injection and if that does not work, an orthopaedic opinion "would be appreciated". Dr. Brown checks off the box on the report which says the worker is not able to return to the workplace in any capacity within the next 20 days. He also checks off the "no" box that queries whether the worker is ready for a rehabilitation program. A September 18, 2008 progress report states the worker was given an injection into the tender parts of his left shoulder.

[22] On October 17, 2008 the board's chief medical consultant issues a report. He notes that there are three different job titles assigned to the worker – construction labourer, carpenter/carpenter's assistant and welder. Following is an excerpt from that report:

Impression: Almost 11 months have elapsed since the incident. There is no evidence of any significant structural abnormalities. Recovery was anticipated quite quickly, but the treating practitioners report that [the worker] feels that he is unable to return to his desired employment because of ongoing discomfort. The therapist has described him as being 80 to 85% recovered and one normally expects a return to work plan to achieve the final recovery which often is not possible without a return to work.

The medical consultant suggests, because there are no significant structural abnormalities that a repeat surgical consultation is not warranted. He recommends the worker attend a multidisciplinary rehabilitation program. Further, due to "the prolonged time loss in the absence of any significant objective findings does raise the possibility that other factors may be involved in the delay in returning to employment."

[23] The worker attends The CBI Physiotherapy & Rehabilitation Centre on November 20, 2008 for assessment in the Occupational Rehabilitation 2 (OR2) program. On November 25, 2008 a report is rendered. Following are excerpts from the report:

Disability Perception  
EPIC Hand Function Sort  
. . . [The worker's] Rating of Perceived Capacity (RPC) score on the first administration of this test was 111/248. This score indicates that he

perceives his physical ability to be at a “sedentary” level.

#### Upper Extremity Function Index

[The worker] completed the Upper Extremity Function Index, a questionnaire used to obtain an indication of his perception of his ability to perform various activities given his current upper extremity injury. He obtained a score of 32/80, where the greater percentage is reflective of greater perceived ability.

#### Anticipated Outcome

[The worker] is an appropriate candidate for the Occupational Rehabilitation 2 Program. He will begin on November 25, 2008, attending from 8:00 a.m. to 2:00 p.m. It is expected he will be discharged on January 9, 2008 [should be 2009] as fit to work with no limitations.

The OR2 treatment team consists of:

Dr. Janet Ames, Sports Medicine Physician

Pamela Parker, Physiotherapist

Ashley Bowden, Kinesiologist

Finola Gallagher, Occupational Therapist

Dr. Gordon England, Psychologist

- [24] A December 11, 2008 note to file by the adjudicator states he spoke with CBI regarding a teleconference meeting to discuss treatment plans and expectations. “The worker has indicated that he was interested in training as a welder”. The adjudicator notes that if the worker is not capable of returning to his preinjury occupation of construction labourer then welding would not be appropriate either. [This is confusing considering he told others that he had his welding ticket/certificate and had been working as a welder for 30 years – see para. #30.]
- [25] A December 18, 2008 report by CBI Physiotherapy states the worker attended 20 out of 20 sessions and was making progress with respect to his left shoulder function; however, he reported slipping in the snow and falling on his left outstretched arm while on a group walk. The worker is put on “interrupt” so he can attend his family physician for investigation. He will return to the program once he has clearance from his family doctor.
- [26] The worker is referred back to physiotherapy. A January 16, 2009 report by Mallory Glustein provides an analysis of “Left rotator cuff strain/biceps strain/AC (acromioclavicular) joint sprain. Comments read, “He was at CBI . . . when he reinjured his shoulder’ (work conditioning program) – I am surprised his shoulder was not recovered more from the initial injury in Nov/07”. [Underlining added by physiotherapist.]
- [27] On February 20, 2009, CBI issues an Interim Report. The worker returned to the OR2 program on January 29, 2009 and had attended 14 out of 17 sessions. The worker reports ongoing pain in his left shoulder although the movement in his shoulder is improving. He worker continues to progress with his function and strength with the anticipation he will be

discharged from the program on March 6, 2009 functioning comfortably within the “light” category of physical demands.

- [28] The worker is discharged from the CBI OR2 program on March 6, 2009 fit to return to work with limitations. Overall he has demonstrated the ability to function in the “light” category of physical abilities and into the entry level of the “medium” category as defined by the Dictionary of Occupational Titles (DOT). The report states:

[The worker] continues to experience greatest difficulty with work over shoulder height. It should be noted that [the worker] continues to experience pain in his left shoulder with certain activities and movements and reassurance has been provided that this should improve over time. [The worker] has been provided with a copy of the exercise program for independent use. He has been encouraged to continue exercising on his own to preserve his gains, and to continue his recovery.

- [29] On April 24, 2009, Donald Bruin, Registered Vocational Professional, Vocational Rehabilitation Assessments Inc. (VRA) completes a Labour Market Survey for the worker. Three occupations are identified for direct entry into the workforce: 1) Contractors and Supervisors, Metal Forming, Shaping and Erecting Trades (NOC 7214); 2) Welding, Brazing and Soldering Machine Operators (NOC 7265.2); and 3) Public Works Maintenance Equipment Operators (NOC 7422). Average wage data is supplied for each with respect to northern BC and Yukon.

- [30] Also on April 24, 2009 a Vocational Assessment is completed by VRA. Following are excerpts from this report:

[The worker’s] general learning ability is average. . . . Based on testing in English, [the worker’s] academic competencies for word reading was at the 12.9 grade level. He scored in the grade 10.4 for sentence comprehension; his math score fell well within the grade 7.4 level.

Currently he is employable via direct entry on a full time basis. Following a review of his direct and related skills and his complete occupational profile the following direct entry occupations have been identified: (see para. 29 above).

[The worker] meets the aptitudinal requirements, educational requirements and physical demands of these occupations on a full-time basis. He will be able to recover his indexed long term compensation wage rate currently and/or in time.

Education: Post-Secondary Education: He continued his education and successfully completed a 3 year Welding program (in English college) in 2001 at Northwest College.

Certifications, Licenses: [The worker] further reported he also obtained

the St. John's First Aid Course, Level III while attending the welding course. [The worker] reported to have obtained his construction certificate from . . . ; however, [the worker] does not remember the date of the welding certificate.

#### Narrative Summary of Claim File Following the Intake Meeting

[The worker] reported working as a Welder for the past 30 years. He reported that he has not worked as a welder since his last employer, . . . , laid him off due to a shortage of work. He reported an interest in carpentry and reported he obtained employment in July 2007 as a Carpenter Framer with . . . in Dawson City.

[The worker] reported working in several occupations while residing in Montreal, QC. He worked for one year as a construction labourer building swimming pools and as a demolition labourer. Prior to this he reported working significantly as a welder, however was unable to recall employers or specific dates. He did report having over 30 years experience as a welder.

#### Summary and Conclusions

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

[The worker] actively participated in a review of this report on April 24, 2009. . . . We reviewed the jobs he is qualified to perform as outlined in this report. He agreed with the results of the assessment, including the above list of occupations he can directly enter at this time.

- [31] The case manager writes to the worker on May 11, 2009 informing him of the decision with respect to suitable occupations and deeming of earning capacity. The case manager notes the worker demonstrated the competency for direct re-entry into the workforce in the occupations identified by VRA. The suitable occupation chosen for establishing his earning capacity is Welder, Brazer and Soldering Machine Operator – NOC 7265.2. Because this occupation is not readily available in the Yukon, wages and jobs in British Columbia were used to determine his earning capacity. The case manager provides the worker's wage loss calculation. His monthly wage loss supplement is \$543.90 per month, in addition to one month's loss of earnings benefits in order for the worker to seek employment.
- [32] The worker attends Dr. Brown on June 16, July 23 and August 6, 2009 with subjective complaints of pain in his shoulder. The August 6 report states the worker said he can only lift 25 lbs. and "so feels that he is not able to work at any meaningful employment that he is trained for." Dr. Brown notes the worker is not medically capable of working full duties, he estimates the worker cannot return to work in any capacity for over 20 days and he does not consider a rehabilitation program appropriate for the worker at this time.

- [33] A December 22, 2009 note to file by the adjudicator states the worker telephoned to provide his new address. He mentioned that he is in a lot of pain. "He felt his shoulder was doing better and he was going to look for work, but he was recently arrested and when he was handcuffed it aggravated his condition."
- [34] The worker appeals the case manager's May 11, 2009 decision to the hearing officer. A decision is rendered on April 9, 2010 denying the worker's appeal and confirming the May 11, 2009 decision.

### **Doctor's Reports**

The worker attended his family physician regularly with subjective complaints of shoulder pain. We will list the dates that he attended Dr. Brown after seeing orthopaedic surgeon, Dr. Leith on May 27, 2008, but will note only objective reporting by Dr. Brown.

[35] **2008**

- June 10, 17
- July 2, July 16 – objective reporting – "there is tenderness in the anterior shoulder joint but no swelling He is able to abduct his shoulder to approximately 120 degrees."
- August 5, 20,
- September 5 [see para. #19]
- September 17 – Dr. Brown suggests steroid injection; September 18 – injection
- October 7
- November 5
- December 19 – The worker slipped and fell reinjuring his shoulder. Dr. Brown reports "There is no deformity but he is reluctant to move it at all. He has got pain in his shoulder over his scapular."

**2009**

- January 2, 15, 23
- March 16, 31
- April 14
- May 5, 26
- June 16
- July 8
- July 23 – Dr. Brown reports "This gentleman seems to be relatively stable at the present time. He seems to have fairly good range of movement but still has significant pain in his shoulder."
- August 6
- September 4, 23
- October 7, 21, 30
- November 12
- December 17

## 2010

- January 15 – Examination is as before.
- February 5, 11
- April 12

### **Hearing Officer's April 9, 2010 Decision**

The hearing officer found the deeming process was carried out correctly and in accordance with the procedure. He also noted there was a lack of objective medical reporting by Dr. Brown to demonstrate the worker's inability to return to work. The hearing officer found the worker's wage loss should be recalculated using the correct amount for the suitable occupation at which the worker was deemed.

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

- [36] The worker testified that Dr. Brown has been his family physician for 10 to 12 years. He said today his shoulder is still sore and hurting.
- [37] The worker said he attempted to work for a roofing company last summer for a couple of days. The third day he was told to go home. He was not paid for the two days he did work. The worker said he could only work with one hand/arm and that is why he was told to go home. This is the only job he has attempted since he was injured in 2007. He tries to work on his own property but has difficulty even mowing the lawn. He uses one arm to mow. He cannot go to work when his shoulder hurts.
- [38] He said that he was a welder and now he cannot do that. He said that "your head is not there when your shoulder is sore; you could make yourself worse".
- [39] When questioned whether the worker was undertaking home exercises, he responded that he does "very light exercise". He said the physiotherapist had him doing stretching exercises, which he continues to do but it hurts every time he attempts it. Holding the telephone receiver to his ear and then changing it from one ear to the other causes his hands to shake.

### **The Workers' Advocate's Submission**

- [40] The advocate says the issue before WCAT is whether or not the worker continues to be physically incapable, as a direct result of the accident he suffered November 22, 2007 [should be November 27, 2007]. He submits the preponderance of medical evidence indicates that the worker is still disabled. He further submits that the worker's vocational assessment was flawed and the decision to deem him was based on the assessment which was also flawed.
- [41] The advocate submits the worker's physician has consistently stated, and it is contained on the record, the worker is not employable at all. The advocate says medical reporting by the worker's family doctor shows that he has never cleared the worker to return to work and all medical reporting indicates the worker continues to have problems with his left shoulder. He asks the committee to contrast this information with the reporting from VRA. He says the

board has ignored the consistent medical reporting from the worker's physician and has preferred an examination by a physiotherapist over that of the worker's general practitioner.

- [42] The advocate lists medical reporting for September 17, 18, October 7, 22, November 5 and December 19, 2008; January 2, 15, 23, March 16, April 14, May 5, June 16, July 23, August 6, and September 4, 2009. He submits Dr. Brown, the worker's family doctor, does not provide an estimated return to work date on any of the medical reports because Dr. Brown's opinion is that the worker is disabled from any sort of employment.
- [43] He contends once the board received the April 24, 2009 vocational rehabilitation and combined it with the CBI report to deem the worker it resulted in the worker being deemed, inaccurately in their opinion. The worker now receives just over \$500 per month when previously he was making approximately \$60,000 per year.
- [44] The advocate maintains that an optimistic assessment was provided by CBI on which the worker was deemed. Contrary to that, there is consistent information from the worker's own physician saying he is not capable of returning to work in any capacity. When these two contradictory opinions are reviewed, they ask the committee to consider the following criteria:
1. Who is in a better position to make a solid qualified medical opinion – the kinesiologist or the family physician?
  2. Who is, by virtue of where they work, more likely to be biased towards an optimistic assessment? The advocate says the vocational rehabilitation people work directly for the board. The worker's physician can bill the board or the provincial Health Care program; they believe the physician is less biased.
  3. What does the medical today tell us about the worker's fitness for work?
  4. What does the *Act* say, with regards to giving the worker the benefit of the doubt?
- [45] He contends the board did not follow its own policy when deeming this worker. He says specifically, Policy RE-13, Determining suitable Employment and Earning Capacity Loss", is predicated upon accurate medical information. It was wrong to prefer the opinion of a physiotherapist to the worker's own physician.
- [46] The advocate says the worker is not "resting on his laurels" since the decision was made. He has been struggling to get by on less than \$600 a month, attending the food bank; he is physically not capable of working.
- [47] The changes being sought are having the worker placed in a position where he can avail himself of the support of the board in his quest to recover from his workplace injury. They ask that the appeal committee find in the worker's favour so the board can resume medical management of the file by consulting with the worker's physician as to what medical course of action would be most appropriate.

## **Issue**

1. Was the worker deemed correctly?

**Answer:** Yes

## Analysis of Issues

The committee understands that to answer the question as posed in the issue there are two distinct parts that need to be addressed:

- I ) Had the worker reached maximum medical improvement when he was deemed?
- II) Did the board use the appropriate procedures as outlined in their Policy ER-13 to deem the worker?

### I) Had the worker reached maximum medical improvement when he was deemed?

[48] We will summarize the events to show the progression of this claim to the time of appeal.

- The worker was injured on November 27, 2007 in Destruction Bay, Yukon and was diagnosed as: "Soft tissue injury/concussion chest wall, & left knee, ? fracture scapula" with no factors that might complicate recovery. A subsequent x-ray done at the Whitehorse General Hospital did not show any broken bones or dislocation in the left shoulder.
- When the pain from the injury persisted the worker returned to his home in Terrace, B.C. on December 19, 2007 and first saw his family doctor, Dr. Brown, on December 28, 2007.
- The worker's claim with the WCB was accepted on February 5, 2008 specifying the areas of injury as left shoulder, chest wall, and left knee.
- On February 13, 2008, Dr. Brown noted that the worker was progressing well, but that after shovelling snow for a while during the previous week the worker's shoulder had become sore and thus he was not yet fit to go back to work.
- An MRI of the left shoulder done on May 27, 2008 indicates "evidence of supraspinatus tendinopathy through the critical zone, but no definite rotator cuff tears are identified". The orthopaedic surgeon, Dr. Leith, on the same day reports that he thinks that the worker has biceps tenosynovitis and irritation of the short head of the biceps as well and recommends that the worker be involved in physiotherapy to address that diagnosis.
- A Functional Abilities Assessment report evaluating the worker at the Cedar River Physiotherapy & Rehabilitation Centre in Terrace, B.C. on September 16, 2008, states in regards to worker's job as a carpenter's assistant: "the worker currently does not meet the job demands".
- The board's medical consultant, upon reviewing the file on October 17, 2008, notes that there is no evidence of any significant structural abnormalities and thus recovery should have been anticipated quite quickly. Quoting from the Official Disability Guidelines 2008 Edition he refers to a study based on 646 cases that individuals suffering from bicipital tenosynovitis were able to return to work after 35 days of medical treatment. He raises the possibility that other factors may be involved in the delay in returning to employment.

- In late November 2008, the worker started a program at the CBI Physiotherapy & Rehabilitation Centre in Prince George (CBI) for an assessment in the Occupational Rehabilitation 2 Program (OR2) with the expectation of being discharged in January 2009 as fit to return to work with no limitations.
- On December 18, 2008, after 20 sessions at CBI, the worker slipped on the snow and sprained/strained his shoulder and went home to Terrace to receive attention from his doctor.
- The worker returned to the OR2 program at CBI on January 29, 2009 and was discharged on March 6, 2009 as fit to return to work with limitations. The discharge report reads: "Overall, the worker has demonstrated the ability to function within the "Light" category of physical abilities and into entry level of the "Medium" category."
- The same report also includes the following: "It should be noted that he continues to experience pain in the left shoulder with certain activities and movements, and reassurance has been provided that this should improve over time. He has been provided with a copy of his exercise program for independent use. He has been encouraged to continue exercising on his own to preserve gains and to continue his recovery."
- On March 16, 2009 the worker reports to Dr. Brown that he is much improved but not enough to go back to his previous job.
- On April 24, 2009, Vocational Rehabilitation Assessments Inc. (VRA) published a vocational assessment and a labour market survey for the worker based on their assessment done on March 12, 2009. It showed the worker was employable and had the physical capacity to earn an income on a full-time basis. Three different occupational clusters were identified where the worker met and exceeded the vocational attributes requirements.
- The board chose a Welding/brazing and soldering machine operator as the suitable occupation for the worker in order to establish earning capacity. On that basis the worker is deemed and receives a monthly wage loss supplement of \$543.90 commencing July 1, 2009 and payable on the last day of the month. (It should be noted that the initial calculations were based on a wrong input figure and the final result for April 30, 2010 was a \$508.75 monthly payment).
- Subsequent reports from Dr. Brown, dated June 16 and August 6, 2009, state that the worker is still in a significant amount of pain and is disabled from work. The doctor's statement is derived from the worker's assertion that "he can only lift 25 lbs and so feels that he is not able to work at any meaningful employment that he is trained for." Yet the doctor says that he estimates the worker will be able to return to the workplace in some sort of capacity in over twenty days.

- When asked during the appeal hearing if he had worked at all since his injury, the worker replied that he had worked two days for a roofing company as a labourer during the summer of 2009, but found he could not do the work required and the foreman let him go.

[49] From the foregoing information the committee notes conflicting evidence as to the worker's physical capabilities from the medical caregivers.

- Dr. Brown, the worker's family physician in Terrace, B.C., has seen the worker approximately 46 times since the injury in November 2007. His reports appear to be based on the worker's account of his physical condition (subjective reporting) and very little or no personal examination of his patient. His impression is that the worker is disabled from work because of the pain he continues to experience.
- Dr. Leith, orthopaedic surgeon, interprets the MRI findings and recommends physiotherapy to address the tenosynovitis problem. The board's medical consultant, after reviewing the worker's file and MRI report, states that the type of injury sustained by the worker should resolve itself after 35 days of treatment.
- A number of physiotherapists, involved with the worker in an effort to get him back into the workforce, all indicate marked improvement of the injured shoulder after a number of treatments. The final sessions at CBI in Prince George culminating in early March 2009 definitely conclude the worker is capable to complete tasks in the light to entry level medium employment categories.

[50] At the hearing, the worker was asked if he was still doing exercises and he replied that he did a little, but that they hurt. The committee agrees this implies the worker is not keeping up his required regimen of exercises. We find this disconcerting especially in the light of the admonition contained in the report from CBI which reads: "He has been encouraged to continue exercising on his own to preserve gains and to continue his recovery."

[51] We have weighed the evidence concluding that more weight should be given to the experts' findings and those who had a hands-on relationship with the worker. The advocate maintains most weight should be given to the worker's family physician rather than a kinesiologist or physiotherapist. We note the worker's occupational rehabilitation team which completed the assessment consisted of professionals including a Sports Medicine Physician; a Physiotherapist; a Kinesiologist; an Occupational Therapist; and a Psychologist.

[52] The worker's advocate stated that since the board was paying CBI, their reporting should carry less weight than the worker's physician's reporting [see para. #44, question 2]. We find this statement perplexing.

[53] The board, upon receiving the final report from CBI, concluded that the worker had reached that level of physical conditioning that would allow him to rejoin the workforce in the light to medium employment categories. It should be noted that the worker participated in 44 out of 47 program days at CBI, which in the opinion of the committee, puts them in a position to make an accurate assessment of the worker's capabilities.

## **Conclusion**

- [54] We conclude the board, in assessing the worker's medical information, acted properly in deeming the worker.
- [55] The committee has not attempted to include events subsequent to the deeming decision. It is possible that those events may have had an effect on the worker's shoulder, but they were considered to be a non-issue in deciding this appeal as they were not related to the work-related claim.

## **II) Did the board use the appropriate procedures as outlined in their Policy RE-13 to deem the worker?**

- [56] Policy RE-13, "Determining Suitable Employment & Earnings Capacity Loss", states:

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

The worker was rated at 75% to 80% of his pre-injury physical capacity at the time of his discharge from the work conditioning program at CBI although according to him and his doctor, he was physically unable to return to his pre-injury job. The criteria of the policy are met.

- [57] After determining that the worker is unable to return to his pre-injury job, the board has to match the worker with suitable employment, which is defined in Policy RE-02-1, "Duty to Cooperate, Part 1 of 4: Early and Safe Return to Work Plans". It reads as follows:

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

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

- [58] The means to find suitable employment is done through an assessment process which is set out in Policy RE-10 and reads as follows:

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

[59] The worker is assessed on March 12, 2009 and a number of suitable occupations are identified, all of which are within his skills and abilities according to the psychometric testing. In other words, the worker demonstrates the competency to re-enter the workforce in a number of occupations within the light to entry level medium employment categories.

[60] Following the assessment process, the decision maker has to determine the earnings for the chosen employment in order to make sure that the worker's compensation will match that of his pre-injury employment. The determination of earnings for the suitable employment are covered by Policy RE-13 which reads:

The YWCHSB will rely on current (i.e. not more than three years old) published labour market information or, in the absence of published labour market information, on a labour market survey of at least three suitable employers when determining estimated earnings for the suitable occupation.

Wage scales applied to a suitable occupation will be based on the greater of Yukon wage scales for the occupation or the wage scale in the jurisdiction where the worker resides.

For workers whose return to work plan is designed to improve existing or transferable skills for the suitable occupation, estimated earnings will be the mid-point on the scale.

[61] The adjudicator's decision letter of May 11, 2009 states that the occupation chosen to establish earning capacity is a Welder, Brazer, and Soldering Machine Operator. (Definitely suitable employment as the worker told several professionals that he has many years experience in welding, including a welding ticket or certification). If there is a shortfall in the worker's earnings because of this deeming process, the board will make up the difference as a weekly wage loss benefit. Legislation with respect to wage loss is found in Section 37 of the *Yukon Workers' Compensation Act*, R.S.Y.2002. It states:

A worker's weekly loss of earnings is equal to the difference, if any, between the

- a) worker's weekly loss of earning, up to the maximum wage rate for a week immediately before the work-related disability arose; and
- b) estimated average weekly earnings that the worker could, in the board's opinion, earn from time to time, in a suitable occupation after the work related injury arose.

[62] The board assessed the worker to be at the mid-point wage for the Welder, Brazer, and Soldering Machine Operator based on his previous experience as a welder. The rates for northern B.C. were used as the worker resides there. The average wage for an operator with transferable skills is reasonable in determining estimated earnings. That resulted in a weekly wage loss which has been paid since July 1, 2009. The worker was paid one month loss of earning benefits for the purpose of seeking employment, that being June 2009.

**Conclusion:**

[63] The committee concludes that the appropriate procedures to deem the worker were carried out correctly by the board as articulated in the *Act* and policies.

**Decision**

The worker's appeal is denied. The hearing officer's decision of April 9, 2010 is confirmed.

Dated this **14<sup>th</sup> day of June 2010** in the City of Whitehorse, Yukon Territory.

This decision is made with the full agreement of the appeal committee.

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H. Leenders, Presiding Officer

**Committee Members:**

H. Leenders	Presiding Officer
H. Hermanson	Member
M. McCullough	Member