

As of October 24, 2011, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number : WCAT-2006-00752
WCAT Decision Date: February 16, 2006
Panel: Elaine Murray, Vice Chair

Introduction

By decision dated May 12, 2003, an officer with the Workers' Compensation Board (Board) concluded that the worker had "knowingly and falsely misrepresented a disability," such that any and all medical findings from a November 6, 2002 permanent functional impairment evaluation were refuted. The Board officer informed the worker that he was not entitled to a permanent disability award because he did not have any permanent disability. He also referred the worker's file to a vocational rehabilitation consultant (VRC) to consider recovery of any vocational rehabilitation benefits that were paid "based on a misrepresented disability."

By decision dated May 29, 2003, a VRC concluded that the worker's misrepresentation of his disability resulted in an overpayment of vocational rehabilitation benefits (income continuity benefits) as of July 8, 2002 (the date of the first videotaped surveillance of the worker). The VRC also concluded that the worker was no longer entitled to income continuity benefits (as of May 27, 2003), and a May 29, 2002 employability assessment was no longer valid.

By decision dated August 8, 2003, the VRC informed the worker that the overpayment of income continuity benefits from July 8, 2002 until May 27, 2003 amounted to \$18,771.33. The VRC also asked the worker to return the computer and software that the Board purchased for him (the value of these items was \$2,258.28).

The worker submitted a request for review of the three above-noted decisions to the Review Division, which resulted in the following two decisions on appeal before me.

By decision dated December 24, 2002 (it should read 2003 and I will refer to it by that date), a review officer informed the worker that he accepted the disability awards medical advisor's (DAMA) conclusions about the range of motion findings, which were based on the DAMA's review of the videotaped surveillance. The review officer also concluded that "[n]otwithstanding the worker's demonstration of abilities, as evidenced by the surveillance, and notwithstanding the worker's inconsistency and misrepresentation, the issue still remains whether the worker's injury, treated surgically, has resulted in a measurable permanent partial disability." As a result, the review officer referred the May 12, 2003 decision back to the Board with directions that a DAMA must determine whether the worker had a residual permanent disability

“associated with non-range of motion features related to the compensable conditions of right carpal tunnel syndrome (CTS) and chronic regional pain syndrome (CRPS).”

In addition, the review officer denied reimbursement of expenses incurred for a September 8, 2003 functional capacity evaluation (FCE) report, a June 16, 2003 medical report prepared by a neurologist, and the neurologist’s September 17, 2003 addendum report.

By decision dated January 26, 2005 (in relation to the May 29 and August 8, 2003 Board decisions), another review officer concluded that the issue of fraud and misrepresentation was not before her because she was bound by her colleague’s December 24, 2003 “finding of fact on the worker’s credibility/misrepresentation.” Since her colleague found evidence of fraud and misrepresentation, she decided that it was appropriate for the VRC to redo the employability assessment, terminate income continuity benefits, and declare an overpayment.

Unfortunately, the worker passed away suddenly just before the oral hearing, which was scheduled for October 21, 2005. The worker’s family wished to proceed with the oral hearing, as scheduled. The worker died intestate, with no dependants. His mother, Ms. T, provided a statutory declaration in this matter, in which she consented to her son-in-law instructing the worker’s legal counsel, Mr. Ishkanian, in these appeals. The oral hearing proceeded on October 21, 2005. Ms. T, the worker’s sister, Ms. M, and the worker’s brother-in-law, Mr. M, testified by teleconference, as they reside out of province.

Mr. Ishkanian seeks the following remedies:

- A finding that the worker did not misrepresent his disability. As a result, he has a measurable impairment in relation to his range of motion, and the first employability assessment remains valid.
- Cancellation of the decision declaring an overpayment, as well as a direction to the Board to reinstate income continuity benefits up to the date of the pension implementation in October 2004 (the worker was granted a permanent disability award following the review officer’s directions to the Board in the December 24, 2003 decision).
- Reimbursement of various expenses.

Issue(s)

1. Does the Workers’ Compensation Appeal Tribunal (WCAT) have jurisdiction to address the matter of an overpayment of vocational rehabilitation benefits as a result of an alleged misrepresentation by a worker?

2. If yes, did the worker make a misrepresentation, which the Board relied on when deciding to pay income continuity benefits, such that an overpayment was properly declared?
3. Does WCAT have jurisdiction to address the termination of income continuity benefits on May 27, 2003 as a result of an alleged misrepresentation? If yes, did the Board correctly terminate income continuity benefits?
4. Did the review officer correctly direct the Board not to re-assess the worker's wrist range of motion findings when he referred the May 12, 2003 decision back to the Board with directions to determine whether the worker had any residual permanent disability?

Jurisdiction

This is an appeal of two Review Division decisions pursuant to section 239(1) of the *Workers Compensation Act* (Act).

Section 250 of the Act provides that WCAT must make its decision based on the merits and justice of the case but, in so doing, must apply relevant policies of the Board's board of directors. Section 254 of the Act gives WCAT exclusive jurisdiction to enquire 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.

Background and Evidence

On July 13, 1999, the then 41-year-old sheet metalworker felt a pop in his right wrist when his hand/wrist was caught between the handles of large cutters used to cut 16-gauge sheet metal.

On January 6, 2000, Dr. Boyle, a plastic surgeon with the Board's Visiting Specialists Clinic (VSC), reported that the worker's right forearm, wrist and hand pain was out of proportion to the examination findings. This, in combination with vascular changes, suggested a sympathetic mediated pain syndrome. Dr. Boyle also questioned whether the worker's initial wrist swelling may have led to an acute CTS.

Further investigation confirmed Dr. Boyle's diagnoses, and the Board accepted the worker's claim for right CTS (surgery on May 10, 2000) and right upper extremity CRPS.

In a June 15, 2000 claim log entry, a Board officer noted a Board medical advisor's opinion that the worker would be left with a permanent functional impairment (decreased grip strength and dexterity), which would prevent him from returning to his

manually intensive job. His functional limitations were to be considered upon completion of a hand therapy program.

An initial hand therapy assessment report, dated July 18, 2000, noted that the worker displayed marked decreased active range of motion in all fingers and his wrist. He also had decreased passive range of wrist motion; however, he had full passive range of motion of all digits.

Upon discharge from the hand therapy program on September 26, 2000, the worker's condition was considered to have reached a medical plateau. The staff noted that he demonstrated motivation and willingness to participate, but concluded that he continued to have sympathetically mediated pain syndrome that limited the functional abilities of his right hand. The staff reported the following findings:

- A 50 ml difference in volume between the right and left hand, which was considered to be a significant difference.
- The right hand was 80 to 82 degrees, whereas the left hand was 90 to 92 degrees.
- The skin of the right hand and wrist had a mottled appearance.
- Numbness of the right hand fingertips.
- Improved range of wrist motion, but still decreased (30 degrees of wrist extension, 30 degrees of flexion, 15 degrees of radial deviation, and 15 degrees of ulnar deviation).
- Significant improvement of active digit range of motion.
- Improved right grip strength (6 to 12 kilograms depending on pain levels), and improved right lateral pinch grip (3 kilograms).
- The worker could tolerate light functional activities for less than 10 minutes of repetitive use of his right upper extremity, and could lift and carry up to 5 pounds once every 30 minutes.
- His right hand fine motor coordination tested well below the norms.

The Board concluded that the worker's condition had reached a plateau, and terminated his wage loss benefits on November 26, 2000. He then began to receive wage loss equivalent vocational rehabilitation benefits while the Board funded retraining for him.

The Board referred the worker for a functional abilities evaluation, which was scheduled for February 21, 2002. The purpose of the evaluation was to determine his current functional status in relation to vocational retraining. The worker declined to participate in functional testing because he thought that there was a risk of aggravating his condition. As well, he thought that the Board had already subjected him to sufficient evaluation. He consented to a physiotherapy clinical evaluation, however.

The worker told the physiotherapist that he continued to experience ongoing acute right wrist and hand pain, which was “not too bad” in the morning, but increased during the day. He said that he avoided using his right hand as much as possible to control the intensity of his pain.

On examination by the physiotherapist, part of the worker’s right wrist and hand was at a lower temperature as compared to his left. His skin was mottled, especially over the right forearm. There was also an absence of sensation to light touch in the right hand. The worker’s active range of wrist motion was restricted (10 degrees of extension, 35 degrees of wrist flexion, and 10 degrees of radial and ulnar deviation). He was also unable to abduct or adduct his fingers, or appose his thumb to any digits. He indicated that he could not tolerate any passive range of motion testing owing to pain. The physiotherapist concluded that the measurements she documented may not represent the worker’s true maximal function, given his agitated state at the time. In addition, not all standard testing was performed. Nevertheless, she concluded that he did not have a functional right hand.

By letter dated April 3, 2002, the VRC informed the worker that the physiotherapist’s assessment did “nothing towards clarifying” his functional abilities. The VRC advised that continuation of vocational rehabilitation assistance would be dependant upon his active participation in the process.

In a recommendation for expenditure memorandum, dated April 3, 2002, the VRC noted that he had spoken to the worker on April 8, 2002 (I am uncertain if that date is correct). The worker told the VRC that he did not decline to participate in the functional abilities evaluation; rather, he was told that he could decline to do something if it would cause pain, and he did so. The VRC told the worker that he had little information of what he would be capable of doing. In response, the worker said that he believed he could only work part time as a gas station attendant.

On April 4, 2002, an external VRC, who was assisting the worker with academic pursuits, reported that the worker continued to have pain in his right wrist and hand. She thought that he required further assessment to clearly define his physical abilities. She also thought that he would benefit from an evaluation of his psychological and emotional health.

In a May 29, 2002 employability assessment, the VRC reviewed the worker's medical history up to his discharge from the hand therapy clinic in September 2000. The VRC commented that the worker did not participate in the functional abilities evaluation, but noted the evaluator's comment that the worker did not have a functional right hand. As for the worker's post-injury functional ability, the VRC relied on the September 26, 2000 hand therapy clinic discharge report to conclude that he had very limited use of his right hand, although he would be capable of light functional activity for limited times.

The VRC cited medical information concerning the worker's medical condition, and noted as follows:

...it takes an extremely motivated and committed person to overcome the effects of chronic regional pain syndrome and I'm afraid [the worker] is not the type of individual in spite of the services provided to date. For these and other reasons stated with in this report I was unable to determine or analyze any position that would be appropriate for this client.

The VRC then concluded that the worker was competitively unemployable since the treatment to date had done little to ameliorate his condition. As well, the VRC commented that the worker continued to use narcotic medication, refused to use the affected limb, and kept an elastic bandage around it, which perpetuated the cycle of pain. In the absence of a positive treatment outcome, along with the worker's knowledge and understanding of his condition, and his motivation to return to suitable employment, the VRC decided that successful vocational rehabilitation could not be achieved.

Based on the employability assessment, the VRC recommended payment of income continuity benefits pending the outcome of the worker's pension assessment.

The Board arranged for videotaped surveillance of the worker, which first occurred on July 8, 9, 17, 18, 24 and 25, 2002. It appears that the VRC requested this surveillance. There is no formal request on file; however, a May 5, 2003 memorandum from the Board's Special Investigations Branch indicates that the worker's claim "became suspicious" to the VRC when the worker would no longer allow anyone to examine his hand.

The surveillance company provided copies of the videotapes and a summary of their activities to the Board in reports dated July 11 and 29, 2002.

On November 6, 2002, the worker attended a permanent functional impairment assessment in Ontario (where he was living). Dr. Djan, a medical consultant with the Ontario Workers' Compensation Board, assessed him. Dr. Djan concluded that the worker had a functionless right hand and wrist, which represented a permanent

impairment. He noted that the worker experienced “excruciating pain” during his examination.

On examination by Dr. Djan, the worker demonstrated the following:

- No swelling or atrophy of the right wrist.
- No atrophy of the thenar or hypothenar eminences of the right hand.
- A tendency to clawing of the right fingers.
- Wrist tenderness.
- Markedly restricted right wrist range of motion (3 degrees of ulnar deviation compared to 25 degrees on the left; 3 degrees of radial deviation compared to 20 degrees on the left; 0 degrees extension compared to 55 degrees on the left; 0 degrees flexion compared to 60 degrees on the left; 160 degrees supination compared to full on the left; and 90 degrees pronation compared to full on the left).
- Considerable weakness of the right wrist muscles.
- The worker could not make a fist with his right hand.
- There was virtually no movement of the digits of the right hand.
- The worker could not approximate his right thumb to his digits.
- Markedly altered sensation in the right wrist and hand (it was absent along the distributions of C6 and T1 on the right).
- Two-point discrimination was not appreciated at a distance of 4 centimetres in the right hand, wrist and distal half of the right forearm.
- Pulses and temperature were normal, but there was a slight burgundy colour to the right wrist and hand.

In a January 24, 2003 memorandum to a DAMA, a claims adjudicator in disability awards (CADA) compared Dr. Djan’s findings to the videotaped surveillance taken of the worker in July 2002. The CADA noted that the videotaped surveillance showed the worker using his right hand and wrist to perform a variety of tasks. These tasks required him to use a hook grip, pinch grip, forceful wrist extension, flexion/extension of his digits, wrist rotation, fine finger dexterity, resisted wrist extension, wrist flexion, forceful ulnar and radial deviation, and forceful power gripping.

By memorandum dated April 11, 2003, Dr. K, a DAMA, noted that he reviewed Dr. Djan's assessment, along with the videotaped surveillance. He spoke to Dr. Djan, who confirmed that the worker's right distal arm was hardly functional. In Dr. K's opinion, the videotaped surveillance showed the worker using his right arm quite normally on several occasions; the motion of his right hand and wrist was not discernibly diminished. Dr. K thought that there was a complete discrepancy between the permanent functional impairment evaluation findings and the videotaped surveillance of the worker. He concluded that the worker did not have any permanent functional impairment.

Further surveillance was conducted of the worker on April 15, 16, 17, and 19, 2003. Dr. K also reviewed this videotape. By memorandum dated April 29, 2003, Dr. K noted that the videotaped surveillance "quite clearly belied" the finding of Dr. Djan that the worker had virtually absent wrist motion, particularly in the segment where the worker was shown writing.

The CADA then rendered the May 12, 2003 decision, which was followed by the VRC's May 29, 2003 decision.

In support of his request for review of the Board officers' decisions, the worker attended a medical examination by Dr. Sawa, a neurologist, on June 16, 2003. Dr. Sawa noted that the worker did not take analgesics on that date, although he would normally take eight to ten Tylenol No. 3 per day, along with Oxycontin and Amitriptyline.

On examination by Dr. Sawa, the worker's right hand was drier and approximately 4 degrees cooler than his left. His right hand was somewhat redder than the left, with decreased hair growth. The worker had decreased pin prick sensation in the right forearm, hand, and fingers. There was no muscle wasting or weakness. Finally, the worker had reduced right wrist extension, which was more reduced than his flexion. His pronation was "mildly" limited. Supination, and ulnar and radial deviation were normal. Dr. Sawa did not provide any range of motion measurements. He concluded that the worker had mild CRPS. He also commented that the worker's CTS did not respond to decompression.

Also in support of his request for review, the worker attended a FCE on August 8, 2003. In their September 8, 2003 FCE report, the assessors (a kinesiologist and a physiotherapist) noted that the worker's assessment results were an accurate reflection of his current functional abilities "performed within his pain tolerance as opposed to his maximum functional abilities" (they noted that the worker had taken Oxycontin before his assessment). They reached this conclusion because the worker demonstrated unreliable and less than full levels of physical exertion on a number of tests.

The FCE evaluators also reviewed the videotaped surveillance and observed that the FCE results conflicted with some of the activities that the worker demonstrated on the

videotaped surveillance. They concluded that the worker demonstrated the functional abilities to perform most of his pre-accident activities of daily living, but not his pre-accident occupation. Dr. Sawa agreed with this conclusion in a brief September 17, 2003 addendum report.

In support of his requests for review to the Review Division, the worker's previous legal representative, Ms. Iwata, reviewed the surveillance videotapes with the worker. The worker provided an October 22, 2003 affidavit, in which he deposed as follows:

I have seen the surveillance and I admit that I was drinking quite heavily at the time. I did not use my hand on a continuous basis or to lift heavy objects. My doctors had told me to use that hand and sometimes I do. However, I do not golf or engage in any other sports activities. If I need moderate or heavy work done or have to lift moderately heavy or heavy articles, I have to ask for help. I find this to be humiliating.

The worker also deposed that until his lawyer advised him to take his medication for his appointments with Dr. Sawa and the FCE, he did not take medication before his appointments because he thought that it was necessary for the doctors to see him without medication.

Ms. Iwata submitted as follows:

- The worker was observed performing activities at about the same level as he demonstrated at the hand therapy clinic in 2000 (lifting light objects and grasping for short durations).
- It was noteworthy that most of the surveillance concludes at noon or in the early to mid-afternoon, and that the worker remained at home for the rest of the day.
- The worker is shown "shaking" his right hand after using it for short periods of time, which suggests that the recent activity was painful.

In accordance with the review officer's December 24, 2003 referral back to the Board, Dr. K reviewed Dr. Sawa's report and concluded that the worker was entitled to an award of 1.0% of total disability for the clinical findings associated with CRPS. He noted that the examination did not reveal any evidence of CTS. The CADA also granted an additional award of 2.5% of total disability for chronic pain.

The VRC prepared an August 11, 2004 employability assessment, in which he concluded that the worker was capable of light employment, with occasional medium strength work. A loss of earnings was not anticipated because the VRC thought that the worker could find employment in light manufacturing, mechanical assembly, or electrical assembly.

On September 13, 2004, Dr. Pollock, the worker's family physician (since June 2000), commented that the worker had never given him the impression that his right hand was completely functionless; rather, the worker said that it was painful and use of his right hand aggravated that pain. Dr. Pollock reviewed the videotaped surveillance and commented as follows:

In them, I see [the worker] doing some activities of daily living including opening doors, using keys in his car, carrying small packages, smoking cigarettes, and even carrying coffee. However, many times, it is visible that [the worker] refrained from using his right hand to carry out minimal tasks and even held it out of the way. Nowhere in the surveillance videos is [the worker] carrying out any meaningful and physically demanding tasks with his right hand. Also, nowhere is mention made of the fact that [the worker] was taking analgesics on a regular basis and whether the activities taped occurred while he was under the effect of analgesics.

In support of this appeal, Mr. Ishkanian also provided a copy of an August 30, 2004 letter from the worker, in which he wrote that he was taking "enormous amounts of pain killers" just to function for short periods of time. He did not understand how the Board could accuse him of fraud or expect him to work as sheet metal worker when he could not manage any repetitive functions of his hand.

Oral hearing evidence

Ms. T testified that she observed her son using his right hand "for minor things," however, he was forever shaking it. She also described how he frequently dropped objects when she handed them to him in his right hand. She said that she did not notice any improvement in his right hand function over time.

As for the videotapes, Ms. T commented that they showed her son doing what she had observed; namely, he very seldom used his right hand, he would switch carrying items from his right to his left hand, he did not use his right hand repetitively, and he would shake his right hand after using it. She also said that she could see the pain in his face.

Ms. M also viewed the videotapes and commented that she did not observe anything other than her brother's "normal everyday hand usage" since he was injured. She observed him switch from his right hand to his left to pump gas, and transfer items from his right hand to his left. She also commented that the videotapes captured her brother grimacing in pain, on occasion.

Ms. M said that she had seen her brother at various stages of medication intake, and observed significant differences in his function between first taking the medication, partway through, and just before he needed to take medication again. She also said that he dropped things with his right hand on a daily basis, but he would try to use it.

She also understood from him that he would not take his medications before his evaluations because he thought that they needed to see his true function. She told him to use the medications, and believed that he did. She was unable to recall when they had this discussion, however.

Mr. M described the worker's right hand use before and after the injury as the difference between night and day. He said that the worker was "crippled" from doing anything he loved to do, such as all of his sports activities and his work. Mr. M observed that prior to his injury the worker had a very strong handshake, but he had a very loose grip and his hand was always cold after he was injured.

Applicable Law and Policy

Since the worker was injured prior to June 30, 2002, the Act as it read prior to the amendments contained in the *Workers Compensation Amendment Act, 2002* (Bill 49) applies to these appeals. On March 3, 2003, the Act was also amended by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), and changes in that Act about the review and appeal process, along with misrepresentation and overpayment, are applicable to this appeal because the misrepresentation and overpayment decisions were made after March 3, 2003. Relevant policy is contained in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

Reasons and Findings

1. *Does WCAT have jurisdiction to address the matter of an overpayment of vocational rehabilitation benefits as a result of an alleged misrepresentation by a worker?*

Section 239(1) of the Act sets out the general provisions concerning when review officers' decisions can be appealed to WCAT. Section 239(2) of the Act includes the following restriction:

The following decisions made by a review officer may not be appealed to the appeal tribunal:

...

- (b) a decision respecting matters referred to in section 16;

A decision "respecting matters referred to in section 16" of the Act refers to vocational rehabilitation matters.

I note the following reasoning set out in *WCAT Decision #2005-01235-RB* (available on WCAT's website at www.wcat.bc.ca), which addressed the declaration of an overpayment of vocational rehabilitation benefits as a result of misrepresentation by a worker:

I find that the issue of the overpayment is appealable to WCAT. An overpayment declaration concerns matters of administrative errors, fraud, misrepresentation, and a lack of statutory authority (item #48.41 of RSCM I). The overpayment decision was rendered by the VRC, and she made her decision with respect to vocational rehabilitation benefits that had been issued under section 16 the Act. Those circumstances might suggest that the review officer's resulting decision was a decision "respecting matters referred to in section 16." Yet, the matter considered by the VRC and review officer was more of a matter of whether money was owed to the accident fund (item #48.40 of RSCM I). By that, I mean that while vocational rehabilitation benefits were the subject of the decision, the decision concerned the application of a policy that is not part of, or inherent to, vocational rehabilitation matters. Thus, I find that the issue of whether the worker was overpaid vocational rehabilitation benefits is before me for decision.

I adopt the above-noted reasoning, and find that the declared overpayment of income continuity benefits is appealable to WCAT.

2. *Did the worker make a misrepresentation, which the Board relied on when deciding to pay income continuity benefits, such that an overpayment was properly declared?*

Section 96(7) of the Act provides that the Board may at any time set aside any decision if that decision resulted from fraud or misrepresentation of the facts or circumstances on which the decision was based.

RSCM I item #48.41 authorizes the Board to declare an overpayment where benefits were paid due to fraud or misrepresentation. RSCM I policy item #C14-104.01 provides that in order to set aside a decision as a result of misrepresentation, there must be more than an innocent misrepresentation to justify declaring an overpayment. Misrepresentation includes concealing information as well as making a false statement. In particular, the policy states as follows:

The misrepresentation must have been made, or acquiesced in, by the worker knowing it to be wrong or with reckless disregard as to its accuracy, ***and the decision must have been made in reliance on the misrepresentation.***

[italics and bold emphasis added]

The worker's income continuity benefits ceased and a pension was not awarded because the Board decided that he had no permanent disability, given his presentation on informal observation. The videotaped surveillance was instrumental in the decision that the worker misrepresented his abilities. But was it also instrumental in the decisions to pay income continuity benefits? To determine this matter, I will first set out my comments and conclusion regarding the videotaped surveillance evidence.

I have reviewed all of the videotaped surveillance. It provides a significant body of evidence with respect to the worker's functional abilities in July 2002 and April 2003. It also provides a basis upon which the worker's evidence can be evaluated.

I appreciate that a person with CRPS, such as the worker, will have good days and bad days. I also appreciate that the use of pain medication and alcohol can sometimes significantly improve function. I acknowledge these two factors because they formed the basis of the worker's submissions to the Review Division, and Mr. Ishkanian raised them during the WCAT oral hearing. I also acknowledge that the videotapes did not capture the worker all of the time on the days in question so as to show his function at the end of the day rather than the start.

Even if I accept the daily variations in the worker's pain, the effect of pain medication, and the gaps where the worker may have been resting his right arm, the videotapes reveal that the worker had functional abilities with his right arm that far exceeded those he reported and exhibited to Dr. Djan on November 6, 2002. As was noted by Dr. K, the worker's presentation on the videotape is in significant contrast with his presentation on November 6, 2002. For example, during the November 6, 2002 examination, the worker had virtually no range of wrist motion. This is markedly inconsistent with the extent of wrist range of motion that he demonstrated on the videotape (as well as being inconsistent with Dr. Sawa's examination results). I agree with Mr. Ishkanian that the activities shown during surveillance do not establish that the worker could perform his pre-injury employment. That is not the issue, however.

I accept that the worker exaggerated his complaints to some degree and limited his participation during formal testing because he wanted others to understand the extent of his pain and limitations and he did not want to increase his symptoms. However, the videotape, and in particular the discrepancy between the worker's functional abilities as shown on the videotape in contrast with his presentation on November 6, 2002 of relatively severe disability, are markedly different.

It is important to the integrity of the workers' compensation system that, as nearly as possible, workers provide accurate information about their conditions. The fact that the worker's pain may vary, does not address the fact that he led Dr. Djan to believe that his overall functional abilities were extremely limited, when they clearly were not so limited.

I consider that these circumstances provide an example of misrepresentation, made by the worker, knowing it to be untrue or at least with reckless disregard to its accuracy. Like the review officer, I accept that the worker misrepresented his abilities and limitations to Dr. Djan during the November 6, 2002 evaluation.

I now turn to the key question, which is whether the worker misrepresented his functional abilities to the VRC and, if so, whether the VRC relied on any such misrepresentation to pay income continuity benefits at any time between July 8, 2002 and May 27, 2003.

The VRC made four decisions relevant to the payment of income continuity benefits between July 8, 2002 and May 27, 2003. He first decided to pay income continuity benefits after completing the May 29, 2002 employability assessment. In an August 6, 2002 claim log entry, the VRC requested approval for payment of further income continuity benefits from August 5, 2002 to December 22, 2002. This recommendation was approved by a manager the next day. In a December 9, 2002 recommendation for expenditure, the VRC requested and received approval to pay income continuity benefits from December 23, 2002 until March 16, 2003. Finally, in a March 8, 2003 recommendation for expenditure, the VRC requested and received approval to pay income continuity benefits until June 15, 2003.

In my view, the VRC did not rely on any misrepresentation by the worker to pay income continuity benefits. The decision to pay income continuity benefits in May 2002, and to continue paying such benefits until May 27, 2003, was based on the VRC's conclusions in the employability assessment. In that assessment, the VRC stated that there was limited evidence of the worker's functional abilities on file, which is why the functional abilities assessment was arranged. The worker chose not to undergo functional testing and the physiotherapist concluded that her examination results did not represent his maximum functional abilities. For this reason, the VRC chose to rely on the worker's functional status as of his September 26, 2000 discharge from the hand therapy clinic to complete the employability assessment.

I agree with Ms. Iwata's and Mr. Ishkanian's submission that the videotaped surveillance does not show the worker exceeding the functional abilities that he demonstrated in September 26, 2000. His actions while under surveillance are quite similar to his functional status upon discharge from the hand therapy clinic. The VRC relied on the worker's functional status as of September 26, 2000 when assessing his employability, and decided that he was unemployable.

Furthermore, I am not persuaded that the worker presented to the VRC in the same manner that he did to Dr. Djan in November 2002. It is noteworthy that the VRC concluded that the worker was unemployable, even after the worker told the VRC on April 8, 2002 that he thought he could work part time at a gas station. I had the impression from the employability assessment that the VRC simply gave up trying to

provide rehabilitation assistance, given the nature of the worker's diagnosed conditions and the limitations that he demonstrated as of September 26, 2000.

This may explain why the VRC continued to authorize income continuity benefits even after the surveillance was on file. In essence, it did not show any improvement in or worsening of the worker's function after September 26, 2000. Thus, there was no reason for the VRC to think that the results of the employability assessment were in question, based on the videotaped surveillance. Certainly, the worker's presentation to Dr. Djan made the Board question the reliability of Dr. Djan's examination findings; however, the evidence does not establish that the VRC placed any reliance on Dr. Djan's findings in deciding to continue paying income continuity benefits.

In other words, if the VRC relied on the worker's presentation to Dr. Djan to continue paying benefits (he certainly did not rely on it for the employability assessment, since it was not available at that time), one must ask why he would have continued to pay benefits given the surveillance? I accept that the VRC would have had access to the July 2002 videotapes, the July 11 and 29, 2002 reports of the surveillance company, the CADA's January 24, 2003 memorandum, Dr. K's observations in April 2003, and the April 2003 videotapes, but he still continued to authorize payment of income continuity benefits.

In short, I am satisfied that the VRC primarily relied on the worker's functional abilities as of September 26, 2000, but for a variety of reasons the VRC considered him to be unemployable. The worker's significantly different presentation to Dr. Djan, as compared to his presentation in September 2000, was not one of those reasons. I am unable to conclude that the VRC's various decisions to pay income continuity benefits between July 8, 2002 and May 27, 2003 were decisions that were made "in reliance on the misrepresentation" that he made to Dr. Djan.

Even with the VRC having access to the July 2002 videotapes surveillance, Dr. Djan's report, and Dr. K's April 11 and 29, 2003 memorandums, he continued to pay income continuity benefits. I am at a loss to explain how it can be said that the VRC made his decisions to pay income continuity benefits in reliance upon any misrepresentation by the worker when the VRC had this evidence before him. If the worker presented or verbally represented himself as being as disabled as he did to Dr. Djan, the VRC should clearly have been alerted to misrepresentation as early as the July 2002 videotaped surveillance.

In my view, this situation falls squarely within the following portion of RSCM I policy item #48.41:

A decision regarding entitlement which is modified or reversed by a later decision does not result in an overpayment. These are referred to as "Decisional Errors" and include errors of policy. **They include situations where new information is later received which initiates a judgment**

change in the original decision. They can also include situations where information was available but overlooked, or a missed wage rate change.

[emphasis added]

I am satisfied that the VRC decided to declare an overpayment and terminate income continuity benefits upon learning that the Disability Awards Department would not be granting the worker a pension. This is either a situation where new information was received by the VRC, which caused him to change his judgment, or a situation where the same information was clearly available to the VRC, but he overlooked it.

It is only decisional errors involving actions due to fraud or misrepresentation that are corrected retroactively to the date of the original decision, and result in an overpayment. Given my finding that the VRC did not make a decisional error based on misrepresentation by the worker, I find that the overpayment was improperly declared (which includes the request for return of the computer and software). I allow this aspect of the appeal.

3. *Does WCAT have jurisdiction to address the termination of income continuity benefits on May 27, 2003 as a result of an alleged misrepresentation? If yes, did the Board correctly terminate income continuity benefits?*

Mr. Ishkanian submits that the VRC simply relied on the CADA's decision that a misrepresentation occurred. He argues, therefore, that the VRC did not really make a "rehab decision," rather, the VRC's decision was no more than a claims decision concerning misrepresentation being put into practice. He also points out that the review officer felt bound by her colleague's finding of fact on the pension decision and, therefore, she did not address the merits of misrepresentation in the context of vocational rehabilitation benefits.

The first question is whether the payment and termination of income continuity benefits is "a matter respecting section 16 of the Act." Income continuity benefits are addressed in RSCM I policy items #89.11 and #89.12, which are within chapter 11 of the RSCM I. That chapter addresses vocational rehabilitation benefits in general. The policy in item #89.11, *Continuity of Income Pending Assessment of Permanent Disability Pension*, states, in part, that the Board may pay a "rehabilitation allowance" to assist workers who are not actively engaged in the rehabilitation process but who are awaiting assessment of their disability pension, if certain criteria are met. I am satisfied that the payment and termination of income continuity benefits is a matter respecting section 16 of the Act.

The next question, however, is whether a decision to terminate income continuity benefits, which stems from a finding of misrepresentation, remains a matter respecting section 16 of the Act. Misrepresentation is addressed in section 96(7) of the Act, and

misrepresentation can impact upon the payment of any type of benefit. I question whether WCAT's jurisdiction should be limited when addressing the implications of a finding of misrepresentation. For example, if the Board had terminated the worker's health care benefits as well as his income continuity benefits, WCAT would be able to address the termination of health care benefits based on misrepresentation, but not the income continuity benefits based on the same misrepresentation. This seems illogical.

Furthermore, I question whether the legislature intended to limit the right of appeal to WCAT when misrepresentation was alleged. The chair of WCAT addressed the purpose of section 239(2)(b) in *WCAT Decision #2004-00999* (available on WCAT's website at www.wcat.bc.ca), and found that its purpose was to restrict WCAT from substituting its judgment on the merits of a vocational rehabilitation matter. I agree with the chair's finding in that matter. In my view, a finding of misrepresentation can be made by any Board officer, and is certainly not an issue exclusive to the decision-making process concerning vocational rehabilitation matters.

Thus, can it be said that the termination of income continuity benefits based on a finding of misrepresentation is more a matter of whether the worker misrepresented his disability than a matter respecting section 16 of the Act? It is arguable that while rehabilitation benefits were the subject of the decision, the decision concerned the application of a policy (item #C14-104.01) that is not part of, or inherent to, vocational rehabilitation matters (as I earlier found in relation to overpayment of benefits based on misrepresentation).

By contrast, section 96(7) of the Act and RSCM I policy item #C14-104.01 address setting aside a decision because of fraud or misrepresentation. While it is arguable that the VRC and the review officer set aside the decision to continue paying income continuity benefits because of misrepresentation, in my view, the fact of misrepresentation alone was not the deciding factor. Rather, the VRC terminated the benefits because the worker was not likely to receive either a significant permanent partial disability award or a pension calculated on a potential loss of earnings, which is a prerequisite to payment of income continuity benefits under RSCM I policy item #89.11.

I recognize that this is a fine distinction; however, given the CADA's conclusion that the worker had no permanent impairment (for whatever reason), it followed that the worker would not have a significant permanent partial disability pension or a pension calculated on the worker's potential loss of earnings. Thus, the VRC would have properly terminated the worker's benefits, in accordance with the policy in RSCM I item #89.11.

While not free from doubt, I find that the decision to terminate income continuity benefits is more a matter respecting section 16 of the Act than a matter respecting misrepresentation pursuant to the Act. I consider that the termination of income continuity benefits concerns the application of a policy that is part of, r inherent to,

vocational rehabilitation matters. Accordingly, I find that I do not have jurisdiction to address this matter.

4. *Did the review officer correctly direct the Board not to re-assess the worker's wrist range of motion findings when he referred the May 12, 2003 decision back to the Board with directions to determine whether the worker had any residual permanent disability?*

Pursuant to section 4(d) of the *Workers Compensation Act Appeal Regulation* (Appeal Regulation), a review officer's decision to refer a decision back to the Board under section 96.4(8)(b) of the Act is not appealable to WCAT. Thus, I do not have jurisdiction to address whether the worker has a permanent disability, since that matter was referred back to the Board with directions to conduct further investigation and render a new decision. However, a WCAT panel in *WCAT Decision #2004-03138* determined that the legislative prohibition against appeals from referrals back to the Board did not apply to "directions" provided by a review officer. In the panel's view, "directions" constitute binding decisions with respect to a party's entitlement or liability and are therefore appealable to WCAT.

In the decision under appeal, the review officer directed the Board to re-assess whether the worker had a permanent disability, associated with "non-range of motion features related to his compensable conditions." In other words, the review officer directed the Board not to re-assess the worker's wrist range of motion, given the review officer's finding that the DAMA had correctly concluded that the worker did not have any wrist range of motion impairment, after viewing the videotaped surveillance.

The question before me is whether that direction was correct.

The videotaped surveillance depicts the worker's wrist range of motion on numerous occasions. I accept that is markedly different from what the worker demonstrated during his evaluation on November 6, 2002, where he demonstrated virtually no range of wrist motion. The DAMA reviewed the surveillance and concluded that the worker's right wrist range of motion was "not discernibly diminished." I am also mindful of Dr. Sawa's range of motion findings, which revealed normal radial and ulnar deviation, and reduced extension more so than flexion. Dr. Sawa did not provide any range of motion measurements, however.

The DAMA has significant expertise in assessing range of motion impairment. Like the review officer, I accept the DAMA's conclusions to the limited extent that the videotaped surveillance revealed no measurable impairment of wrist range of motion. Accordingly, I agree with the review officer's direction to the Board not to re-assess the worker's range of motion. I deny this aspect of the appeal.

Conclusion

Review Division decision of December 24, 2003

I confirm the December 24, 2003 Review Division decision.

As for reimbursement of the expenses associated with the September 8, 2003 FCE report (\$2,006.25); the June 16, 2003 neurologist's report (\$1,926.00); the September 17, 2003 addendum report from the neurologist (\$481.50); and the psychologist's clinical notes and records (\$100.00), I refer to item #13.23 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP). It provides guidance with respect to section 7(1)(b) of the Appeal Regulation, which allows for reimbursement of expenses for obtaining or producing evidence. Item #13.23 of the MRPP explains that if WCAT finds a medical report was useful or helpful in the consideration of the appeal or that it was reasonable for the party to have sought such evidence in connection with the review and appeal proceedings, WCAT may order reimbursement.

Given the nature of the issues under appeal, I find that it was reasonable for the worker to have sought all of the above-noted evidence for purposes of these appeals. I consider the amount charged for the FCE report to be reasonable for the time and expertise involved in assessing the worker and preparing a report, and order the Board to reimburse the worker's estate in that amount. The expenses for Dr. Sawa's two reports are greater than that agreed upon by the British Columbia Medical Association and the Board for similar reports. Nevertheless, I understand that Dr. Sawa charged the amount that he would normally charge for his services in Ontario. I consider it reasonable for the worker's estate to be reimbursed for the actual amounts charged by Dr. Sawa. Finally, I direct the Board to reimburse the worker's estate for the psychologist's clinical notes and records, as per the Board's tariff.

Review Division decision of January 26, 2005.

I vary the January 26, 2005 Review Division decision, and find that an overpayment should not have been declared.

No other expenses were requested and none are awarded.

Elaine Murray
Vice Chair

EM/ml