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

WCAT Decision Number: WCAT-2005-04330
WCAT Decision Date: August 18, 2005
Panel: Randy Lane, Vice Chair

Introduction

In November 2002 the worker, then a 47-year-old cement finisher, reported bilateral upper limb symptoms. A claim for bilateral carpal tunnel was accepted by the Workers' Compensation Board (Board). The worker underwent bilateral carpal tunnel releases in April 2003. Temporary disability wage loss benefits were paid from March 31, 2003 until November 9, 2003. Vocational rehabilitation benefits were paid from November 10, 2003 until July 11, 2004.

Initially, the Board determined that the worker did not have a permanent functional impairment associated with his condition. In *Review Division #10438*, dated April 19, 2004, a review officer with the Board's Review Division determined that the worker should be referred to the Disability Awards Department for a permanent functional impairment assessment. (Review officers' decisions may be viewed on the Internet at the Board's website at www.worksafebc.com.)

By decision of August 11, 2004 the worker was advised that his permanent disability associated with his upper limb condition was 0.93% of total disability. He was not given an award for chronic pain. He was awarded a lump sum payment. He was not provided with a loss-of-earnings award under subsection 23(3) of the *Workers Compensation Act* (Act).

In *Review Division #20815*, issued in January 2005, but misdated January 13, 2004, a second review officer confirmed the August 11, 2004 decision.

The worker appealed the "January 13, 2004" (January 13, 2005) decision to the Workers' Compensation Appeal Tribunal (WCAT). The worker's employer was notified of the appeal. While it initially indicated that it wished to participate, by letter of March 17, 2005 the employer's representative advised that the employer no longer wished to participate.

An oral hearing was held on June 28, 2005. The worker gave sworn testimony. He was represented by his legal representative, Mr. Wener. The worker's wife attended as an observer. The day before the hearing, Mr. Wener submitted a May 28, 2005 report from Dr. Neumann (the worker's family practitioner), a copy of a November 4, 2004 report from Dr. Anzarut (the worker's neurologist), and copies of reports from Dr. Perey (the worker's orthopaedic surgeon). At the oral hearing the worker submitted

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

six photographs depicting his work as a cement finisher, Dr. Neumann's bill for her May 28, 2005 report, and a November 24, 2004 letter from Social Development Canada regarding his eligibility to Canada Pension Plan disability benefits. Also at the oral hearing, I provided Mr. Wener with a copy of Dr. Neumann's May 27, 2005 progress report that had been received on file subsequent to the provision of file disclosure to him.

Issue(s)

At issue are whether the worker is entitled to an award for chronic pain, whether the percentage of impairment was properly calculated, and whether the projected-loss-of-earnings method should be used to assess his permanent disability.

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act). 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). It 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, it must apply a policy of the board of directors of the Board that is applicable in the case.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background

As the issue concerns the worker's pension entitlement, it is not necessary for me to outline in detail the earlier part of the claim. As well, the two decisions by the review officers provide detailed outlines of the claim.

In his October 15, 2003 claim log entry, Dr. R, a Board medical advisor, described the worker's restrictions as follows:

> The restrictions are to reduce the use of vibrating tools and machinery and to avoid forceful flexion activities of the wrist. The worker is at risk for a recurrence which may possibly lead to permanent impairments should he return to a job involving frequent use of vibrating equipment, or frequent repetitive forceful wrist movements.
>
> [all quotations in this decision are reproduced as written, save for changes noted]

In his May 10, 2004 memorandum the case manager observed that accepted limitations included difficulty with lifting, heavy pushing and pulling, and activities requiring a forceful grip. Accepted restrictions included reducing the use of vibrating tools and avoiding forceful flexion activities of the wrist. He noted that the worker's restrictions precluded a return to work. He also commented that the restrictions which were noted as part of a preventative referral for vocational rehabilitation assistance were not "…absolute restrictions and it is not impossible for the worker to return to his pre-injury work."

Following the termination of temporary disability benefits in November 2003, the worker was provided with vocational rehabilitation assistance, which included sponsorship of an interview skills workshop, and sponsorship of job placement services offered through Mr. W, a vocational rehabilitation consultant retained by the Board. The job placement services were initially scheduled to conclude on May 3, 2004; however, they were extended to July 11, 2004.

On June 22, 2004 the worker was assessed by Dr. R2, a disability awards medical advisor. Dr. R2 documented the worker's symptoms as follows in his permanent functional impairment evaluation report:

> He reports bilateral painful thenar and ulnar volar wrist joints. The ulnar wrists pain is momentary, radiates proximally with activity and disappears spontaneously. Relieving factors include Tylenol #3, four to six tablets a day. He reported range of movement of his wrists and digits to be okay but painful. He reported that the strength of his hands seems to be good but he had poor endurance. He reported bilateral tingling of both hypothenar noted with driving. He reports nocturnal thenar pain in one or two nights a week. He reports bilateral wrist swelling after driving to Whistler. He reported momentary spontaneous white discoloration of the palms of the hands. He denied cold sensitivity of the hands. He denied excessive sweating of the hands.

Dr. R2 noted that there was no noticeable deformity, swelling or discoloration of the worker's hands at resting posture. No clinical proximal or distal muscle wasting was found. He commented as follows, in his June 22, 2004 additional factors memorandum:

> No demonstrable physical impairment to report.
>
> Descriptive inconsistent weakness of dynamometer hand grip reading.
>
> The range of movement of the wrists and the hand digits is equal and within the normal range bilaterally. The 2-point discrimination reading was essentially within normal and is consistent with the reported marked

> improvement of the EMG study. There are no signs of residual post operative complications, residual nerve entrapment or residual double crush phenomenon.

In her July 16, 2004 memorandum the disability awards officer (DAO) noted Dr. R2's comments, and observed that a comparison with average ranges of movement for both wrists supported a determination that the worker had slight restrictions in range of movement on both sides. She made the following observations regarding her decision to award the worker 0.61% of total disability:

> His impairment calculates to 0.61% of total disability on both sides. Although he already had an award for his right wrist impairment, there is no longer any evidence of the degree of disability on the right side that he was previously assessed at. He was granted an award of 2.5% for the right wrist but now only is assessed at 0.61% total disability so has had an improvement in his right wrist over the years. Therefore, as he was already compensated for a greater disability of the right wrist than is presently assessed, I will not grant any further award for right wrist impairment under this claim.
>
> For his left wrist I will grant an award of 0.61% total disability in recognition that the accepted CTS and surgery has left him with some mild restriction in range of movement. I note he also has ongoing complaints and chronic pain but I find that this is consistent with the condition for which the claim has been accepted. I do not find that the chronic pain is inconsistent or in excess of what would be expected from the CTS condition. He has increased problems with activities and has a vulnerability relating to the type of activities or endurance. I do not find that he has any evidence of additional impairment of function under Section 39.10 or Section 39.02 of the Rehabilitation Services and Claims Manual, Volume 2.

The DAO determined that the worker was entitled to an additional 0.3% of total disability, for bilateral enhancement.

As of Mr. W's July 19, 2004 final report, the worker had not secured employment. Mr. W documented that the worker advised him that most employers he had contacted were not interested in employing him if he could not perform the regular duties of all employees. Mr. W observed that the worker had made a good effort to return to work and had appeared quite distressed about his future. The worker indicated he would apply for Canada Pension Plan disability benefits and that he would continue to search for suitable opportunities. (In November 2004 the worker was advised that he was eligible for Canada Pension Plan disability benefits.)

Dr. R was later asked by a claims adjudicator whether the restrictions were based "only on the worker's pain complaints, or [on] some measurable pathology" and whether there was a "a high probability of immediate and significant harm to self or others, were this worker to return to his pre-injury duties." In his July 7, 2004 claim log entry Dr. R responded, in part, as follows:

> …The restrictions noted in log entry of 15 Oct 2003, to reduce the use of vibrating tools and to reduce repetitive forceful wrist movements is not based on reports of pain, but is based on the medical literature where someone who has developed a condition (such as carpal tunnel syndrome) induced by either vibration or the work situation (bending and twisting of the wrists) should not return to the same high risk exposure. (Refs. 1 and 2). It has been estimated that the risk of development of paresthesia post operatively following carpal tunnel release surgery is approximately 18 times higher in those with high exposure to vibration compared with those with low exposure to vibration. (Ref 3). …
>
> There is not a high probability of immediate and significant harm to self or others, should this worker return to his pre-injury duties.
> There is however a probability of recurrence of the carpal tunnel syndrome, and the subsequent possibility of a permanent impairment. This probability is estimated to be 18 times higher in a worker returning to a high vibration exposure. (Ref 3).

In his July 22, 2004 memorandum the claims adjudicator, Disability Awards Department (CADA) considered policy at item #40.00 of the *Rehabilitation Claims Services Manual, Volume II* (RSCM II) which provides that it is necessary to consider whether "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." He noted that the following were part of the "specific skills" which were essential to the worker's occupation:

> Knowledge of concrete material and application properties
> Knowledge and learnt ability to direct and place concrete into forms and onto surfaces according to grade.
> Knowledge and learnt ability to operate required powered and hand equipment such as powered compactor, jackhammer, trowel, etc.

Regarding the "impossible" test, the CADA observed as follows:

> When reviewing the threshold of "impossible", consideration would include:

- Whether there is an absolute medical disability?
- Whether there is a legal disability (inability to meet the legal requirements of the job)?
- Whether there is a high probability of immediate and significant harm to self or others?

The CADA noted Dr. R's July 7, 2004 claim log entry and the results of the permanent functional impairment examination. The CADA observed that the examination revealed "…normal and equal range of motion, with no sensory deficits. Weakness was reported as inconsistent." He then concluded "…based on the medical evidence that it would not be impossible for this worker to perform the essential skills of his pre-injury occupation." He observed as follows:

> The circumstances of this claim are not considered "so exceptional" that they would entitle a loss of earnings assessment. The worker has not lost the ability to perform the essential skills needed to continue in the occupation at the time of injury.

As noted above, the Board issued an August 11, 2004 decision regarding the worker's entitlement to a permanent partial disability award. In addition to the percentages for permanent impairment of function and bilateral enhancement, the worker was awarded a small amount (0.02%) for age adaptability. No award for chronic pain was granted.

In her January 13, 2004 decision the review officer made the following determinations, in denying the worker an award for chronic pain:

> My review of the evidence leads me to conclude that the worker's pain symptoms have decreased significantly since chronic pain was accepted on this worker's claim. This significant reduction in pain symptoms is consistent with the prognosis given by neurologist, Dr A, in September 23, 2003. At that time, Dr A told the worker that there had been very significant improvement and he suspected the pain and stiffness in the worker's hands would eventually resolve.
>
> Subsection (4)(b)(i) of policy item #39.02 states that "Pain is considered to be disproportionate where it is generalized rather than limited to the area of impairment or the extent of the pain is greater than that expected from *the **impairment***." (emphasis added) The policy item then goes on to provide: "Disproportionate pain, for the purposes of this policy, is pain that is significantly greater than what would be reasonably expected given *the type and nature of **injury or disease***." (emphasis added)

> Policy item #39.02 seems to require that the extent of the worker's pain be compared to what is expected for *both* the impairment *and* the injury or disease.
>
> The DAO described the worker's symptoms – increased problems with activities and vulnerability relating to the type of activities or endurance. The DAO found that the worker's ongoing complaints of pain are consistent with CTS and the worker's described chronic pain is not inconsistent with or in excess of what would be expected from CTS. I agree with the DAO's assessment.
>
> When this claim was opened, the worker had CTS that involved severe pain symptoms. He underwent release surgery on both wrists, and the evidence shows that by the time of his PFIE examination in late June 2004, his pain complaints, and the impact of pain on his daily life and functioning, had decreased significantly. I find that the worker's pain is not greater than what would be expected given the degree of impairment: 0.91% of total disability. Nor is it significantly greater than what would be reasonably expected given the worker's condition: bilateral CTS, with bilateral surgical release approximately one year prior to PFIE examination.
>
> As a result, I find that the worker's pain complaints do not amount to disabling, disproportionate chronic pain, in accordance with Board policy item #39.02. An additional award for chronic pain will therefore not be provided, as it would result in the worker being compensated twice for the impact of pain.

The review officer agreed with the determination of the CADA that the worker's pension award should not be assessed using the loss-of-earnings method:

> Policy item #40.00 specifies the criteria that must be met in order for a worker to be eligible for a loss of earnings assessment. These criteria include that the worker must no longer be 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. In considering this criterion, *the medical evidence must conclude that the work injury makes it* ***impossible*** *for the worker to continue in the occupation.* For the purpose of this policy, an occupation is defined as being broader than the worker's job, and includes a collection of jobs or employments that are characterized by a similarity of skills. Skills involve the application of knowledge and abilities. Policy item #40.00 confirms that a worker may experience a loss of earnings as a result of the work injury, but that fact alone is not

> sufficient to meet the criteria necessary for an assessment under the loss of earnings method.
>
> In this case, BMA, Dr R, was of the opinion that there is not a high probability of immediate and significant harm to self or others, should this worker return to his pre-injury duties. There is, however, a probability of recurrence of the CTS, and the subsequent possibility of a permanent impairment. There is no expert medical evidence contrary to Dr R's opinion. As a result, the medical evidence in this case does not conclude that the work injury makes it **impossible** for this worker to continue in his pre-injury occupation.

Decision and Reasons

Percentage of Disability

Mr. Wener contended that the effect of the worker's symptoms on his functioning supported a higher percentage. He contended that the worker could not grip or squeeze. He could not think of a job that did not involve gripping and squeezing. He submitted that the worker's disability was such that it was as if he did not have any hands. He indicated that he did not contest the accuracy of the findings in the permanent functional impairment examination conducted by Dr. R2.

I note that Dr. Neumann, in her May 28, 2005 report, contended that Dr. R2's report was of "limited value". She contended that it was "…highly unlikely to have an intact sensory examination in a patient with abnormal nerve conduction caused by entrapment neuropathy and superimposed abnormalities of median and ulnar nerves due to peripheral neuropathy." She observed that the permanent functional impairment assessment percentage would have to be reviewed and adjusted.

I find that the percentage of disability was properly established. Dr. R2's assessment takes the form of an expert opinion with respect to the assigning of a percentage of impairment (item #97.40 of the RSCM II). Dr. Neumann does have extensive qualifications in neuropathology (she is certified as a specialist in that area); however, I do not consider that she is an expert in disability assessment. I consider it significant that she does not contend that her examination of the worker establishes two-point discrimination readings different from those obtained by Dr. R2. As well, Dr. Neumann does not contend that her examination results yielded different ranges of motion than those documented by Dr. R2.

The Board primarily bases its calculation of percentages of disability on its Permanent Disability Evaluation Schedule (PDES) issued pursuant to subsection 23(2) of the Act and an Additional Factors Outline (both of which may be viewed on the Board's website). I find that the worker's permanent disability was properly assessed

with respect to the PDES and the Additional Factors Outline. I confirm the percentage of disability established by the Board.

Chronic Pain

I consider that the worker's pain would be classified as specific chronic pain associated with a medical reason (item #39.02(1) of RSCM II). Given that determination, entitlement to an award for chronic pain would arise if the worker's circumstances satisfied the policy at item #39.02(4)(b) (Specific and Non-Specific Chronic Pain – Disproportionate to the Impairment):

> A worker's entitlement to a section 23(1) award for chronic pain will be considered in the following cases:
>
> i) Where a worker experiences specific chronic pain that is disproportionate to the associated objective physical or psychological **impairment**.
>
> Pain is considered to be disproportionate where it is generalized rather than limited to the area of the impairment or the extent of the pain is greater than that expected from the **impairment**.
>
> In these cases, a separate section 23(1) award for chronic pain may be considered in addition to the award for objective permanent **impairment**.
>
> ii) Where a worker experiences disproportionate non-specific chronic pain as a compensable consequence of a work **injury or disease**.
>
> Disproportionate pain, for the purposes of this policy, is pain that is significantly greater than what would be reasonably expected given the type and nature of **injury or disease**.
>
> [emphasis added]

The review officer considered that a specific pain would be disproportionate if it was (i) disproportionate to the associated objective physical impairment and (ii) was greater than would be expected, given the type of injury or disease. That conclusion would seem to be a reasonable one, given that the language of item #39.02(4)(b) indicates that both requirements need to be met. The first requirement stems from item #39.02(4)(b)(i). The second requirement would appear to stem from the discussion in the last paragraph in the above quotation. The last paragraph in the above quotation refers to injury or

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

disease, yet it is part of the general text of item #39.02(4)(b); it is not indented to show that it is part of item #39.02(4)(b)(ii). Thus, its reference to "injury or disease" applies to all of item #39.02(4)(b), not just item #39.02(4)(b)(ii). This would appear unusual, given that item #39.02(4)(b)(i) is drafted with respect to "impairment" and item #39.02(4)(b)(ii) is drafted with respect to "injury or disease." However, I accept that, as a result of a fair and reasonable interpretation of the text of the policy item, a determination of whether "specific pain" is disproportionate is assessed with respect to whether it is disproportionate to the impairment and also with respect to whether it is disproportionate to the injury or disease. I note that the policy item reflects the text set out in *Resolution #2002/11/19-04*, dated November 19, 2002, passed by the Board's panel of administrators (the Resolution may be viewed on the Board's website).

While the Board accepts that the worker has chronic pain, that, by itself, does not establish entitlement to an award. I accept that the worker experiences pain in proportion to the level of activities he performs with his hands. Mr. Wener observed that the worker's pain was disproportionate some times and not disproportionate at other times. In that regard, the worker testified that there would be times when he would take ten tablets of Tylenol No. 3 in a day, and there would be times when he would not take any Tylenol No. 3. While the worker has not returned to employment, he is active around the home (although his tasks take considerably more time than they did before 2002) and he does drive.

I find that the worker is not entitled to an additional award for chronic pain. I accept the analysis of the Board officer.

Loss of Earnings

Subsection 23(3) of the Act permits the Board to pay a worker a periodic payment that equals 90% of the difference between the worker's pre-injury earnings and either his post-injury earnings or earnings that he is capable of earning in a suitable occupation after the injury (whichever the Board considers "better represents the worker's loss of earnings").

Subsection 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 of the RSCM II provides guidance in considering whether subsection 23(3) applies. It states that "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)." It notes that "Occupation is broadly defined as a

collection of jobs or employments that are characterized by a similarity of skills." It sets out criteria that must be met:

> 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.
>
> [emphasis added]

There is also a practice directive respecting the application of subsection 23(3); *Practice Directive #46* is entitled "Permanent Disability Benefits - Section 23(3)." It provides detailed instructions regarding the approach to a subsection 23(3) decision. Practice directives are not binding on WCAT, but they 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 Board will investigate whether the worker meets the "so exceptional" requirements of subsection 23(3) for assessment of permanent disability benefits. *Practice Directive #46* 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").

Practice Directive #46 goes on to state, in part, the three criteria found in policy and the considerations relevant to those criteria.

> 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.
>
> …
>
> [emphasis in bold print added]

Mr. Wener contended that the phrase "so exceptional" found in the Act does not mean "impossible". He observed that the "so exceptional" test was a more stringent test than that found in the statute before the recent amendments. He commented that one could understand why a more stringent test was put into the legislation; however, the statute did not refer to an "impossible" test.

I note, in passing, that the "so exceptional" test was not recommended in the *Core Services Review of the Workers' Compensation Board* (the Winter report). Further, a review of the Debates of the Legislative Assembly (Hansard) establishes that the *Workers Compensation Amendment Act, 2002* which added the "so exceptional" test to the Act was debated in the Legislature, but there was no discussion of the "so exceptional" test and how it would affect the assessment of workers' entitlement to loss-of-earnings pensions.

For reasons which will become apparent below, I do not need to resolve whether the "impossible" test accords with the Act.

Even before considering whether the "impossible" test accords with the Act, it is necessary to examine the extent to which the "impossible" test is part of Board policy. During the course of submissions, Mr. Wener and I reviewed the fact that the three formal bulleted criteria outlined in item #40.00 of the RSCM II refer to a worker being "no longer able to perform the essential skills" and being "unable to work in his or her occupation." The criteria do not include the word "impossible" which is used later in the policy.

One might consider that the absence of the word "impossible" from the three formal bulleted criteria means that it is not part of the formal criteria. Thus, one could argue that the "impossible" test is not a required criterion that must be met. Alternatively, one could consider that the later discussion of the word "impossible" in the policy should be taken to be an explanation of what the Board means when it indicates that a worker is "no longer able to perform the essential skills" and is "unable to work in his or her occupation." By that, I mean that the policy could be considered to establish that the Board considers that the phrases "no longer able to perform the essential skills" and "is unable to work in his or her occupation" are to be interpreted as meaning that it is impossible for the worker to return to continue in his or her occupation. One might question whether the everyday meaning of the words "no longer able" and "unable" is the same as the word "impossible". Yet, I accept that it would be open to the Board to define words in a manner it deems appropriate. Thus, it could determine that "unable" means "impossible".

Whether "unable" means "impossible" is the subject of a document partially reproduced in *WCAT Decision #2005-02196-RB,* dated April 28, 2005. As can be seen from that decision, an August 20, 2003 claim log documented the Board's determination that "…the worker is unable to return to his pre/reopening job." The same claim log documented the decision that it "…is not impossible for the worker to return to his pre-injury/reopening job…." On the basis of the second conclusion, the Board denied the worker a loss-of-earnings pension. That was a case where the Board determined that "unable" did not mean "impossible".

In the case before me, the May 10, 2004 memorandum noted earlier in this decision documented that restrictions precluded a return to work, but that it was not impossible for the worker to return to work. The CADA documented his understanding that the case manager had concluded that the worker was unable to return to his pre-injury job; later in that memorandum, he determined that it was not impossible for the worker to perform the essential skills of his pre-injury occupation. I appreciate that there may be a difference between the requirements of a pre-injury job and the requirements of the skills of an occupation.

Aside from Mr. Wener's objection to the Board's interpretation of the "so exceptional" test as an impossible test, he contended that it was impossible for the worker to return to his pre-injury employment. He submitted that it was hard for doctors to speak in terms of "impossibilities." He drew attention to the comment of Dr. Anzarut, in his November 4, 2004 report, that "It is highly unlikely that [the worker] will be able to return to do doing any manual work." I noted at the hearing that Dr. Neumann did comment in her report that "It is impossible for [the worker] to return to his previous occupation as a cement finisher, or any other type of work requiring sustained use of both hands."

In reviewing the worker's case, I consider it is important to keep in mind the observations of the activity-related soft tissue disorders (ASTD) program that treated him for six weeks in the summer of 2003. The program identified the job demands and the worker's inability to achieve them. Mr. Wener confirmed with the worker at the hearing that the list of job demands set out in the report of the ASTD program was accurate. The report identified the following demands:

- Lifting an average of 50 pounds from ground to shoulder level;
- Carrying 50 pounds for varying distances;
- Pushing/pulling wheelbarrows;
- Forceful gripping for lifting/carrying, as well as pushing/pulling wheelbarrows, and sustained gripping for operating chippers and jackhammers; and
- Reaching and handling involving finishing cement using circular elbow movements with a trowel and sustained gripping throughout.

As well, Mr. Wener reviewed with the worker the list of job requirements set out in NOC classification code 7282, entitled "Concrete Finishers". The worker agreed with the NOC requirements, save for his observation that imparting the desired finish to cement surfaces was done only by hand; he did not use power tools. He did confirm that he used grinders, chippers, and jackhammers on a daily basis, sometimes up to

several hours a day; however, those tools were not used with respect to the imparting of finish.

The ASTD discharge report noted that the worker attended 28 out of 28 days and was punctual. He participated actively in all aspects of the program and his effort was "very good." The report documented that the worker was not fit to return to work. Lifting was not assessed, due to the worker's demonstrated difficulty with clenching a fist/light gripping. The worker was not able to complete lifting, as he was not able to forcefully grip or tolerate resisted wrist flexion/extension. The worker was not able to tolerate carrying 50 pounds for the above-noted reasons. While light pushing was added to his program, the worker was not able to progress with respect to wheelbarrow pushing, due to the above-noted reasons and irritability of symptoms. His grip strength was well below age/gender norms; while he progressed with repetitions and activities, he was functioning at a very light physical level. He was limited with gripping activities, especially regarding sustained gripping for greater than a few seconds. As for reaching/handling, the worker had been given weight-bearing exercises with gripping, and he had been able to increase the exercises, but he was still at a light level. The worker made "very small functional gains" while in the program, and was discharged on September 3, 2003 as not fit to return to work.

In his September 23, 2003 report Dr. Anzarut considered that there had been "very significant improvement" in the worker's nerve conduction studies between February 2003 (pre-surgery) and September 2003 (post-surgery). Examination revealed normal hand muscle strength with no wasting of the intrinsic hand muscles. The worker appeared to have full range of movement of the wrists and fingers. There was pain over the hyperthenar eminence. Dr. Anzarut commented that he "…would suspect the pain and stiffness in [the worker's] hands to eventually resolve."

That September 23, 2003 report of Dr. Anzarut might suggest that the worker's condition would improve. Yet, as noted above, in his November 4, 2004 report, Dr. Anzarut commented that it was highly unlikely that the worker would be able to return to doing any manual work. Dr. Anzarut noted that the worker had ongoing problems with pain in his hands and over the volar aspect of the wrists, which was exacerbated by any sort of manual work. The worker complained of nocturnal paraesthesia which wakened him from sleep. Gripping aggravated his symptoms, and his symptoms were worse in his right hand.

Dr. Anzarut documented that examination revealed "no real change." Muscle strength was normal. The worker's hands were somewhat puffy, and he had difficulty making a fist. There was no wasting or weakness of the intrinsic hand muscles. Conduction studies were "still very abnormal" and revealed delays in the right and left median nerves, and there was slowing in both ulnar nerves. He suspected that the worker had a peripheral neuropathy and most likely had a superimposed entrapment

neuropathy of the median nerves, as well as the ulnar nerves. He did not recommend any further surgical procedure.

I find that Dr. Anzarut's November 4, 2004 report establishes that the worker's condition did not improve after September 2003. I consider that the absence of such improvement means that the ASTD program report continues to be a valid assessment of the worker's ability to return to his pre-injury employment.

The ASTD program report was not produced by physicians. Does that mean that it cannot be considered to be "medical evidence", as that term is used in Board policy? I do not consider that expression should be interpreted so narrowly as to exclude evidence from healthcare professionals who are not physicians. I note that in cases of permanent psychological disabilities the Board relies on the input of psychologists who are not physicians. Generally speaking, the workers' compensation system relies on many types of healthcare professionals for diagnosis and treatment of injured workers, and I consider that evidence from all of those professionals is eligible to be considered. There will be cases where non-physicians offer comments outside of their area of expertise or where the opinions of physicians are much more persuasive than the opinions of non-physicians. In those cases, the weight of the evidence will guide a decision-maker. That is preferable to entirely discounting an opinion on the basis that it does not come from a physician.

I appreciate that the job demands assessed by the ASTD program focused on what might be considered to be physical demands. In that regard, I note that Board policy provides that skills are defined as the "learned application of knowledge and abilities." One could argue that the language in policy is sufficiently broad to conclude that such "abilities" as lifting and carrying may be considered as "skills." I also appreciate that one could argue that "lifting" and "carrying" are not skills. As noted above, *Practice Directive #46* provides that "Skills are not to be confused with physical demands such as standing, sitting, etc." I question whether "lifting" and "carrying" can be regarded as physical demands akin to "sitting" or "standing". I consider it significant that *Practice Directive #46* did not list "carrying" and "lifting" as "physical demands." I accept the comments in *WCAT Decision #2004-06402*, dated November 30, 2004, in which the panel observed that heavy labour may be considered a skill.

Aside from the question of whether demands such as lifting and carrying are skills is the issue of the use of vibrating tools. I consider that the worker's use of such tools involved "the learned application of knowledge and abilities." He was adept in handling and operating such equipment, and I find that such activities involved "the learned application of knowledge and abilities." The CADA also considered that operation of such equipment was a skill.

In considering the July 7, 2004 opinion of Dr. R with respect to the worker's eligibility to a loss-of-earnings award, I note that Dr. R considered that a return to pre-injury duties was associated with the subsequent possibility of a permanent impairment. It is notable that the worker had a permanent impairment at that time. Thus, Dr. R's opinion is somewhat problematic in analyzing the worker's eligibility for a pension under subsection 23(3) of the Act. I am much less persuaded by Dr. R's opinion than the review officer.

I do not consider that I need to assess whether the "impossible" test accords with the "so exceptional" test found in the statute. As well, I do not need to determine whether the "impossible" test should be considered to be a formal policy criterion. Further, I do not need to assess whether the three considerations in reviewing the threshold of "impossible" used by the CADA in his July 22, 2004 memorandum accord with the policy or the statute. (Those examples are not found in law or policy or in the practice directive; however, my observation is not intended to suggest that those examples cannot be used, if they fail to appear in such sources.)

I make the above comments, because I find that the worker is medically incapable of undertaking his pre-injury occupation. The worker's pre-injury occupation as a cement finisher was physically demanding, and I find that the evidence establishes that, as a result of the compensable disability, the worker was no longer able to perform the essential skills needed to continue in the occupation at the time of injury and that the effect of the compensable disability is that the worker is unable to work in his occupation. I am cognizant of the results of Dr. R2's June 22, 2004 examination; however, I am persuaded by the ASTD program report.

There has been no consideration of whether the worker can perform other occupations. The Board did not assess that issue, given its conclusions regarding the worker's ability to return to his own occupation. I do not consider that it falls to WCAT, on appeal, to assess that much broader issue, in the absence of any initial consideration by the Board. My determination that the worker is medically incapable of undertaking his pre-injury occupation does not require the Board to pay the worker a pension under subsection 23(3). It now falls to the Board to evaluate the worker further.

Conclusion

I allow the worker's appeal, in part. I vary the January 13, 2004 decision of the review officer. While I find that the worker is not entitled to an additional amount for chronic pain and that the worker's percentage of disability was properly established, I find that further evaluation with respect to the loss-of-earnings method of calculation is appropriate.

Expenses

I have considered the request for reimbursement of expenses associated with material obtained from Dr. Perey and Dr. Neumann. I advised Mr. Wener that the reports from Dr. Perey submitted by him are found on the worker's claim files. Some reports concerned the worker's 1996 injury and were not relevant to his 2002 claim. Mr. Wener indicated that when he was retained in February 2005, he contacted Dr. Perey for copies of his reports. He indicated that he did not know that the reports were also in possession of the Board. I decline to award reimbursement for expenses associated with Dr. Perey's reports.

Dr. Neumann tendered a bill for $2,500.00, on the basis that she spent ten hours preparing her report. Her bill exceeds, by a considerable margin, the applicable tariff item. I do not consider that this is a case where the actual amount billed for the report should be reimbursed. I consider it was reasonable for the report to have been obtained, and I order reimbursement up to amount listed in the applicable Board tariff item.

Randy Lane
Vice Chair

RL/jy