As of May 12, 2015, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2004-06402
WCAT Decision Date: November 30, 2004
Panel: Teresa White, Vice Chair

Introduction

The worker, who was born in 1964, suffered a compression fracture of his L1 vertebra on July 23, 2002 when he fell approximately eight feet while working as a construction labourer doing framing work.

The worker appeals Review Division findings of February 5, 2004 to the Workers' Compensation Appeal Tribunal (WCAT). The review officer considered two issues.

The first concerned vocational rehabilitation benefits. Section 239(2)(b) provides that decisions of the Review Division respecting matters referred to in section 16 (which include vocational rehabilitation) may not be appealed to WCAT. As such, that issue is not before WCAT.

The second issue considered by the Review Division was the Board's decision to grant the worker a permanent partial disability award based on permanent functional impairment (PFI) of 7.38% of total disability.

The worker initially requested an oral hearing, but later indicated he wished this appeal to proceed by way of read and review of the evidence and submissions on file. I agree that the issues can be fully considered and resolved based on that basis.

The worker has received advice and assistance from a workers' advisor and has provided a written submission. The employer, although notified, is not participating.

Issue(s)

The issue is whether the worker's permanent disability award has been properly determined. This includes consideration of whether the worker is entitled to consideration for a disability award based on loss of earnings pursuant to section 23(3) of the Act, and whether he is entitled to an award for chronic pain.

The worker is not objecting to his long term wage rate, and the plateau date used as the effective date for his permanent disability award has already been confirmed by a previous WCAT panel.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Jurisdiction

This appeal was filed under sections 239 and 242 of the *Workers Compensation Act* (Act), which govern appeals from decisions of review officers of the Board.

The worker's permanent disability award was based on the application of the Permanent Disability Evaluation Schedule (PDES), which is a rating schedule compiled under section 23(2) of the Act. WCAT has no jurisdiction respecting an appeal respecting the application of the PDES where the specified percentage of impairment has no range or has a range that does not exceed 5% (see section 239(2)(c) of the Act). In considering this section, WCAT panels have taken different approaches to the interpretation of that restriction on jurisdiction with respect to impairment of the spine. I have reviewed those decisions. I prefer, and agree with, the reasoning in WCAT-2004-02317, which concluded that the range of impairment of the spine includes the global loss of range of motion of 24% rather than the amounts specified for each individual motion. As such, I have concluded that WCAT has jurisdiction in respect of the Board's decision respecting the application of the PDES in this case.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board which is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

Section 250 of the Act provides that WCAT must make its decision based on the merits and justice of the case but, in so doing, must apply relevant policies of the board of directors of the Board. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into and determine all matters of fact and law arising in an appeal before it.

The worker's injury occurred after June 30, 2002, which was the effective date for changes to the *Workers Compensation Act* made by the *Workers' Compensation Amendment Act, 2002*.

Background and Evidence

The worker's compensable injury occurred on February 7, 2002 when he fell while working as a construction worker on a framing project. He was found to have an L1 burst fracture with about 25% compression. The injury was considered to be stable. The physicians who assessed the worker at a trauma centre estimated that the worker would be off work for at least four months.

While in hospital, the worker was noted to have cocaine and alcohol dependence, of moderate severity. The physician who assessed him suggested an intensive treatment

program while the worker was off work. See the consultation report from Dr. Rucker dated July 26, 2002. I note that subsequently the worker has indicated that he does not use illicit drugs or abuse alcohol.

The worker had problems with pain management immediately after the injury and after his discharge from hospital. On August 8, 2002 the worker's family physician Dr. Amin reported that the worker had severe pain, and could not sleep. The medication he had been given (Vioxx) was not helping. The worker has also been prescribed Tylenol No. 3 which he has indicated in a later submission causes him gastrointestinal distress,

The worker participated in an occupational rehabilitation program (ORP) through an external provider of services to workers on behalf of the Board. He was discharged on March 3, 2003 because of a lack of progress and inability to tolerate the daily program schedule. Pain and medication issues were noted to be the primary barriers. The discharge report states that because of the worker's pain/medication issues, it was recommended that if future rehabilitation was to be considered it should involve frequent consultation with a physician. The report further states that medication and pain issues continued to be significant barriers for the worker, and suggested that a pain program may help him address the issues.

The worker's condition was felt by the Board to have plateaued as of April 6, 2003, and the worker was referred for a disability award assessment. As noted previously, the plateau date has been confirmed by another WCAT panel.

On the client questionnaire completed by the worker as part of his disability award assessment, he indicated that he was taking eight to ten Advil and eight to ten Tylenol No. 3 per day.

On a pain diagram, the worker indicated intermittent headaches, mostly before going to bed. He had the sensation of a "line" going across his mid back with forward stooping. He had intermittent dull aching on the dorsum of his right wrist with extension. The primary area of pain was in his mid-low back. He also indicated he had intermittent pins and needles in that area with "too much activity." The worker described the pain in his worker's lumbar spine as constant, and stabbing in nature, as if someone was cutting him with a sharp piece of glass. He felt pressure on his lower back which was worse with constant movement.

The worker also indicated a wide range of functional impairments due to pain in the low back.

With respect to the possibility of a pain program, a Board medical advisor reviewed the file in March 2003 and stated that from his experience as a pain program physician, and the reports on file, he did not see what a pain program could do for the worker. The medical advisor noted that the worker had been pain free for up to five hours a day if he

paced his activities. The worker's L1 burst fracture was initially a very serious injury, but there should be further incremental improvements of his condition over the next one to two years. However, this would be so slow and progressive that the worker met the definition of plateau as set out in policy item #34.54.

The Board medical advisor said that the worker's restrictions were:

- Lifting limited to light-medium.
- No repetitive bending or flexing of trunk.
- No fixed standing position.
- No sustained bending forward.

An x-ray on April 7, 2003 showed a healed L1 fracture with no evidence of complications. There was evidence of loss of height but no complications related to it.

On June 10, 2003 Dr. Amin stated on his physician's progress report that the worker continued to complain of pain and was "awaiting to go to pain program." Dr. Amin said, "I would be refusing to see this patient further as I can't help him!"

On June 12, 2003 the worker was seen by the spine clinic at the hospital. The physician who completed the report stated that he tended to agree with the conclusion that the worker's condition had plateaued. There was "a possibility" that the condition might improve over time but the fracture had healed with reasonably good lordosis. It was unlikely that surgical intervention would benefit the worker. The physician stated that he was "not exactly sure what his ongoing pain is due to." An MRI was recommended to determine whether there were any degenerative changes that could be contributing to the worker's back problems, and if there were none, the L1 fracture was likely responsible.

An MRI was carried out on July 21, 2003. The L1 fracture was identified. There was no evidence of cord signal change, and no evidence of canal stenosis or neural foramina stenosis at the visualized levels.

The worker was seen again by the spine clinic on October 16, 2003. He was complaining of back pain that was there all the time, and came on as soon as the worker tried to move around or do activities. The worker was reported to be unhappy with his disability award. He was "currently doing phone sales."

The physician noted that the MRI did not show any evidence of neurological compromise. There was a compression fracture at L1 which was "approximately 50-60%." There was reasonable alignment of the spine. There was endplate herniation of the T12-L1 disc into the vertebral body of L1. There was no nerve root compromise.

The option of surgical fusion was discussed with the worker but the worker was "not keen on pursuing this avenue." The worker was told that most patients with this type of injury were able to continue on, but the worker's history of heavy labour may make it less likely of a return to that type of activity.

On September 8, 2003 the worker's request for review of the Board's decision to conclude wage loss benefits on the basis that the worker's condition had plateaued effective April 6, 2003 was denied. The review officer found that the weight of evidence supported the Board's decision and that he was no longer temporarily disabled by April 6, 2003. The worker appealed that Review Division decision to WCAT. In a decision dated February 19, 2004, another WCAT vice chair denied the worker's appeal, finding that he had plateaued by April 6, 2003.

The background evidence respecting the Board's assessment of the worker for permanent functional impairment is summarized very concisely in the Review Division findings under appeal. After my review of the Review Division decision, and the entire file and submissions, I find myself in agreement with the facts as they are summarized in the Review Division decision. As such, I do not consider it necessary to repeat them all in this decision, and I will repeat only those aspects of the facts and submissions necessary to explain my decision.

The worker was found unable to return to his pre-injury job. The ARCON impairment rating reported indicated that the worker had a scheduled impairment of 7.38% for abnormal motion of the spine. This degree of impairment was used to implement the permanent disability award.

With respect to pain, the worker was noted to assume a position in the chair whereby he pushed on the chair with his left arm, a position which he said took some of the pressure off his back. He demonstrated facial grimacing while sitting and sat for approximately 15 minutes before standing and walking around, complaining of increased low back pain from sitting. During the testing he reported severe low back pain (10/10) after the second trial of the leg lift and was unable to finish the third trial.

With respect to symptom response during the evaluation, the worker indicated at least 8/10 during each of the activities required by the evaluation (0 indicates no symptoms, and 10 indicates symptoms so severe that the examinee cannot continue). With respect to functional tolerance, the worker reported:

- His balance was reduced.
- He avoids bending forwards. His low back did not curl as far.
- He experienced back pain even carrying a load of laundry across the room. He could only carry 10 pounds for short distances.
- He avoided climbing stairs and could not climb them two at a time.
- He avoided crawling due to pain.

- He tended to pick things up with his toes rather than crouching down.
- He could not drive more than 45 minutes.
- Overall, he felt more fatigue and had to take frequent naps.
- Non-compensable right wrist pain hampered his ability to handle objects.
- He avoided kneeling as getting in and out of the position aggravated low back pain.
- He could not lift small objects above his head. Even lighting a 4L jug of milk could aggravate his low back pain for days afterwards.
- He could not lift his daughter or play kickboxing with his son. He was unable to fight, go dancing, snowmobile, canoeing or run and jump. He had sharp pain in his low back if he coughed.
- His ability to pull or push objects was limited because it aggravated his low back pain.
- He noticed low back pain when reaching for dishes. He must plan his movements.
- He was unable to sit for more than 15 to 20 minutes. He could not sit in a canoe. He used a lumbar roll to support his back while sitting.
- He had to "sway back and forth" while standing and could not stand for more than 30 minutes.
- He had limiting stooping tolerance.
- Rainy weather bothered his back and he felt "like an old man now."
- He walked slowly to guard his low back and developed a limp when walking for one to two hours.

The physician who examined the worker for permanent impairment concluded on the basis of the examination that the range of motion measurements were likely unreliable. However, they appeared to be in keeping with the medical information that was provided. The CADA concluded that the range of motion measurements were the best reflection of the worker's residual impairment of function. The CADA noted that where there is both anatomic loss and loss of range of motion, the final impairment is based on the greater of the two. The worker had lost 70% of the height of the L1 vertebra due to the compression fracture. This calculated to 2.8% of total disability. The range of motion findings calculated to an impairment of 7.38% and as such were utilized.

With respect to sections 23(3), 23(3.1) and 23(3.2) of the Act, the claims adjudicator in Disability Awards (CADA) concluded that it was not impossible for the worker to return to his occupation at the time of his injury or to a related occupation. The long term wage rate was roughly at minimum wage level (90% of the minimum wage for the class average earnings for construction labourers), and the worker was considered to have the skills to obtain other minimum wage employment. As such, the worker was not considered to satisfy the criteria for an award under subsection 23(3) of the Act. A claim log entry of August 5, 2003 states that if an employer was willing to train the worker on the job, the Board would consider making funds available to assist with the job training.

Specifically, the CADA noted that the worker retained the ability to understand and follow directions from a skilled tradesperson which he would need as a construction helper. He also retained the ability to identify the materials, equipment and tools used at the job site, and to use the tools in his tool belt. The CADA said that while this was not an exhaustive list, it summarized the essential skills required in the worker's occupation.

The Review Officer found that, due largely to the long-term wage rate used to calculate the worker's permanent disability award, the worker did not meet the threshold for an assessment under section 23(3). The worker's injury job had begun only five weeks before the injury, and the worker had no employment earnings during the previous one year. As such, the Board used the statistical class average earnings, which placed the worker's wage rate at approximately the minimum wage level.

The Review Officer noted that the worker was not able to return to heavy labour occupations. The worker had, in the past, worked as a machinist and had experience operating a variety of tools and machining equipment. He had the physical ability to work in occupations requiring light to medium lifting, which do not require repetitive bending or flexing of the trunk, fixed static standing or sustained forward bending. The worker's retained skills and physical capabilities would, with appropriate vocational rehabilitation assistance, enable him to return to work in suitable occupations in which he could match the long term earnings level he had at the time of the injury.

With respect to chronic pain, the review officer noted that the worker's description of his ongoing pain was limited to the area of impairment, which was the low back. As such, the review officer concluded that the worker's pain was included in the disability award based on functional impairment.

The worker provided a statement to the Review Division. He stated that he had worked for a telemarketing company for two months. He said that sitting for too long was painful, but in that job he was able to get up and move around. However, the worker had found he could not earn enough money on the job, having earned $570.00 between September 22 to the end of November.

An initial vocational assessment in the worker's file is dated April 11, 2003. It provides a lengthy history of the worker's previous employment, which included working in the construction industry, log building, concrete work and landscaping labour. The worker also has a history of work as a member of the ironworkers' union, making springs, and working as a forest firefighter during his teenage years. He has also done some short term commercial fishing. The worker has also taken a meat cutting course and worked for one year as a meat cutter. The worker has been on and off social assistance but told the VRC that he had never had a problem finding work when he wanted it.

The worker has a grade 12 education. At the time of the vocational assessment he did not have a driver's license because he "has high fines to pay." The worker does not have computer skills but told the VRC he could receive, forward and delete email.

The VRC prepared a rehabilitation plan dated March 8, 2004. The appropriate occupations/occupational categories were considered to be:

- Plastic products inspectors. This required light strength, high school education, and training on the job. The work involved assembling, finishing and inspecting plastic parts and finished products. The VRC found 322 local businesses that hire in the manufacturing of plastic products.
- Assemblers and inspectors, electrical appliances, apparatus and equipment manufacturing. This work involves assembling prefabricated parts to produce household, commercial and industrial appliances and equipment. The strength required fell into the medium category, and involved handling loads between 10 and 20 kg. Some high school education and training on the job are required. There were 100 companies that were "local" and have positions related to the field.

The VRC budgeted eight weeks of job search for a light production job.

The worker expressed interest in becoming a welder. The VRC noted that the amount of training (three year apprenticeship) exceeded his vocational rehabilitation entitlement. Further, the worker would only be able to handle the lighter forms of welding.

There are many pages of job search records sent by the worker to the Board in the file. They indicate that the worker sent a "package" to a large number of employers in a variety of sectors, including light manufacturing.

In his submission received by WCAT on June 9, 2004, the worker noted that he had not been referred to a pain program, based on the opinion of a Board medical advisor who had not examined him. This was contrary to the advice of the ORP. The ORP discharged him as unfit to return to work. The worker submitted that he should be referred to a pain program to determine whether the pain he experienced was disproportionate to his injury.

The worker also submitted that his work history did not include anything except labouring positions, and that the jobs listed in the vocational rehabilitation assessment were jobs that required labouring. He is restricted to light/medium lifting, with no repetitive bending or flexing of the trunk, and no fixed static standing or bending forward.

The worker requested additional vocational rehabilitation funding; however, WCAT does not have jurisdiction with respect to further vocational rehabilitation as set out above.

The worker provided a letter from a former co-worker, who stated that the worker was a hard worker who could move things when asked. He was fit and ready to take on any task on a construction site. The worker now limps and complains about pain in his back.

Findings and Reasons

There are three aspects of the worker's permanent disability award in issue. The first is the extent of functional impairment, the second is whether he is entitled to an award for chronic pain, and the third is the issue of loss of earnings. I will address them in turn.

Functional Impairment

The worker's degree of functional impairment is based on the application of the PDES, and in particular the percentages of impairment based on loss of range of motion of the lumbar spine. I have reviewed the evidence on the file, including the permanent functional impairment evaluation and other medical evidence, including the imaging studies. I can see no reason to interfere with the findings respecting range of motion, nor the degree of impairment that corresponds with those findings. There is insufficient evidence upon which I could conclude that the CADA or the Review Division erred in their application of law and policy, or that the permanent functional impairment evaluation results were in error. As such, those findings and conclusions are confirmed.

Chronic Pain

The second issue is whether the worker is entitled to an additional award for chronic pain. Published policy respecting chronic pain is found in policy item #39.02 in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). This policy was effective January 1, 2003 and applied to all new claims and all active claims that were awaiting an initial adjudication as of the effective date. This has been interpreted, and I agree, to mean an initial adjudication respecting compensation for chronic "subjective" or pain complaints. In the worker's case, the initial adjudication occurred after the effective date, and I agree with the prior decision makers that the current policy item #39.02 in the RSCM II applies.

The policy states that in making a determination under section 23(1), the Board will enquire carefully into all of the circumstances of a worker's chronic pain resulting from a compensable injury or disease. Evidence that may be considered includes the findings of any multidisciplinary assessments, information provided by the worker's physician and any other relevant information on the file. The worker's own statements will also be considered, along with the worker's conduct and activities.

The worker's pain complaints fall into the category of "specific chronic pain," which is pain with clear medical causation or reason, such as pain that is associated with a permanent partial or total physical disability.

A worker with specific chronic pain that is consistent with the impairment is not entitled to an additional award for chronic pain. Pain is considered to be consistent with the associated compensable impairment where the pain is limited to the area of the impairment, or medical evidence indicates that the pain is an anticipated consequence of the physical or psychological impairment. In these cases, an additional award for the specific chronic pain will not be provided, as it would result in the worker being compensated twice for the impact of the pain.

Pain is considered to be disproportionate where it is generalized rather than limited to the area of the impairment or the extent of the pain is greater than that expected from the impairment.

The worker has extensive, and now long-standing complaints of pain. A pain program was not considered to be of likely benefit, based on the opinion from the Board medical advisor. I take that to mean that a pain program would not improve the worker's condition and as such would not reduce his complaints of pain.

Taking the evidence as a whole, it is apparent that the worker experiences pain that is inconsistent with the injury and the extent of objective functional impairment, for reasons that are complex and not well-understood. Unless one accepts that the worker's complaints of pain lack veracity, he is entitled to an award for chronic pain.

There are some suggestions in the file that the worker's effort during the permanent functional impairment examination was inconsistent and as such the range of motion findings may not be reliable. It could be inferred from that evidence that the worker might exaggerate his pain complaints. There is also some evidence that the worker has had difficulties with drugs and/or alcohol in the past, which could contribute to his experience of pain or constitute evidence of pre-existing difficulties in coping with pain. However, I do not consider that evidence sufficient basis to conclude that the worker is not telling the truth about the extent of his pain complaints, which have been consistent and expressed on many occasions. The fact that the worker exhibits pain behaviour or limits his participation in functional activities does not mean his experience and complaints of pain are not genuine. As noted in the policy, the decision maker must

consider the worker's reports, the medical information available, and the worker's conduct and activities.

The worker's permanent functional impairment award was based solely on loss of range of motion of the spine. Inherent in such an award is an amount for pain that is consistent with the degree of impairment and the injury. In the worker's case, the evidence supports a conclusion that he experiences pain that is disproportionate to the degree of functional impairment. In such a circumstance, the applicable published policy provides for an award of 2.5% for chronic pain.

The worker is entitled to an award based on policy item #39.02 in the RSCM II for chronic pain.

Section 23(3) Award

The final issue is whether the worker is entitled to consideration for a permanent disability award based on section 23(3) of the Act.

Section 23(3) of the Act provides:

> Subject to sections 34 and 35, if
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> (a) a permanent partial disability results from a worker's injury; and
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> (b) the Board makes a determination under subsection (3.1) with respect to the worker;
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> the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between
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> (c) the average net earnings of the worker before the injury, and
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> (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
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> (i) the average net earnings that the worker is earning after the injury;
> (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.
>
> (3.1) A payment may be made under subsection (3) only if the Board determines that the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so

exceptional that an amount determined under subsection (1) does not appropriately compensate the worker for the injury.

(3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation.

Policy item #40.00 provides, in part:

Section 23(3) is a discretionary provision that establishes rules for compensating a worker for a permanent partial disability in exceptional circumstances. Section 23(3) is only applied where the test set out under section 23(3) and (3.1) is met. This test requires that the Board determine whether the combined effect of a worker's occupation at the time of injury and a worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) does not appropriately compensate the worker for the injury. Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills.

For the purposes of determining whether the worker meets the test set out under section 23(3) and (3.1), the Board must consider the combined effect of a worker's occupation at the time of injury and the resulting disability. While a worker may experience a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under section 23(3) and (3.1). The following is a list of criteria that must be considered under section 23(3) and (3.1). Each of these criteria must be satisfied in order for a worker to be assessed under section 23(3).

- The occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature;
- As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature;
- The effect of the compensable disability is that the worker is unable to work in his or her occupation or in an occupation of a similar type or nature, or to adapt to another suitable occupation, without incurring a significant loss of earnings.

Skills are defined in this context as the learned application of knowledge and abilities.

> In all cases, the Board must determine if, following recovery from a work injury, a worker is either able to return to the occupation at the time of injury or to adapt to another suitable occupation. This determination includes consideration of both the worker's transferable skills and the worker's post-injury functional abilities. In the vast majority of cases a worker's entitlement to a permanent partial disability award is determined under the section 23(1) method and this estimate of impairment of earning capacity is considered to be appropriate compensation.
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> However, in exceptional cases, the amount determined under section 23(1) may not appropriately compensate a worker. In these cases, medical evidence confirms that the work injury makes it impossible for a worker to continue in the occupation at the time of injury or in an occupation of a similar type or nature. In addition, the worker is considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.
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> For the purposes of this policy, a significant loss of earnings means the Board may conclude in these exceptional cases, that the loss of earnings a worker will experience as a result of the combined effect could not have been anticipated under the section 23(1) method of estimating a worker's long term loss of earning capacity.
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> An example of when the combined effect may be considered so exceptional is one where a work injury results in a significant disability of two digits on the dominant hand of a worker whose occupation requires fine motor skills. As a result of the disability, the worker is no longer able to perform fine motor skills, and consequently, is unable to continue in the pre-injury occupation, or another occupation of a similar type or nature. In addition, due to the disability, the worker is unable to adapt to another suitable occupation without incurring a significant loss of earnings.
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> As a result, the section 23(1) award may not be considered to appropriately compensate the worker for the impact of the combined effect, and may therefore result in a consideration under section 23(3).

There is, in addition, a "practice directive" respecting the application of section 23(3). Practice directives do not constitute published policy, and as such are not binding on decision-makers in the workers' compensation system, but they do provide guidance and assistance in interpreting the Act and published policy.

Practice directive #46 provides that if there are indications that the worker will have difficulty returning to his or her pre-injury employment for reasons related to permanent restrictions arising out of the injury, the team will also investigate whether the worker

meets the "so exceptional" requirements of section 23(3) for assessment of permanent disability benefits. At a team meeting the DAO will determine what additional relevant information may be needed to complete a permanent partial disability assessment. The case manager, in consultation with the officer in Disability Awards and the vocational rehabilitation consultant (VRC), will arrange for this information to be gathered at the appropriate time in the worker's recovery.

The practice directive further states that information required may include a description of the essential skills required for the worker's occupation. It states that occupation for this purpose is defined by the collection of job titles that fall within a four digit occupation code as categorized by the National Occupational Classification ("NOC"). In describing the essential skills of an occupation, information may be gathered from a variety of sources including, but not limited to, data collected from specific jobs and other occupational descriptions such as is found in the NOC publications. Consideration will also be given to a worker's transferable skills and residual functional abilities.

The practice directive goes on to state, in part:

> The policy requires that three criteria must be satisfied in order for a worker to be assessed under section 23(3):
>
> 1*. The occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature;*
>
> Policy defines skills as the learned application of knowledge and abilities. Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills. The worker's occupation at the time of injury will be identified in terms of the NOC classification system, at the four-digit (unit group) code level.
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> 2. *As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature;*
>
> A similar occupation is defined as an occupation where the first three digits of the NOC code (minor group) are the same as the worker's pre-injury occupational code. Where a worker is considered to be able to perform any one or more of the jobs listed in the preinjury four digit NOC occupation code, or any one or more of the jobs under a similar four digit occupation, the worker does not meet the "so exceptional" test. The medical evidence must confirm that the disability makes it impossible for the worker to perform the essential skills of the occupation. The duties for

an occupation must be considered in terms of the essential skills necessary to perform those duties.

Skills are not to be confused with physical demands such as standing, sitting, etc. The impact of limitations on physical demands may be mitigated through workplace modifications and therefore, the worker would still be able to perform the essential skills of the occupation.

For example, an ironworker with a knee injury may not be able to return to his pre-injury job because it requires that he climb ladders several times a day, which he is no longer able to do. Climbing ladders would not necessarily be determined to be an essential skill for the occupation of ironworkers. The worker still has the skills to be an ironworker. The NOC four-digit code for ironworkers (7264) lists various jobs within that occupation, which a worker may still be able to perform, even with the knee injury.

For example, an electronics technician is required to have fine motor skills to perform the core duties of his occupation. If the technician sustains a back injury, he still retains the fine motor skills necessary to be an electronics technician. The worker may experience difficulty with physical activity of prolonged sitting or standing. However, these are physical demands, not skills of the occupation required to perform the duties of an electronics technician.

3. *The effect of the compensable disability is that the worker is unable to work in his or her occupation or in an occupation of a similar type or nature, or to adapt to another suitable occupation without incurring a significant loss of earnings.*

Where a worker is unable to return to the pre-injury occupation or a similar occupation, consideration will then be given to whether the worker can adapt to another suitable occupation. For this purpose a worker is considered to retain all the essential skills of the pre-injury occupation, with the exception of the limitations caused by the permanent disability. Pre-injury transferable skills (considering as well the possibility of enhancements or re-certifications, through vocational rehabilitation assistance) will also be included to determine the worker's residual (post-injury) skill set. Where the worker is considered able to return to a suitable occupation, it must further be determined whether the worker will incur a significant loss of earnings.

For the purposes of the policy, a significant loss of earnings means the Board may conclude in these so exceptional cases, that the loss of

> earnings a worker will experience as a result of the combined effect could not have been anticipated under the section 23(1) method of estimating a worker's long-term loss of earning capacity. A loss of earnings is not sufficient to meet the requirements of the "so exceptional" test. Consideration must also be given to the nature of the section 23(1) award in relation to the Permanent Disability Evaluation Schedule and/or other schedules, judgements and considerations used to determine the functional impairment and whether these could not have anticipated this worker's disability and resulting loss of earnings capacity. In considering such loss, consideration may also be given to comparing the extent of loss through aggregate statistical references on average occupational earnings.
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> For example, a logging helicopter pilot suffers a moderate head injury and has residual audiovestibular disturbance assessed at 10% disability. The disability is such that it renders it impossible for him to meet the physical requirements for holding a helicopter pilot's license and he is also unable to return to a different job in the same occupation or a similar occupation. The 10% award may be appropriate compensation for the average worker. However, it may not represent appropriate compensation in the case of the helicopter pilot.

In the worker's case, his occupation was identified as "trades helper and labourer," which is NOC #7611. The examples listed in the June 6, 2003 memo that addressed the "so exceptional" consideration fall within that NOC classification, and include, but are not limited to such occupations as bricklayer helper, carpenter helper, construction labourer, demolition worker, plumber helper and roofer helper. The duties include such things as unloading construction materials, moving materials, mixing materials, assisting trades people such as carpenters, removing rubble from construction sites, and operating tools.

The CADA noted that the question was whether the worker still had the ability to apply those skills, and referred specifically to understanding directions, identifying the materials, equipment and tools used on the jobsite, and using the tools in his tool belt.

I agree that the worker does retain those specific skills. However, if the listed duties are considered, it becomes apparent that one of the essential "skills" necessary for occupations in NOC #7611 is the ability to handle potentially heavy materials. It is difficult to envision any job falling within NOC #7611 that could be performed by a worker who is limited to light/medium work, with no repetitive bending or flexing of the trunk, no fixed static standing and no sustained forward bending. Although those activities are not necessarily "skills" and could be classified as "physical demands," they are not the type of physical demands that could be mitigated through workplace modifications. If the worker were a skilled trades person, he may have "helpers"

available to do the heavy lifting and bending, but the worker's skills, and his employment history, all required the ability to perform relatively heavy physical labour. I consider that his L1 compression fracture, which is acknowledged to constitute a serious injury, to have limited his ability to perform an essential "skill" of his occupational category, which is heavy physical labour.

I acknowledge that in most cases heavy physical labour is not a "skill," in the sense that it is a learned application of knowledge and abilities. However, in the limited circumstances of this case, where the vast majority of jobs in the NOC classification require heavy physical labour, it must be considered a "skill." There is very little else that could be classified as a "learned application of skills and knowledge" in the jobs listed, and while the worker retains the ability to follow directions, and identify his tools, he is limited in his ability to use those tools because of his compensable disability, which includes chronic pain and the inability to do heavy lifting, sustained standing or bending.

In support of that conclusion, and as an example, if the worker had become paraplegic because of his spinal injury, he would still retain the ability to follow instructions, to identify his tools and to "use" the tools in his tool belt, but he most certainly would not have been able to return to work as a trades helper or labourer. As such, physical ability to perform heavy labour must be considered a "skill" required of a trades helper or labourer.

As such, I have concluded that the worker's injury does make it impossible for him to continue in the occupation at the time of injury or in an occupation of a similar type or nature. However, that does not mean he is entitled to a permanent disability award based on section 23(3). Policy states further that, in addition, the worker must be considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.

After considering the information in the worker's file, and the submissions, I am not persuaded that he is unable to adapt to another suitable occupation without incurring a significant loss of earnings due to his work injury. The worker may be unable to work in an occupation requiring heavy labour, but he has already demonstrated his ability to adapt to another occupation. The worker has been employed in telemarketing, and stated that he is able to perform that work because it allows him to sit, stand and move around.

The worker's long term wage rate is, as has been noted by the previous decision-makers, near minimum wage level. His employment history, and his training and experience, are consistent with a similar earnings level. The type of employment suggested by the VRC, which included work such as plastics product work or assembly do not require the physical skills required of heavy labour work and would replace the worker's pre-injury income.

As such, the worker is not entitled to a permanent disability award based on section 23(3) of the Act.

Conclusion

The worker's appeal is allowed, and the Review Division decision varied, in part. He is entitled to a permanent partial disability award based on 7.38% of total disability, plus 2.5% for chronic pain. He is not entitled to consideration of a permanent disability award based on section 23(3) of the Act.

Teresa White
Vice Chair

TW/cd

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898