

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

WCAT Decision Number : WCAT-2005-01639
WCAT Decision Date: March 31, 2005
Panel: Teresa White, Vice Chair

Introduction

The worker appeals two decisions of the Review Division of the Worker's Compensation Board (Board) to the Workers' Compensation Appeal Tribunal (WCAT). The workers' compensation claim underlying this appeal arose on August 28, 2002, when the worker injured his left ankle while working as a self-employed millwright.

The first Review Division decision is dated April 8, 2004 and flowed from an October 29, 2003 decision of the Board. The Board's decision concerned the termination of wage loss benefits on October 26, 2003, and the worker's eligibility for a permanent disability award based on section 23(3) of the *Workers Compensation Act* (Act). The review officer also denied reimbursement for legal fees.

The second Review Division decision is dated October 22, 2004. It flowed from a Board decision of February 27, 2004, which addressed the worker's permanent disability award.

The worker is represented by legal counsel. An oral hearing was held on February 28, 2005 in order to hear evidence from the worker and submissions from counsel. The worker's wife attended the oral hearing as an observer.

There is no employer participating in this hearing because the worker was self-employed at the time of his compensable injury.

Issue(s)

The first issue is whether the worker was entitled to wage loss benefits after October 26, 2003.

The second issue is whether the worker's permanent partial disability award (PPD) was properly determined. This includes consideration of the effective date, the percentage of permanent functional impairment awarded, the applicable statutory provisions, and the worker's entitlement to an award based on loss of earnings pursuant to section 23(3) of the Act.

The issue of reimbursement for legal fees also arises.

Jurisdiction

These appeals are brought by the worker pursuant to section 239(1) of the Act.

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

The worker's compensable injury occurred on August 28, 2002, after the June 20, 2002 effective date of the amendments to the Act made by the *Workers Compensation Amendment Act, 2002* (Bill 49). The law and policy that applies is that in effect after the amendments to the Act by Bill 49.

Published policy applicable to this appeal is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Section 239(2)(b) states that a decision by a review officer respecting a matter referred to in section 16 of the Act may not be appealed to WCAT. This means that decisions relating to vocational rehabilitation are not appealable to WCAT.

It must also be noted that section 239(2)(c) of the Act limits WCAT's jurisdiction with respect to Board decisions respecting the application under section 23(1) of rating schedules compiled under section 23(2) of the Act where the specified percentage of impairment has no range, or has a range that does not exceed 5%. The Permanent Disability Evaluation Schedule (PDES) is a rating schedule compiled under section 23(2) of the Act and it was applied in determining the worker's permanent disability award. WCAT has jurisdiction respecting the award for loss of range of motion of the worker's ankle, because the range specified in the PDES is from 0 to 12% (12% is the award granted for total immobility of the ankle, and loss of range of motion amounting to less than total immobility is determined based on the range from 0 to 12).

However, the amount specified in the PDES for a talocalcaneal arthrodesis, which means a fusion of the talocalcaneal joint (also sometimes referred to as the "hind foot" or the subtalar joint), is up to 4.25%. The loss of range of motion of the worker's hind foot was based on this item in the PDES. On that basis, WCAT does not have jurisdiction respecting the aspect of the worker's disability award for immobility of his hind foot.

Background and Evidence

The compensable injury

The worker was born in 1946. He is an immigrant to Canada. At the time of his compensable injury, the worker was earning his living working as a millwright and working as a form of independent contractor. It is uncontroverted that the worker had reduced his work hours because he had developed cardiomyopathy, a non-compensable heart condition. However, the worker's plan, as expressed in his evidence at the oral hearing, was that he would continue working but had the flexibility to work when he wanted and could (and had) hire other workers.

The worker's ankle injury occurred on August 28, 2002 when a piece on metal fell on his left ankle. An x-ray on the date of injury showed an undisplaced fracture of the base of the medial malleolus (the bony "bump" on the inside of the ankle, which is the medial side of the lower end of the tibia).

The worker subsequently developed a wound infection of a large abrasion over or near the medial malleolus. This was initially treated with antibiotics, including intravenous antibiotics. Concerns were raised about the possibility of an infection extending into the bone. The result was surgery to debride the wound on September 25, 2002. There is some mention in the file of skin grafting, but a review of the medical evidence and the worker's evidence at the oral hearing confirms that the wound subsequently healed without grafting, although the worker has been left with some scarring and discolouration of the skin in the area.

A medical report titled "Note for work" and dated October 16, 2002 states that the worker had been ill since approximately mid January 2002 and had been working four to five hours per day since early March 2002. He restarted full time work in mid August.

A report from the orthopaedic surgeon dated October 28, 2002 states that the worker's ankle wound continued to improve. He was able to increase weight bearing and was able to stand and walk for longer periods of time.

On December 16, 2002 another orthopaedic surgeon reported that the worker had pain on the medial side of his foot when he put weight on it. His foot looked like it was twisted outwards. The worker was using a cane. X-rays showed the fracture had healed but there was a small chip fracture over the malleolus that did not appear to be intra-articular (involving the joint). The diagnosis included possible sympathetic dystrophy (also called reflex sympathetic dystrophy (RSD) or chronic regional pain syndrome (CRPS)). A bone scan was ordered to make sure the worker did not have a hidden infection of the bone. The orthopaedic surgeon noted that the worker's ankle range of motion was limited to five degrees of dorsiflexion (lifting the foot up at the ankle), ten degrees of plantar flexion (equivalent to pointing the foot downwards) and

minimal inversion (turning the foot inwards at the ankle) and eversion (turning the foot outwards at the ankle), due to pain.

A bone scan, dated December 30, 2002 showed abnormalities of the left lower leg, ankle and foot suggestive of RSD as well as the healing ankle fracture. The radiologist thought that infection was unlikely.

A CT scan on January 4, 2003 showed non-specific findings. These included marked generalized osteopenia associated with soft tissue swelling. Generalized osteopenia (decreased calcification or density of bone) with soft tissue oedema (swelling) were noted to be findings that can be seen with RSD.

On February 11, 2003 the worker's family physician reported that the worker had tried light duties but could not tolerate them past two hours because of pain from too much walking. The worker could not squat.

A medical assessment report from a medical rehabilitation program recommended further physiotherapy but noted that the worker had cardiomyopathy (non-compensable) that limited his exercise tolerance. The report, reflecting an examination on February 28, 2003, states that the worker's ankle dorsiflexion range of motion was 20 degrees on the right and 10 degrees on the left. Plantar flexion was 55 degrees on the right and 50 degrees on the left. Eversion was 30 degrees bilaterally. Inversion was 50 degrees on the right and 20 degrees on the left.

The orthopaedic surgeon saw the worker on July 28, 2003. The worker continued to have diffuse swelling of the whole left ankle. There seemed to be increased laxity of the medial and lateral ligaments and a possible left anterior drawer sign. The diagnosis was possible ligament damage and possible chronic synovitis and early OA (osteoarthritis) of the left ankle. An MRI was suggested.

The medical rehabilitation physician saw the worker again in August 2003. She noted that the worker did not appear to have any significant gains in range of motion or strength compared with the previous assessment on July 2, 2003. He had a correctly fitting elastic sleeve and rocker sole shoe. The physician noted that the worker was to have an MRI but stated that if nothing further resulted from an orthopaedic surgical point of view, the worker would be considered to have maximum medical improvement.

The MRI of August 26, 2003 showed well corticated ossific fragments adjacent to the medial malleolus and mottled increased signal primarily in the subarticular location within the tibia and talus. This could be attributed to "aggressive osteopenia." The radiologist said that this could be reflective of RSD.

A claim log entry dated October 23, 2003 by the case manager states that a “team meeting” had been done on October 22 and it “was decided that the worker is now at a plateau.” There is no specific record of the team meeting in the file.

There is a record of a team meeting on September 24, 2003, during which it was decided that the worker was at a plateau in his recovery and he would likely have permanent functional impairment. The worker also had chronic pain in excess of six months and beyond the usual recovery time of a comparable injury. There was sufficient evidence on file to form a multi-disciplinary assessment, and it was accepted that the worker had specific chronic pain.

The worker was examined for permanent functional impairment twice. The first examination took place on November 28, 2003. The report states that the worker had lost $\frac{1}{2}$ of the available range of motion of his left forefoot, and $\frac{1}{4}$ of subtalar inversion/eversion. Range of motion findings for ankle dorsiflexion were 4 degrees on the left and 20 degrees on the right. For ankle plantar flexion the result was 28 degrees on the left and 34 degrees on the right.

These results were questioned by a Board medical advisor. He compared them to the February 28, 2003 report by the medical rehabilitation program physician. He said that it was very surprising that the worker’s midtarsal joints would be restricted following his injury since they are two joints removed from the ankle (with the subtalar joint separating them). The mild reduction of subtalar joint motion was “not so unexpected.” (I pause to note again that although I have, for completeness, included evidence relating to the subtalar joint measurements, I do not consider that WCAT has jurisdiction respecting that aspect of the worker’s award).

The second permanent functional impairment examination was conducted on February 19, 2004. On this examination, the worker demonstrated dorsiflexion of 28 degrees on the right and 20 degrees on the left. His plantar flexion was 58 degrees on the right and 50 degrees on the left. At the subtalar joint, inversion was full on the right and $\frac{1}{2}$ on the left. Eversion was full on both sides. At the mid tarsal joint, all movements were full.

The strength of both ankles was tested simultaneously and was 5/5 and equal bilaterally. The left ankle was one centimetre in diameter bigger than the left.

The worker told the medical advisor about how his ankle did not always respond as expected, and that he stumbles easily. He also told me the same thing at the oral hearing. The worker reported pain at 3/10, which increased to 5/10 by walking.

The range of motion measurements from the February 19, 2004 examination were used. The worker was granted an award of 2.5% for chronic pain in accordance with policy item #39.02 in the RSCM II. He was also granted 1% for scarring and

depigmentation. This resulted in an overall impairment rating of 8.08%, to which was added age adaptability of 0.97% for a total of 9.05%. I note here that I have checked the Board's calculations, using these percentages, and I could find no error in the calculations themselves.

At the oral hearing, the worker showed me his left foot. He showed me the medial malleolus and some swelling surrounding it. He also pointed to some scarring, depigmentation and pigmentation above the medial malleolus. The worker said that he walked with a limp, and that he had constant ankle pain at the level of three out of ten. If he walked for an hour, the pain increased to six out of ten. He felt that the pain was in his ankle joint and around the medial malleolus.

The worker also showed me how he could move his foot. I am not an expert in disability evaluation, but as a lay person it was clear that the worker has the ability to both dorsiflex and plantar flex his foot. He also demonstrated inversion and eversion. I formed no impression about movement of his hind or midfoot. I make no conclusion from the worker's demonstration of his foot movements other than to note that the worker's ankle is clearly not completely immobile, and also that the worker is emotionally upset about the restriction in ankle movement, and the condition of his ankle in general.

At the oral hearing, the worker said that his daily routine included an approximately 45 minute to 1 hour walk. If he walked any further he had increased pain, although the worker said he had pain in his ankle all of the time. The worker said he knew "where to cut it off." He walked on level ground, on a seaside walkway.

The worker's evidence was that he did not take any medication for his ankle, and was not receiving any physiotherapy or massage therapy. He did not know if he would need surgery in the future. He did not have any medical appointments scheduled.

The worker said that he knew about his "osteopenia" and the RSD from medical reports. His physicians had not told him he had either condition. He did not know if those conditions were better or worse.

Non-compensable medical conditions

The worker has a heart condition called cardiomyopathy. A specialist in internal medicine first confirmed this condition in April 2002.

The worker applied for workers' compensation benefits relating to his cardiomyopathy, citing exposure to various substances at work as the cause. His claim was denied. Another WCAT panel heard the worker's appeal from that denial and issued a decision dated July 30, 2004. The worker's appeal was denied. At the oral hearing, counsel

expressed his disagreement with that decision. However, that WCAT decision is final and conclusive pursuant to section 255 of the Act.

The worker's cardiomyopathy is not due to the nature of his employment and is not compensable. No appeal of that decision is before me and the previous WCAT decision is final.

According to a work capacity evaluation (WCE) carried out on October 2 and 3, 2003, the worker scaled down his workload about four months before the compensable injury because of his heart condition. During the WCE, the worker wore a heart rate monitor and advised the evaluator that his physicians advised him to limit his heart rate to 100 beats per minute. This limitation restricted his participation in the WCE.

A medical assessment report from a medical rehabilitation program dated October 3, 2003 states that the worker was involved in a cardiac rehabilitation program commencing the week before.

A report from an internal medicine specialist dated December 11, 2003 states that the worker's left ventricular function had not improved. The specialist recommended that the worker not go back to work until his ventricular function had improved. The report notes that the work required "heavy physical exertion."

The claim log reveals a conversation between a Board medical advisor and the rehabilitation program physician dated October 22, 2003. The information recorded states that the worker had met the criteria for RSD (CRPS) in August 2003, but he now no longer met the criteria. It was not felt that a pain program would help. The medical advisor recorded that the worker's complaints of pain were related to mechanical post fracture pain rather than RSD (CRPS).

The result is that the Board did not accept RSD as a permanent condition. Counsel indicated during the oral hearing that the Board had not replied to his letter seeking acceptance of the RSD. However, it is clear from the file that the Board has adjudicated the question of acceptance of long-term RSD, which is not accepted. Information in the file indicates that the worker had some signs of RSD earlier on but the medical opinions were that it did not persist.

Counsel also submitted that the Board had not responded with regard to acceptance of "aggressive osteopenia." Although the question of acceptance of osteopenia is not before me, I note that after my review of the entire file, and the submissions, I am not persuaded that this is a "diagnosis" that the Board must adjudicate. This was simply a finding/suggested condition on a diagnostic imaging study and the evidence does not suggest that it is a diagnosis or condition that must be adjudicated. The medical reports link the radiological appearance of osteopenia to the possibility of RSD and do not suggest that it is a separate diagnosis. If the worker does indeed have a condition

or diagnosis called “aggressive osteopenia,” it is open to him to approach the Board for adjudication of its acceptance.

At the oral hearing, the worker said that his cardiomyopathy was better than it had been previously. He said that he attended a cardiac rehabilitation program twice per week for one and one half hours each time. He did a warm up, stretching and then ten minutes on each of four different pieces of equipment (treadmill, rower, “stepper” and recumbent bike). He then did a “warm down’ and stretching.

The worker said that the reason he was not working was not his heart condition. He said that his cardiomyopathy was improved. His counsel asked whether he would be working as a millwright if he did not have his ankle injury and the worker responded that he was “not sure.” He said that there were some jobs, depending on the company, where the power engineer sits in a room and controls buttons.

Employment history

At the time of the compensable accident, the worker was self-employed as a millwright but had worked for six years for the same company as an independent contractor.

The worker’s employment history involves work as an auto mechanic, millwright and power engineer. The worker is qualified as a fourth class power engineer. According to the worker’s evidence, this is the lowest level of qualification as a power engineer.

The worker started his own millwright business several years before his compensable injury. At the oral hearing, he said that he intended to keep working as long as he was able. He said that because he had his own business, he would be able to take time off when he wished, and could thus continue to work as he became older. The worker said that he had employed up to three people in his millwright business. On the date of injury, he had been working on the same job for five years.

The worker’s evidence at the oral hearing was that his company was not functioning, had no contracts, no income, and no employees. He was not bidding on any contracts and had no income since August 28, 2003. He did not intend that the company would ever function again. He said he felt he could not work in millwrighting. He did not explain how or why he could not work in a management/supervisory role for a millwrighting business.

The worker said that he had injured his back and had three and one half months off while working for a previous employer. His back continued to bother him.

Functional capacity/work capacity

The WCE referred to above concluded that the worker was capable of functioning in a full-time capacity in his pre-injury work. The evaluator noted the limitations imposed by the worker's cardiomyopathy, and that the worker had become deconditioned because of his compensable injury and his heart condition. The WCE report states that the worker was pain limited.

The worker said he could not work as a power engineer because it involved physical work. Large tools are used and the work requires good footing in order to allow effective pulling and pushing. The boilers have heavy parts that the power engineer is required to carry, install and repair. The job is done in standing, and requires good balance. The job also requires walking and climbing.

The worker said that he had been "deemed" unsafe in that work (he said this had been written in a letter but could not recall from whom). The worker specifically referred to his ankle being subject to "strange behaviour." It bends in a strange way and the worker stumbles frequently and easily.

Work as a power engineer involves heating equipment and the machinery that produces power (steam) in a plant. This means work on boilers, and networks of piping and controls. Millwright work includes electrical, welding, machining, fabrication, plus machinery installation, maintenance, and repair.

A fourth class power engineer does physical work. First, second, and third class power engineers, according to the worker, do not do physical work. However, two years of training is needed to move between classes.

Vocational Rehabilitation

The worker was referred for vocational rehabilitation. A plan was developed and described in a January 16, 2004 document prepared by the vocational rehabilitation consultant (VRC). The recommendations for the plan were based on the worker obtaining the necessary qualifications and training for work as a maintenance manager. The worker was considered physically capable of undertaking that work, despite his cardiomyopathy.

The VRC noted that the worker's previous vocational and educational background met the necessary criteria for obtaining a management position in the maintenance field. The worker had been working within a trade capacity for a number of years, had post-secondary education and had owned his own millwright business.

The VRC recognized that the worker was unable to return to his pre-injury work, due to the residual effects of his compensable injury. However, on completion of the plan the

worker would have the skills for a return to employment that compared to his pre-injury employment in terms of earning capacity.

A letter from counsel for the worker dated March 22, 2004 reports that the worker was requesting an additional computer course, but had completed five courses of two weeks in length, and had been receiving excellent marks. The course in question (“A+”) was one that trains individuals in computer assembly, repair, and maintenance.

A further letter from counsel dated July 15, 2004 suggests that the worker felt he had to quit working for physical reasons relating to his ankle injury. The worker had started working again on June 23, 2004, and had worked three hours per day for eleven or twelve days. The worker reported that his heart function had been tested and had been between 39% and 43%.

The worker had told counsel that he would like to work full time as a millwright but his ankle could not handle even three hours per day. At the hearing, the worker said that none of the jobs for which he was qualified could be performed in sitting (although he later mentioned that some steam engineer work could be done in sitting, pushing buttons).

At the oral hearing, the worker said that in his mind his vocational rehabilitation plan was focused on obtaining work that he could do while seated. He wanted to become a computer assembly/maintenance/repair technician but the Board was not willing to fund that course (the “A+” training). The worker said he did not have sufficient personal financial resources to pursue this training himself.

The worker provided a list of 199 jobs that he had applied for between March 15, 2004 and September 24, 2004. The worker had only two interviews and was not offered either position. He also received two written replies and one by phone. The worker did not find a job with any of these employers, and ceased looking because he believed himself to be physically incapable of the work. The worker was aware of a reason for his failure to obtain a specific job in only one instance. One of the employers told the worker that he would be required to walk on overhead beams and the worker was not capable of such walking.

The worker further said that he did not think he could teach millwrighting or power engineering, as this would require a year of training. The worker said he discussed this possibility with the Board but it did not materialize.

Decisions under appeal

The October 29, 2003 Board decision was that the worker was no longer temporarily disabled. His compensable condition had reached a plateau. There was no medical investigation or treatment expected, nor any significant change in the worker's condition over the following several months. Entitlement to wage loss benefits would come to an end on October 26, 2003.

Counsel submitted that the worker's condition had not plateaued, pointing to the worker's evidence about pain and swelling in his ankle. Counsel submitted that the swelling and pain varied in intensity and there were periods of instability. Counsel submitted that the Act did not define temporary or permanent. Further, the words "stabilized" and "plateaued" are not found in the Act. The RSCM II speaks of potential changes that are within the range of normal fluctuations but there is no description of what is normal in the worker's condition. Counsel submitted that osteopenia and RSD were "progressive" and "generally change."

The worker's evidence at the oral hearing was that he does not have any medical appointments scheduled and is not receiving any treatment in the form of physiotherapy or massage therapy. The worker did not know whether he would have further surgery on his ankle. He further did not describe pain in his ankle that was worsening or improving over time.

With regard to the worker's entitlement to a disability award based on section 23(3) of the Act, the case manager referred to policy item #40.00 in the RSCM II, which outlines a process for assessment under section 23(3) of the Act. It states that a worker's entitlement to a disability award under section 23(3) is considered where 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.

The case manager said that the "criteria for the 'impossible threshold'" were:

1. Absolute medical disability.
2. Inability to meet legal requirements of the job; and
3. High probability of immediate and significant harm to self and others.

The case manager did not cite a source for these three "criteria." It is also not clear from the letter whether the case manager considered this an inclusive list, in that a worker would be required to meet all three criteria, or whether satisfying any one of them would be sufficient. I note here that there is nothing in the Act or published policy setting out these three criteria for the "impossible test." I will address that point later in this decision.

In any event, the case manager concluded that although the worker may not be able to return to his pre-injury job, there were other jobs in that industry that the worker would be able to perform. Therefore, the injury did not make it impossible for the worker to continue in the occupation at the time of the injury.

Counsel also submitted that the worker's drop in income made the case "exceptional." The worker had been unemployed for two years after being employed all his life. This was "exceptional." The worker was entitled to a permanent disability award based on loss of earnings, and the Board should be "ashamed of itself."

Counsel submitted that the worker was very credible, and was a person who focused on details. Despite that, he made 199 job applications and received only one telephone and two written replies. He had only one interview. The worker's effort was sufficient over six months, and reasonable.

Counsel submitted that as a 58 year old man, with accented English (I noted little, if any difficulty with communication in English. I asked the worker to clarify his evidence once during the oral hearing, but because of audibility rather than intelligibility.) Counsel submitted that the worker was potentially subject to discrimination. The worker has to disclose his ankle problem to potential employers. Regarding vocational rehabilitation (which is not before me), counsel submitted that the Board had "self-limited" the worker's entitlements inappropriately. The worker should have been entitled to re-training for a sedentary job. The worker has never been told what another suitable occupation was, or how the worker had transferable skills.

Regarding the question of chronic pain, counsel submitted that current policy was not lawful, and that it was illegal to limit recovery to the same percentage for everyone. This, counsel submitted, was an illegal fettering of discretion. Counsel submitted that I should substitute a permanent disability award of 100% for chronic pain.

Counsel further submitted that I should substitute a permanent disability award of 100% for "age adaptability." I should also substitute a 100% award for scarring and depigmentation.

Counsel further submitted that the worker's circumstances were "exceptional" and that the worker was not magnifying his symptoms. The worker was truthful, and would be working if he could. The worker has lost significant income as a result of his compensable injury.

Regarding his degree of functional impairment, the worker said that the Board medical advisor who examined him for functional impairment made an error when he recorded that the worker did not limp. The worker said he did limp. He also could not squat. Furthermore, the worker feels that the Board medical advisor did not take the range of

motion measurements in a “professional” manner. The worker said that the physician put a tape around his ankle and then said “17 degrees.”

Other submissions

Counsel asked that I refer to a July 28, 2004 submission he filed in the appeal of the worker’s cardiomyopathy claim to WCAT. I have obtained and reviewed that submission, which relates to the alleged causes of the worker’s cardiomyopathy, but notes that the worker had been unable to work, but because of his ankle condition and not the cardiomyopathy. The submission states that the worker was able to work as a millwright for short periods in June and July of 2004.

With respect to this appeal, counsel submitted that the worker was exactly the person for whom the Board should award a permanent disability award based on section 23(3). The worker was “100% credible,” had no savings and no RRSP. He would be working if he could. Counsel submitted that the worker’s case had been subject to injustice, and that proper inquiry had not taken place. He referred to policy item #97.00 in the RSCM II, which provides that there is no burden of proof on the worker. Counsel submitted that the decision-makers involved in the worker’s case were biased and prejudiced, and had no intention to carry out any inquiry. The worker, counsel submitted, had also been unfairly treated by WCAT in respect of his cardiomyopathy appeal. Counsel submitted that the worker’s entire future depended on the outcome of this appeal, as did his wife’s future.

Counsel submitted that there was “no policy” on millwrights, power engineers, auto mechanics or “medial malleolus.” While that may be true, there are many published policies that have general application to the issues on this appeal.

Counsel submitted that the decision of the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R was applicable. He submitted that the appropriate test of causation was “significant contributing factor,” and that the compensable disability need not be the sole or necessarily the predominant cause.

Counsel submitted that the worker’s case was exceptional, because he had been unemployed for 2.5 years after being employed all of his life. The worker has made 199 job applications but received very few replies.

Counsel submitted that the question of whether policy item #39.02, which addresses chronic pain, is so patently unreasonable that it is not capable of being supported by the Act and its regulations has been referred to the Chair of WCAT under section 251 of the Act. Counsel did not ask that this appeal be suspended or that a decision be delayed until the completion of the section 251 process. I decline to do so.

Counsel submitted that I should exercise “maximum discretion” in favour of the worker in order to tie up all the loose ends.

After the oral hearing, counsel provided an additional short submission. I have the discretion to accept that submission, which I have exercised in favour of accepting it. However, I was not inclined to grant counsel’s request for an opportunity to comment further after disclosure of the audiotapes of the oral hearing, which I consider provided counsel and the worker with a full and fair opportunity to be heard.

In the post-hearing submission, counsel noted that no one had taken a “site visit” of a millwright’s job, an auto mechanic’s job or a 4th class stationary engineer’s job. I do not consider that a “site visit” would provide me with any further relevant evidence. Counsel also provided a diagram showing the anatomy of the foot and ankle. He submitted that no Board decision had explained to the worker and given reasons respecting what would be a “suitable occupation,” or why the worker’s situation is not “exceptional.” The worker’s 2003 tax notice of assessment was attached, and shows income of \$53,000 in 2003.

Counsel submitted that the worker had been denied an oral hearing eight times and that this constituted an injustice. In that respect, the worker had an oral hearing and a full opportunity to make submissions in this appeal.

Counsel also referred me to the Concise Oxford Dictionary definition of exceptional, as “unusual, not typical.”

Findings and Reasons

Plateau date

The first issue is whether the worker was entitled to wage loss benefits after October 26, 2003, because the worker’s condition had not plateaued or stabilized.

Policy item #34.54 in the RSCM II is titled, “*When is the Worker’s Condition Stabilized.*” It states that when a worker is medically examined to assess the degree of impairment, the examining doctor must first determine whether the worker’s condition has stabilized. A condition will be deemed to have plateaued or become stable where there is little potential for improvement or where any potential changes are in keeping with the normal fluctuations in the condition, which can be expected with that kind of disability.

The policy also provides guidelines, which operate where there is potential for significant change in the condition. If the potential change is likely to resolve relatively quickly (which the policy states means generally within 12 months), the condition will be considered temporary and the worker maintained on temporary wage-loss benefits under section 29 or section 30 of the Act, and a further examination will be scheduled.

If the potential change is likely to be protracted (which the policy states means generally over 12 months), the condition will be considered permanent and the permanent disability award assessed and paid immediately on the worker's present degree of disability and the claim scheduled for future review.

The practical effect of a plateau date is that it is used to determine when temporary disability benefits cease and a permanent disability award becomes effective.

The essence of counsel's argument regarding the worker's plateau date is that his ankle continues to be painful and swollen, and that it worsens with activity. Counsel submitted that it must be considered whether or not this fluctuation was in keeping with the normal fluctuations in the condition which can be expected for the worker's condition.

The worker clearly stated that he is not undergoing any treatment for his ankle, and is not taking any medications. The condition of his ankle essentially fluctuates based on his activity level. The worker did not have any medical appointments regarding his ankle scheduled and said he did not know if he was likely to have surgery in the future.

I consider the evidence strongly supports a conclusion that the worker's ankle condition had plateaued effective October 26, 2003. The worker had undergone extensive medical treatment and investigation. The infected wound had healed. It is apparent that significant improvement was not anticipated. As an example, the orthopaedic surgeon who saw the worker on September 9, 2003 discharged the worker from his care, noting that surgery was not recommended to remove small bone chips. On July 8, 2004 the same orthopaedic surgeon saw the worker again, noted the worker's complaint that the more activity he does, the more pain he gets, and again stated that surgery was not recommended. The orthopaedic surgeon further stated that the worker probably could not return to millwright type work.

The fact that the worker's ankle has not returned to its pre-accident state does not mean that the condition has not plateaued. Published policy makes it clear that a condition is considered to be plateaued or stabilized when there is little potential for improvement or where any potential changes are in keeping with the normal fluctuations in the condition that can be expected with the kind of disability. That published policy is clearly applicable in the worker's case.

The worker's appeal respecting the plateau date is denied and the Review Division decision confirmed. The Board properly determined that the worker's condition had stabilized or plateaued on October 26, 2003.

Permanent Disability Award

The issues relating to the worker's permanent disability award include the effective date, the degree of functional impairment (including age adaptability and chronic pain), whether the worker's award should be "payable for life," and finally whether the worker is entitled to a disability award based on loss of earnings under section 23(3) of the Act.

The effective date of the worker's permanent disability award is October 27, 2003, the day following completion of wage loss benefits. Given my conclusion above respecting plateau date, I can see no reason why the effective date of the worker's permanent disability award should be changed.

The next issue is the degree of functional impairment. The worker was examined for permanent functional impairment (PFI) on November 28, 2003 and reassessed on February 19, 2004. The reason that the Board re-examined the worker was because a Disability Awards Medical Advisor (DAMA) reviewed the results of the first assessment and questioned whether the worker's ankle range of motion measurements accurately reflected his disability. The DAMA noted that on March 10, 2003 the medical rehabilitation assessment reported the worker had 10 degrees of left ankle dorsiflexion and 50 degrees of plantar flexion. In a later report, he had 4 degrees of dorsiflexion and 28 degrees of plantar flexion.

The first PFI assessment found the following ankle range of motion:

Dorsiflexion	left 4 degrees	right 20 degrees
Plantar flexion	left 28 degrees	right 34 degrees

Midfoot/forefoot mobility was reported as $\frac{1}{2}$. Subtalar inversion/eversion was reported as $\frac{3}{4}$.

The second PFI examination found the following:

Dorsiflexion	left 20 degrees	right 28 degrees
Plantar flexion	left 50 degrees	right 58 degrees

This examination reported subtalar inversion and eversion separately. Inversion was $\frac{1}{2}$ on the left and eversion full. Adduction and abduction of themidtarsal area was full.

The fact that the worker had two examinations, with differing results, means that I must choose one over the other. Under the circumstances, and after considering the Board's reasons for re-examining the worker, I am satisfied that the second examination should be the one used for determining the worker's permanent disability award. The Board medical advisor, in his January 15, 2004 memo pointed out that there were variations in the range of motion measurements. He felt that the worker was having more pain that

expected from his ankle, and some of the limitation in motion was resulting from pain inhibition. The Board medical advisor also stated that it would be very surprising to find midfoot restriction since the worker's injury was to his ankle, and the midtarsal joints were not involved. Mild restriction in subtalar movement was expected.

The second PFI examination was done because of inconsistency in the results. It was done by a DAMA with expertise in disability evaluation. I recognize that the worker did not feel confident in the DAMA and that he seems to be of the impression that the measurements were taken cursorily. However, after a careful review of the file, including the previous reports and the two PFI examination reports, I consider that the second PFI examination likely provided a more accurate picture of the worker's ankle range of motion. In particular, it is notable that reports by previous treatment providers include range of motion measurements similar to those found during the second PFI examination.

The range of motion findings from the second PFI examination were properly used to determine the degree of functional impairment resulting from the worker's ankle injury. In that respect, it is normal that there should be day-to-day small variations in range of motion, particularly where it is limited in part by pain inhibition.

The worker was awarded 2.5% for specific chronic pain in his ankle. Policy item #39.02 in the RSCM II states that where a Board officer determines that a worker is entitled to a section 23(1) award for chronic pain, an award equal to 2.5% of total disability will be granted to the worker. There is no discretion to make any award other than 2.5%. As was pointed out by counsel, there is a process in the Act, set out in section 251, whereby the chair of WCAT may make a determination that a policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. The determination is then sent to the board of directors of the Board. There has been no determination by the Chair of WCAT respecting the chronic pain policy.

In any event, even if the current chronic pain policy was found to be patently unreasonable, based on the considerations in former policy relating to subjective complaints, I would have awarded the worker 2.5% for subjective complaints of pain in his ankle. I am not persuaded that any other amount, and in particular any greater amount, would be applicable even in the event that policy did not limit discretion as to the amount of the award.

The worker's permanent disability award was increased by age adaptability. Counsel submitted that I should award the worker 100% for age adaptability.

With all due respect to counsel, neither the Act nor published policy allow, in any circumstances, for an award of 100% for age adaptability, and I decline to step outside the statutory and policy framework from which WCAT obtains its jurisdiction. I can find no error in the Board's application of published policy respecting age adaptability, which

is determined by reference to policy item #39.11 in the RSCM II. The percentage rate derived by use of the permanent disability evaluation schedule is modified by the application of an age variable. This age adaptability factor is used for workers over the age of 45 where the disability is calculated in accordance with the permanent disability evaluation schedule. The disability is increased by 1% of the assessed disability for each year over 45 up to a maximum of 20% of the assessed disability.

The next question is whether the worker's permanent disability award should be "payable for life." The amendments to the Act made by Bill 49 have a significant impact on the duration of permanent disability awards. Section 23.1 of the Act states that if a worker is less than 63 years old on the date of the injury, compensation payable under section 23(1) or 23(2) of the Act is payable until the worker reaches age 65. If the Board is satisfied that the worker would retire after reaching 65 years of age, the compensation is payable until the date the worker would retire, as determined by the Board.

The worker's evidence is, essentially, that he planned never to retire. He suggested that because he had his own business, he could work when and if he wanted, and he could hire others to help him.

Published policy respecting this issue is found in policy item #41.00 of the RSCM II.

Policy item #41.00 states that section 23.1 of the *Act* recognizes age 65 as the standard retirement age for workers. Confirmation of age 65 as the standard retirement age may also be found in the contractual terms of some employer sponsored pension plans and collective agreements. As well, Statistics Canada information lends weight to the general view that, on average, workers retire at or before 65 years of age. Section 23.1 also permits the Board to continue to pay benefits where the Board is satisfied that the worker would retire after the age of 65 if the worker had not been injured.

Policy goes on to state that the standard of proof under the Act is on a balance of probabilities as described in policy item #97.00, *Evidence*. However, as age 65 is considered to be the standard retirement age, the Board requires evidence that is verified by an independent source to confirm the worker's subjective statement regarding his intent to work past age 65. Evidence is also required so that a Board officer can establish the worker's new retirement date for the purposes of concluding permanent disability award payments.

If the worker's statement is not independently verifiable, the Board officer will make a determination based on the evidence available, including information provided by the worker. Examples of the kinds of independent verifiable evidence that may support a worker's statement that he intended to work past age 65, and to establish the date of retirement, include the following:

- names of the employer or employers the worker intended to work for after age 65
- a description of the type of employment the worker was going to perform, and the expected duration of employment
- information from the identified employer or employers to confirm that he or she intended to employ the worker after the worker reached age 65 and that employment was available
- information provided from the worker's pre-injury employer, union or professional association to confirm the normal retirement age for workers in the same pre-injury occupation
- information from the pre-injury employer about whether the worker was covered under a pension plan provided by the employer, and the term of that plan

The policy notes that this is not a conclusive list of the types of evidence that may be considered. A Board officer will consider any other relevant information in determining whether a worker would have worked past age 65 and at what date the worker would have retired.

Where the Board is satisfied that a worker would have continued to work past age 65 if the injury had not occurred, permanent disability award periodic payments may continue past that age until the date a Board officer has established as the worker's retirement date. At the worker's age of retirement, as determined by a Board officer, periodic payments will conclude even if the worker's permanent disability remains.

It will be clear from the foregoing that there are only very limited circumstances where a worker's permanent disability award may be payable beyond age 65 and there is no provision for an award to be made "payable for life." It is of course possible, based on the application of the above policy, that the Board could, in certain limited circumstances decide that the worker intended to continue to work for the remainder of his life. However, there must be very specific evidence, verified by independent sources.

The evidence in this case relating to the worker's retirement age is his own statement that because he was self employed he would have had the flexibility to continue working. However, the worker's other evidence is that the work was physically demanding, requiring him to walk on overhead beams and perform heavy lifting. It seems very unlikely that as he aged, even if he had not injured his ankle, the worker would have retained the physical capacity to perform the type of work he describes. There is also the fact that the worker has a non-compensable heart condition, and that he attends a cardiac program very regularly to assist in the management of his cardiomyopathy. His participation in that program would of necessity limit his ability to engage in remunerative work. He had already reduced his hours before the compensable ankle injury because of his heart condition.

The Board considers that the worker's ankle injury has not precluded him from working, albeit with modifications. It is also apparent from the worker's statements, such as his statement that there are some power engineer positions that allow work in a seated position, pushing buttons of some kind. The worker also has management experience in his chosen field, because he operated his own business.

Despite that, the worker has not continued to operate his company, and has not hired other workers to perform the physical aspects of the work. I consider this evidence that the worker did not intend to continue actively working past the age of 65. In that respect, I also note a document in the file, which is a letter from the worker to his legal counsel, dated November 13, 2003. The letter speaks to the worker's attempts to obtain work and his contacts with the vocational rehabilitation consultant. The worker states, "Do I have to go through all this at my age I don't think anybody hires supervisors from the street, they groom their own." By referring to this statement, I do not mean to be critical of the worker. His sentiment is understandable. However, it is some evidence that the worker had his age in mind when making decisions about employment opportunities.

I am not persuaded that the worker would have continued to work past the age of 65 or that the evidence is sufficient to conclude under policy item #41.00 that the worker's permanent disability award should be payable after age 65.

I can understand why the worker would be unhappy with the fact that his disability award payments end at age 65. However, law and policy specifically limits entitlement past age 65 and the worker has not brought himself within the exceptions provided for. In any event, a permanent disability award extended beyond age 65 is not automatically "payable for life." There are very specific limitations and it is inherent in the law and policy that workers retire at some point.

Counsel invited me to ignore law and policy, and make the worker's disability award "payable for life" based on considerations relating to the worker's character, his demonstrated history of hard work and his difficult financial circumstances. I do not question the worker's work ethic, his character, or the fact that he may now face difficult financial circumstances. However deserving the worker may be, WCAT is bound to apply the Act and published policy except in very limited circumstances which do not apply here.

The remaining question is whether the worker is entitled to a permanent disability award based on the application of section 23(3) of the Act. Section 23(3.1) of the Act states that a payment under section 23(3) may only be made if the Board determines that the combined effect of the worker's occupation at the time of the injury and the 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.

Policy item #40.00 in the RSCM II provides guidance in considering whether section 23(3) applies. It states, 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.

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.

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.

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.

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). It provides detailed instructions regarding the approach to a section 23(3) decision. Practice directives are not binding on WCAT but provide guidance and explanation of the Board's interpretation of law and 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 Board's disability awards officer (DAO) will determine what additional relevant information may be needed to complete a permanent partial disability assessment. The case manager, in consultation with the

DAO 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.

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 [National Occupational Classification] 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.

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 this case, the case manager concluded that although the worker may not be able to return to his pre-injury job, there were other jobs in that industry that the worker would be able to perform. Therefore, the injury did not make it impossible for the worker to continue in the occupation at the time of the injury.

Counsel made submissions about the meaning of the term "exceptional." He said that the worker's drop in income made his case exceptional, as did the fact that the worker had been unemployed for two years. Counsel also suggested that the worker's age, and the fact that English was not his first language made the circumstances exceptional.

Counsel submitted that the worker was very credible, and had demonstrated by his job search that he could not find work he was able to perform.

As noted above, the case manager said that the "impossible threshold" required the following:

1. Absolute medical disability.
2. Inability to meet legal requirements of the job; and
3. High probability of immediate and significant harm to self and others.

With respect to the case manager, I have been unable to locate anything in law or policy suggesting that these three things must be satisfied. Firstly, the meaning of "absolute medical disability" is unclear and suggests an extreme level of disability. It is furthermore unclear what would be meant by "legal requirements" of the job, and there is nothing in law or policy that suggests there must be a "high probability of immediate and significant harm."

If these three items were the requirements, it is difficult to envision *any* but the most extreme situation where a worker would be entitled to a disability award under section 23(3). I do not consider that result to be the intention of the legislature. If the legislature intended to, it could have deleted section 23(3) and made all disability awards payable on the basis of functional impairment. Further, I consider these three items referred to by the case manager to be inconsistent with published policy.

Rather, the published policy, with the additional interpretative guidance provided by the practice directive refer to the specific skills essential to the occupation. The worker's compensable disability must make him unable to perform those essential skills, thus making him unable to work in the occupation. Further, the worker must not be able to adapt to another suitable occupation.

The worker's occupation at the time of his injury, as a millwright, falls within NOC code 7311. The jobs with the same first three digits of the NOC code include heavy duty equipment mechanics (7312), refrigeration and air conditioning mechanics (7313), railway car men/women (7314), aircraft mechanics and inspectors (7315), machine fitters (7316), textile machinery mechanics and repairers (7317), and elevator constructors and mechanics (7318).

According to the NOC, millwrights such as the worker perform a variety of duties, including:

- Read blueprints, diagrams and schematic drawings to determine work procedures
- Install, align, dismantle and move stationary industrial machinery and mechanical equipment, such as pumps, fans, tanks, conveyors, furnaces and generators according to layout plans using hand and power tools
- Operate hoisting and lifting devices such as cranes, jacks and tractors to position machinery and parts during the installation, set-up and repair of machinery
- Inspect and examine machinery and equipment to detect and investigate irregularities and malfunctions
- Install, troubleshoot and maintain power transmission, vacuum, hydraulic and pneumatic systems, and programmable logic controls
- Adjust machinery and repair or replace defective parts
- Operate machine tools such as lathes and grinders to fabricate parts required during overhaul, maintenance or set-up of machinery
- Clean, lubricate and perform other routine maintenance work on machinery
- Construct foundations for machinery or direct other workers to construct foundations
- Assemble machinery and equipment prior to installation using hand and power tools and welding equipment.

Based on the above, the file evidence, and the worker's evidence at the oral hearing, I consider that although the worker may have some physical limitations, such as climbing

and walking on scaffolding, he retains the specific skills essential to his occupation. In particular, the worker retains his knowledge base, his manual skills, and his ability to operate an independent business and direct other workers. I appreciate that he may have some discomfort in his ankle if he stands for long periods. I also appreciate that he has some functional limitation because of his cardiomyopathy, but that is not compensable.

It is apparent that the worker considers himself unemployable. However, the evidence does not support a conclusion that he lacks transferable skills or that he would be unable to use those skills in an accessible workplace. Neither does the degree of functional impairment of his foot and ankle suggest that he would be precluded from suitable work utilizing his skill set.

The fact that the worker has sustained a loss of earnings is not sufficient to entitle him to a disability award under section 23(3). Neither is the fact that he has sent out many job applications and has not been successful in obtaining employment. In that respect, it was apparent to me from the worker's evidence at the oral hearing that he is not looking for work, or intending to try to operate his company using employees to perform the heavier work, despite the worker's clearly high level of skills and his knowledge of the industry. I can certainly understand why the worker has decided not to continue working, and his wish to, effectively "retire," but that does not entitle the worker to a disability award based on loss of earnings.

The legislature has clearly and unequivocally limited entitlement to such an award to situations that are exceptional, such that the award under section 23(1) does not appropriately compensate the worker. Furthermore, the meaning of "exceptional" is made clear in published policy. It does not mean simply "not typical" or "unusual." There are very specific policy requirements that provide a detailed meaning of exceptional.

However credible and deserving the worker may be, I am not persuaded that the worker's circumstances meet the requirements of the Act and published policy, which I am bound by law to apply. The worker's section 23(1) award appropriately compensates the worker for the effect of his injury.

Legal Fees

In making its decision to deny payment of legal fees, the Review Division applied policy of the board of directors. Policy item #100.40 in RSCM II provides:

#100.40 Fees and Expenses of Lawyers and Other Advocates

No expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for

compensation. (41) The Board will not pay the legal costs of a claimant or employer in connection with court proceedings to challenge a Board decision beyond what it may become subject to pay following the court's decision under the general law of costs.

Item B4.5 of the *Review Division Practices and Procedures* currently provides:

It is not necessary for a party to be represented during a review. If a party chooses to retain a representative for the purposes of review, they do so at their own expense. The Review Division is bound by the Board's policy respecting fees and expenses of lawyers and other advocates. As stated in Policy #100.40 of the *Rehabilitation Services & Claims Manual*, "No expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation".

With respect to expenses incurred for pursuing an appeal to WCAT under Part 4 of the Act, section 7 of the *Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02* (Appeal Regulation), provides:

7. (1) Subject to subsection (2), the appeal tribunal may order the Board to reimburse a party to an appeal under Part 4 of the Act for any of the following kinds of expenses incurred by that party:

- (a) the expenses associated with attending an oral hearing or otherwise participating in a proceeding, if the party is required by the appeal tribunal to travel to the hearing or other proceeding;
- (b) the expenses associated with obtaining or producing evidence submitted to the appeal tribunal;
- (c) the expenses associated with attending an examination required under section 249(8) of the Act.

(2) The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

WCAT has no authority to order the Board to reimburse legal fees in relation to the appeal to WCAT. With respect to the Review Division decision under appeal, the Review Division and WCAT are both subject to a statutory requirement to apply an applicable policy of the board of directors. Policy at #100.40 is applicable, and provides that such expenses will not be paid.

The worker is not entitled to reimbursement of legal fees.
There are no other expenses for which reimbursement is claimed or awarded.

Conclusion

The worker's appeals are denied and the Review Division decisions of April 8, 2004 and October 22, 2004 confirmed.

Teresa White
Vice Chair

TW/pm/cd