

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

WCAT Decision Number : WCAT-2005-01733
WCAT Decision Date: April 07, 2005
Panel: Lynn M. Wilfert, Vice Chair

Introduction

The worker is appealing a June 10, 2004 review of a decision of the Workers' Compensation Board (Board) dated October 21, 2003. That decision set out the worker's pension entitlement with respect to his left shoulder and granted him a 27.88% permanent partial disability (PPD) award under section 23(1) of the *Workers Compensation Act* (Act). The Board concluded that the worker's circumstances were not so exceptional as to warrant a loss of earnings assessment under section 23(3). The review officer confirmed the Board's decision of October 21, 2003.

Issue(s)

What is the worker's pension entitlement under the claim with respect to the pension wage rate, date of implementation, level of functional impairment and any loss of earnings consideration?

Jurisdiction

This appeal was filed under section 239(1) of the Act. The Workers' Compensation Appeal Tribunal (WCAT) may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (see 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 of directors of the Board that 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 of the Act). The worker's injury occurred after June 30, 2002 which was the effective date for changes to the Act made by the *Workers Compensation Amendment Act (No. 2), 2002* (Amendment Act).

The policies relating to this appeal are found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). 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 on 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% (section 239(2)(c) of the Act). The range of impairment for loss of range of motion in the shoulder exceeds

5% and I have concluded that WCAT has jurisdiction respecting the application of the PDES in this case.

Item 14.30 of the *WCAT Manual of Rules of Practice and Procedure* (MRPP) states that WCAT will generally restrict its decision to the issues raised by the appellant in the appellant's notice of appeal and submissions to WCAT. An exception to the foregoing is where the subject of an appeal is a pension award and the WCAT panel may address any aspect to the pension decision without the need to provide notice to the parties.

Background and Evidence

The worker was employed as a landing bucker/hooktender when he injured his left shoulder at work on September 6, 2002. The worker's claim was accepted for a dislocation/fracture of the posterolateral aspect of the humeral head and he underwent surgery on January 20, 2003. The worker had a permanent functional impairment (PFI) and was unable to return to his pre-injury employment. The review officer had summarized the history of the worker's claim file and I refer the reader to that decision for background information which will not be repeated but will be referenced in this finding.

The worker was considered not able to return to his pre-injury occupation because he could not meet the job demands. He was capable of light work but had to avoid overhead work or work which involved reaching and had to keep his left arm close to his side in a neutral position for most activities. The worker's PFI was assessed at 26.3% plus an age adaptability factor of 1.58%, and he was granted an award effective June 2, 2003, the details of which were set out in a decision of October 21, 2003. The Board considered that the worker's circumstances were not so exceptional that he would be entitled to a loss of earnings assessment. The worker was advised in the decision of October 21, 2003 which he appealed to the Review Division. The review officer stated the appropriate Board policy, in particular, the criteria noted under policy item #40.00, and relied upon the opinion of the disability awards claims adjudicator (DACA) and the disability awards officer (DAO). They reviewed the job duties under National Occupational Classification (NOC) 8211 and determined that the occupation was primarily supervisory, and therefore the worker was capable of performing the essential skills of his pre-injury occupation. The review officer agreed with that decision and denied the worker's request for a review based on the physical requirements and duties described under NOC 8211.

In his submission to the Review Division, the worker's representative submitted that the occupation of hooktender is not just supervisory but is physically demanding and even more demanding than the worker's normal position of a landing bucker. He noted that the worker's supervisor had stated there would be nothing available for him in the logging industry with his limitations. He submitted that the worker has exceptional

impairments which prevent him from returning to his pre-injury occupation or similar occupations.

The worker was represented at the oral hearing through his union and the respondent was not participating. The worker submitted the following information in support of his appeal:

- Confirmation that the worker had been accepted for Canada Pension disability effective January 2003.
- Letter of February 8, 2005 from the employer confirming that there were no logging jobs in the company that he was qualified for and capable of performing. Light duty jobs in the industry had been eliminated and the remaining jobs require varying degrees of physical fitness.
- Physicians' chart notes stating that at the time the worker was discharged from the occupational rehabilitation program (ORP), he was not fit to return to work.
- Job descriptions for various positions in the logging industry which indicated that, although there may be some supervision involved, all positions require significant physical components and manual skills.
- The attending physician's statement to the long-term disability carrier confirming that the worker was permanently disabled.
- Excerpts from the Workers Compensation Board Yarding and Loading Handbook describing the responsibilities and some of the job descriptions for hooktender and confirming the nature of that position.

The worker's testimony confirmed the evidence contained in the claim file regarding his background in the logging industry where he had been employed since the age of 16. The worker normally worked as a dryland sort bucker but, on the date of the injury, that job was not available and he had the seniority to be offered the position as a hooktender. Contrary to the impression of the review officer, this position was not mainly supervisory but was actually more physically demanding than his position as a bucker. Although the hooktender has the responsibility for laying out a setting, once the site has been set up and logs are yarded to the roadside, the hooktender works ahead of the crew and must move the haulback blocks to a new site, notch stumps, and hang blocks in preparation for yarding the next logs down to the landing. The blocks can weigh seventy-five pounds or more and are carried over extremely tough terrain. The worker's primary duties and skills were physical.

The worker confirmed that he has had no supervisory training and has never been in a position where he was only supervising and not physically involved in logging. The

worker does not feel he has transferable skills for supervision as he has only completed grade 9 and failed his GED. He has never prepared or written any reports, developed work schedules, nor has he been involved in any training programs for new workers other than physically demonstrating activities.

The worker reviewed the efforts by the vocational rehabilitation consultant (VRC) to attempt to find suitable employment. Any driving or equipment operating jobs were eliminated as he is unable to lift his left arm to operate the turn signal or to open the door. All of this must be done with his right hand. He finds his driving tolerance is approximately one hour before he has to stop and get out. He also must be very careful because of his pain medication. The worker takes time-released morphine every four hours to control his shoulder pain. The VRC suggested work in car sales, but ultimately, this was eliminated due to the worker's inability to stand and only use one hand to keyboard on the computer. The VRC was unable to identify any suitable position other than part-time telephone sales at minimum wage.

The worker described his limitations in his activities of daily living. He noted that, although he had three surgeries in each knee, was legally blind in one eye, had a finger amputation on his left hand and wrist problems, he had been able to continue working until he sustained his shoulder injury. Since that time, he has significant pain and is unable to lift more than three pounds or raise his arm above approximately 70 degrees. He requires morphine on a regular basis for his pain and also takes medication for the effects of the morphine on his stomach. The pain medication has had significant side effects such as dizziness, loss of appetite, nausea, and the worker feels it has affected his short-term memory. His sleep is interrupted and he can do very little activity around the house. His wife is now responsible for all the yard work. The worker is unable to work on his 1977 Corvette that he was restoring, and even dressing and showering is painful for him. He has been accepted by Canada Pension disability based on his compensable injuries and there are no other conditions that are disabling him from employment.

The worker's representative submitted that the medical evidence is that the worker cannot return to his pre-injury employment or any other physical job. The worker is not a supervisor in the normal context of the word, but rather, he was a working chargehand and he lacks the skills and education to solely be a supervisor. There is no accommodation that can be made to compensate for his physical limitations in the workplace. The representative said that worker met the test under policy item #40.00 and section 23(3) of the Act.

Reasons and Findings

Section 23(3) of the Act provides that the Board may pay a permanent disability award on a loss of earnings basis. Sections 23(3.1) and 23(3.2) of the Act provide that:

- (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 the 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 the injury or to adapt to another suitable occupation.

Policy item #40.00 of the RSCM II 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).

In addition to policy item #40.00, the Board has published practice directives which are intended to provide guidance in interpreting and applying the Act and published policy. Practice Directive #46 states that through consultations and team meetings, the case manager (CM) will determine whether the worker is able to return to his or her pre-injury employment and notes 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” requirement of section 23(3) for assessment of permanent disability benefits. At the team meeting, the Claims Adjudicator Disability Awards (CADA) 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 VRC, will arrange for this information to be gathered at the appropriate time in the worker’s recovery.

Information required may include a description of the essential skills required for the worker’s occupation. Occupation for this purpose is defined by the collection of job titles that fall within a four-digit occupational 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 CADA is responsible for making a recommendation regarding whether the “so exceptional” test has been met. The medical advisor may be asked to provide an opinion on whether the compensable injury makes it impossible to perform the essential skills of the worker’s occupation. The VRC may be asked to provide an occupational analysis, transferable skills analysis, or other appropriate assessment to confirm the occupational skills possessed by or required by the worker. The CADA’s decision will be based on the impact of the disability on the worker’s ability to perform the essential skills needed to continue in the occupation at the time of the injury, or an occupation of a similar type or nature in the long term.

In defining criteria for so exceptional, the practice directive states in part:

The policy requires that three criteria must be satisfied in order for a worker to be assessed under section 23(3):

- (i) *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 a 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).

- (ii) *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 pre-injury 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 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.

(iii) *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 a possibility of enhancements or recertifications, through vocational rehabilitation assistance) will also be included to determine the worker's residual (post-injury) skills 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 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 licence and he is also unable to return to a different job in the 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.

The worker's primary position was as a landing buckler which is NOC category 8421 listed as "chainsaw and skidder operators". These primary duties involve operating chainsaws or skidders and although this does require "learned application of skills and knowledge", the impact of the limitations on the physical demands could not be mitigated through workplace modifications and therefore the worker would not be able to perform the essential skills of the occupation. I have also considered similar occupations where the first three digits of the NOC code are the same as the worker's pre-injury occupational code. This includes silviculture and forestry workers NOC 8422 and these duties all require a physical component which could not be mitigated through workplace modification.

Practice directives do not constitute published Board policy although they do provide guidance in applying policies. Practice directive #46 is very specific in that it directs the Board officers to use the NOC classification at the four-digit level for considering the worker's occupation at the time of injury and then defines "similar occupations" as an occupation where the first three digits of the NOC code are the same as the worker's pre-injury occupational code. However, it is significant that the Practice Directives note, in describing the essential skills of an occupation, that 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. In my view, it is particularly important that there be a clear understanding of the worker's pre-injury employment and not just blind acceptance of the NOC classifications. The NOC classification can be very broad and may not accurately reflect realities of the worker's employment and residual skills and abilities. The position of a hooktender is listed under NOC classification 8211 (supervisors of logging and forestry) as they have some limited supervision of other crew members. However, the primary aspect of this job involves significant physical labour which, in fact, is heavier than the position of a landing buckler and in my view should more accurately be classified as a forestry labourer.

Since the Board's practice directive relies upon the NOC classification it is important to analyze how the NOC codes are structured. The initial number indicates the skill type and NOC classification #8 contains supervisory and equipment operation occupations in the natural resource sectors of mining, oil and gas production, forestry and logging, agriculture, horticulture and fishing. The second number indicates the skill level which is primarily based on the nature of education and training required to work in an occupation. The third digit specifies a domain in which an occupation is carried out and the fourth digit defines the unit groups. However, although equipment operation

occupations are included in this group, the detailed profile summary and in particular the physical activities listed do not meet the actual requirements of many of the jobs listed and there is little discussion of equipment operation. It is necessary to read the profile summary to understand the type of position the NOC occupation is describing. In this case it is clear that the profile summary does not in any way reflect the position of hooktender.

Relying solely upon the NOC classifications may not accurately reflect the realities of an actual occupational field and, despite the direction in Practice Directive #46, it should be incumbent upon the DACA to gather further information about the essential skills of an occupation. Simply reading the main duties listed in the occupational descriptions of the NOC without reading the more detailed descriptor profiles may not give an accurate picture of the jobs noted and whether they are properly classified.

As an example, an in-depth analysis of the NOC classification 8211 lists in part the profile and main characteristics for occupations in this group as follows:

- Having the general ability to supervise and coordinate the activities of logging and forestry workers.
- Verbal ability to communicate with technical, professional and management personnel regarding harvesting and management plans, procedures and schedules.
- Clerical perception to prepare production and other reports.
- Directive interest in supervising silvicultural activities such as scarification, planting, and vegetation control, ensuring that government regulations are met; and in hiring and training new workers.

A hook tender may coordinate setting up the yarding site but none of the other aptitudes apply to the job of hooktending.

Skill level 2 (the second digit in the code) is listed as occupations that usually require college education or apprenticeship training. Hooktending does not require either.

If one strictly applied the profile summary for the physical activities of this NOC group, it states that the use of limbs in performing the work is not relevant and the work activities do not involve coordination of limbs. The examples given of jobs where limb co-ordination is not relevant are counseling clients and providing therapy, proofreading materials before publication and responding to inquiries at an information desk. This in no way represents the physical activities of a hooktender that require multiple limb coordination to walk over rough ground, operate a chainsaw, and carry heavy blocks and lines.

The strength classification for this NOC group is listed as limited where work activities involve handling loads up to five kilograms and examples given of these activities are conducting economic and technical feasibility studies, administering and marking written tests, or examining and analyzing financial information. Hook tenders must carry weights far heavier than five kilograms on a steady basis.

The body position involved in sitting, standing and walking is ranked as level 3 which states that this level involves work activities in combinations and varying degrees of sitting, standing and/or walking. The examples given are teaching students through lectures, discussions, audiovisual presentations and field studies or ensuring that systems and equipment are operating efficiently on job site. Although a hooktender might occasionally sit between turns or if a line breaks, most of the day is spent standing, walking and climbing over uneven ground.

In terms of the aptitudes listed under the profile summary, these positions are considered to require greater levels of numerical abilities, spatial perception and clerical perception than motor coordination or manual dexterity.

When comparing the accuracy of the detailed NOC 8211 profile with the job duties of a hooktender, it in no way provides an accurate reflection of that job. Strict reliance upon the NOC classification is not sufficient to determine the essential skills of this job.

The worker has extensive experience in a very physically demanding occupational field and has acquired considerable skills, knowledge and abilities in logging. However, the policy states that skills are defined as the learned **application** [our emphasis] of knowledge and abilities. Although the worker still retains that specific knowledge and abilities, he would not be able to **apply** them with his physical limitations.

The worker has performed some limited supervisory duties as a hooktender. I recognize there may be occupational categories where a worker may take his skills set and apply it through workplace modifications. However, in this case, as confirmed by the employer, there are no positions that the worker has the abilities to perform as the physical demands cannot be mitigated through workplace modifications. Although the worker has retained his knowledge and abilities in the forest industry, he is unable to apply that knowledge. If the worker was confined to a wheelchair, he would still retain his knowledge and understanding of the forest industry but would not have been able to return to work in that or a similar field and, in this instance, I conclude that his physical abilities are required as skills in order to apply his knowledge. Consequently, I conclude that the worker's injury makes it impossible for him to continue in the occupation at the time of injury or an occupation of a similar type or nature.

The second requirement under section 23(3) is that the worker must be considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.

I have considered the efforts by the VRC and the worker to upgrade his education and develop a suitable occupation. Considering that the worker has a grade 9 education, is legally blind in one eye, has had three surgeries on each knee, a partial amputation of one finger and a wrist impairment, in addition to his compensable shoulder injuries, I find that the worker is unable to adapt to another suitable occupation without incurring a significant loss of earnings. Thus, I find that he is entitled to an assessment for a permanent disability award based on section 23(3) of the Act.

Conclusion

I vary the review officer's decision and find that the worker is entitled to an assessment for a permanent partial disability award under section 23(3) of the Act. No costs were requested.

Lynn M. Wilfert
Vice Chair

LMW/jkw/ml