Noteworthy Decision Summary

Decision: WCAT-2005-06524 **Panel:** Jill Callan **Decision Date:** December 7, 2005

Section 251 Referral to the Chair – Permanent Disability Award – 2.5% Award for Chronic Pain – Policy Item #39.01 of the Rehabilitation Services and Claims Manual, Volume I – Patently Unreasonable Interpretation – Fettering of Discretion – Sections 23(1), 23(2), 23(3) and 251 of the Workers Compensation Act

Policy item #39.01 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) can rationally be supported by former section 23 and is not patently unreasonable under the *Workers Compensation Act* (Act). The policy takes the degree or extent of injury into account by establishing the threshold criteria for a worker becoming eligible for a chronic pain award. Section 23(1) has a long history of being viewed as establishing a method for determining impairment of earning capacity based on averages rather than the circumstances of individual workers, which is justified on the basis of presumed loss of earning capacity. The broad discretion granted under section 23(3) of the Act and the related policies in RSCM I enable decision-makers to apply the projected loss of earnings method when the 2.5% award does not adequately compensate the worker for his or her impairment of earning capacity.

The worker sought a chronic pain award under item #39.01 of RSCM I, which sets out that all workers who meet the criteria for a permanent disability award for chronic pain will be awarded a functional impairment award of 2.5% of total disability. The vice chair's concern about the policy was that it prescribes that all chronic pain awards must be 2.5% of total, and thus fetters the discretion of decision-makers who are granting awards for chronic pain under former section 23(1) of the Act. The issue in this section 251(3) determination was whether, for the purposes of former section 23, policy in item #39.01 of RSCM I is so patently unreasonable that it is not capable of being supported by the Act.

The chair firstly considered whether chronic pain awards are scheduled awards, and whether item #39.01 grants any discretion to a decision-maker to depart from the award of 2.5% of total. If chronic pain awards are scheduled awards, the 2.5% award prescribed by the impugned policy might be viewed as a starting point rather than the award that is to be granted in all cases that meet the requirements of item #39.01. The chair agreed with the analysis in *WCAT Decision #2004-04324* and concluded that an award under the impugned policy is not a scheduled award under former section 23(2) of the Act. She further concluded that the impugned policy does not grant any discretion to a decision-maker to set an award at an amount other than 2.5% of total. Although the first paragraph of item #39.01 states that "[t]his policy sets out guidelines for the assessment of section 23(1) awards", there is no suggestion in the policy or Practice Directive #61 that the 2.5% is meant to merely be a guideline or starting point for assessing the award.

It is apparent from the Board's discussion paper on chronic pain that policy-makers rejected the concept of establishing awards for various levels of chronic pain because of the inability to objectively verify various levels of pain. However, item #39.01 sets out thresholds that must be met in order for a worker to be entitled to an award for chronic pain. If pain is specific chronic pain, it must be "disproportionate to the associated objective physical or psychological impairment". If it is non-specific chronic pain, it again must be "disproportionate". In light of these thresholds, it is viable to conclude that item #39.01 takes the degree or extent of the injury into account by establishing the threshold criteria for a worker becoming eligible for a chronic pain award.

into account by establishing the threshold criteria for a worker becoming eligible for a chronic pain award.

Section 23(1) has a long history of being viewed as establishing a method for determining impairment of earning capacity based on averages rather than the circumstances of individual workers, which is justified on the basis of presumed loss of earning capacity. The broad discretion granted under section 23(3) of the Act and the related policies in RSCM I enable decision-makers to apply the projected loss of earnings method when the 2.5% award does not adequately compensate the worker for his or her impairment of earning capacity. In light of the long established approach to the application of section 23(1), coupled with the broad discretion granted by section 23(3), the impugned policy is not patently unreasonable under the Act.

As a result of her analysis of section 23, the chair found it unnecessary to consider whether the board of directors can establish a policy that is a fixed and inflexible rule that exhausts the discretion granted by the Act, provided the policy is within the objective of the Act or within the margin of manoeuvre contemplated by the legislature.

As the *Workers Compensation Amendment Act, 2002* significantly amended section 23, and the appeal before the vice chair required the application of former section 23, the question of whether item #39.02 of the *Rehabilitation Services and Claims Manual, Volume II* is patently unreasonable under the current section 23 was beyond the scope of the vice chair's referral.

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1. Introduction

This determination under section 251(3) of the *Workers Compensation Act* (Act) is made in the context of the worker's appeal, in which she seeks a chronic pain award under item #39.01 (Chronic Pain) of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). The vice chair of the Workers' Compensation Appeal Tribunal (WCAT) assigned to hear the appeal contends that it raises the question of whether item #39.01 of RSCM I is so patently unreasonable that it is not capable of being supported by the Act. Specifically, the vice chair submits that the final paragraph of the policy is patently unreasonable. It provides:

> Where a Board officer determines that a worker is entitled to a section 23(1) award for chronic pain in the above noted situations, an award equal to 2.5% of total disability will be granted to the worker.

In this determination, I will refer to that provision in item #39.01 of RSCM I as the impugned policy.

Under section 251(3) of the Act, I must decide whether the impugned policy "should be applied" in adjudicating the worker's appeal. In accordance with section 251(1), this requires me to determine whether the impugned policy is "so patently unreasonable that it is not capable of being supported by the Act and its regulations". In this case, the relevant section of the Act is the former section 23 and there is no relevant regulation.

The vice chair contends that the impugned policy is inconsistent with the purpose of the former section 23(1) of the Act and that it unlawfully "fetters the discretion of the decision-maker to compensate for chronic pain under section 23(1)". Specifically, her concern is that the policy dictates that, if the criteria for entitlement to an award for chronic pain under item #39.01 are met, the decision-maker is limited to granting a functional pension for chronic pain of 2.5% of total. She points out that "[t]here does not appear to be any room in the policy for the decision-maker to deviate from the 2.5%, even in exceptional or unusual cases".

2. Participants and Procedural Matters

Counsel for the worker is Mr. Craig Paterson. Although invited to do so, the employer is not participating in the appeal.

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Section 246(2)(i) enables WCAT to "request any person or representative group to participate in an appeal if the tribunal considers that this participation will assist the tribunal to fully consider the merits of the appeal." As I view the question raised by the vice chair to be of considerable importance to the workers' compensation system, I directed that the following representative groups be invited to participate in this determination:

- B.C. Federation of Labour
- Business Council of B.C.
- Coalition of B.C. Businesses
- Employers' Advisers Office
- Employers' Forum to the WCB
- Workers' Compensation Advocacy Group
- Workers' Advisers Office.

The vice chair had also referred the impugned policy to me under another appeal. When I directed that the representative groups be invited to participate in this referral, I had also invited them to participate in the referral under the other appeal. However, in *WCAT Decision #2005-04398*, dated August 22, 2005, the vice chair decided that the impugned policy was not applicable to the appeal before her in that case. Accordingly, she withdrew that referral.

WCAT will send copies of this determination to the parties, the chair of the board of directors of the Workers' Compensation Board (Board), the president of the Board, and the Board's vice president, Policy, Investigations and Review Divisions. In addition, WCAT will send copies of this determination to the representative groups, with the worker's and employer's identifying information deleted.

Submissions have been provided by Mr. Paterson, the Employers' Advisers Office, the Workers' Advisers Office, and the Workers' Compensation Advocacy Group. Mr. Paterson has adopted most of the submission of the Workers' Compensation Advocacy Group. He has also provided his own submissions on behalf of the worker. With the exception of the Employers' Advisers Office, each of the participants submits the impugned policy is patently unreasonable under section 251(1) of the Act.

Mr. Paterson has requested an oral hearing of this determination. In making this determination, there is no need for me to assess the worker's credibility or make any findings of fact in relation to her appeal. The question before me is purely a legal question. Accordingly, I find this matter can be fully and fairly considered without an oral hearing.

3. Scope of Determination

When submissions were invited, WCAT had informed the participants that the vice chair had referred both item #39.01 of RSCM I and item #39.02 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) to me for a determination under section 251. Accordingly, the submissions address both policies. It is understandable that the vice chair referred both policies to me because they are identical.

In *WCAT Decision #2005-01710*[1], which is also a determination under section 251(3) of the Act, I found that item #1.03(b)(4) of RSCM I and RSCM II was patently unreasonable, even though the appeal that led to the determination only involved the application of the policy in RSCM I. However, that situation differed from the situation now before me because the policy in each volume of the RSCM related to the application of section 35.1(8) of the Act as amended by the *Workers Compensation Amendment Act, 2002* (Bill 49).

In this case, item #39.01 of RSCM I relates to section 23 of the Act as it existed prior to the amendments that flowed from Bill 49 (which I will call the former section 23 or simply section 23) and item #39.02 of RSCM II relates to section 23 of the Act as amended by Bill 49 (which I will call the current section 23). Under section 251(2), the authority of a vice chair to refer a policy to me only arises if he or she "considers that a policy of the board of directors should not be applied" in deciding an appeal. In this case, the policy applicable to the appeal before the vice chair is item #39.01 of RSCM I. As Bill 49 significantly amended section 23, and the appeal before the vice chair requires the application of the former section 23, I find the question of whether item #39.02 of RSCM II is patently unreasonable under the current section 23 is beyond the scope of the vice chair's referral.

Some of the submissions before me raise objections to aspects of item #39.01 of the RSCM I other than the specific provision referred by the vice chair, which I have designated as the impugned policy. This is the element of the policy that the vice chair considers should not be applied in the adjudication of the appeal. Accordingly, I will restrict this determination to the narrow question of whether the impugned policy (as defined earlier) is patently unreasonable.

4. Issue(s)

The issue is whether, for the purposes of the former section 23 of the Act, the policy in item #39.01 of RSCM I which sets out that all workers who meet the criteria for a permanent disability pension for chronic pain will be awarded a functional pension of 2.5% of total disability, is so patently unreasonable that it is not capable of being supported by the Act.

[1] WCAT decisions are available at: http://www.wcat.bc.ca/research/appeal-search.htm.

5. Policy-making Authority

The impugned policy came into effect on January 1, 2003 as a result of the November 19, 2002 resolution of the former panel of administrators of the Board entitled "Re: Chronic Pain" (2002/11/19-04)[2]. Bill 49 amended the governance structure of the Board effective January 2, 2003, establishing the board of directors under section 81 of the Act. Under the current section 82(1)(a) of the Act, the board of directors has the authority to "set and revise as necessary the policies of the board of directors, including policies respecting compensation".

Pursuant to the board of directors' *Decision No. 2003/02/11-04*, "Policies of the Board of Directors", February 11, 2003 (19 WCR 1[3]), item #39.01 of RSCM I became a policy of the directors as of February 11, 2003.

6. The Worker's Claim

The worker's claim has been accepted for a permanent aggravation of pre-existing osteoarthritis of her lumbar spine. By decision dated June 12, 2003, the Board granted her a permanent partial disability award under the former section 23(1) of the Act based on permanent functional impairment of 2.2% of total disability.

The worker requested a review of the June 12, 2003 decision by the Review Division. The remedies sought by the worker included an award for chronic pain. In *Review Decision #5341*, dated November 26, 2003, the review officer confirmed the June 12, 2003 decision and found the worker is not entitled to an award for chronic pain.

The worker's appeal of the Review Division decision to WCAT has resulted in the referral that is the subject of this determination.

7. The Act and Policy

The worker's entitlement to a permanent partial disability award was established under the former section 23 of the Act, which provides, in part:

> 23(1) Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average

[2] Resolution available at: http://www.worksafebc.com/law_and_policy/policy_decision/panel_decisions/2002/november/assets/PDF/20021119-04.pdf.
[3] Published policy resolutions are available at: http://www.worksafebc.com/publications/wc_reporter/default.asp.

> earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.
>
> (2) The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.
>
> (3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.

Section 23(1) of the Act is the statutory foundation for item #39.01 of RSCM I.

The panel of administrators' November 19, 2002 resolution resulted in the amendment of a variety of policies related to the adjudication of chronic pain. The following definitions are set out in section 1 of the amended item #39.01 of RSCM I:

> 1. Definitions
>
> Chronic pain is defined as pain that persists six months after an injury and beyond the usual recovery time of a comparable injury.
>
> The Board distinguishes between two types of chronic pain symptoms:
>
> > Specific chronic pain - pain with clear medical causation or reason, such as pain that is associated with a permanent partial or total physical or psychological disability.
> >
> > Non-specific chronic pain - pain that exists without clear medical causation or reason. Non-specific pain is pain that continues following the recovery of a work injury.

Section 4(a) of item #39.01 of RSCM I provides that, if a worker has specific chronic pain that is consistent with the associated compensable physical or psychological permanent impairment, the award granted under section 23(1) of the Act will be considered to have appropriately compensated the worker for the impact of the chronic pain.

The section of item #39.01 that is germane to this referral is section 4(b), which provides:

> (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.
>
> Where a Board officer determines that a worker is entitled to a section 23(1) award for chronic pain in the above noted situations, an award equal to 2.5% of total disability will be granted to the worker.

8. Analysis

(a) The Standard of Patent Unreasonableness

Section 250(2) of the Act provides:

> The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

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Section 251(1) provides:

> The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Pursuant to section 251(2), if, in the course of deciding an appeal, a vice chair considers that a policy should not be applied, the issue must be referred to me, in my capacity as chair of WCAT, for a determination as to whether the policy should be applied. In light of section 251(1), the standard of review is patent unreasonableness.

In *WCAT Decision #2003-01800-AD*, dated July 30, 2003 (19 WCR 179[4]), which was also a determination under section 251(3), I noted the standard of patent unreasonableness requires a significant degree of deference. I quoted from Supreme Court of Canada judgments, which characterize patent unreasonableness as akin to being "clearly irrational" and "so flawed that no amount of curial deference can justify letting [the decision] stand". More recently, in *WCAT Decision #2005-01710*, dated April 7, 2005 (see pages 12 to 17), I provided an overview of additional judgments of the Supreme Court of Canada related to this standard and the reasons given by Alan Winter in *Core Services Review of the Workers' Compensation Board* (March 2002)[5] (Core Review) for his recommendation of the standard of patent unreasonableness for the purposes of section 251.

The Employers' Advisers Office agrees with my previous analysis of the standard. However, Mr. Paterson, the Workers' Advisers Office, and the Workers' Compensation Advocacy Group contend I have granted excessive deference to the board of directors.

I have previously addressed the arguments advanced by the Workers' Advisers Office and the Workers' Compensation Advocacy Group in *WCAT Decision #2005-01710* and concluded:

> I do not accept the contention that the WCAT chair is to apply a less stringent standard than that applied by the courts on judicial review. In my view, if the Legislature had intended that the WCAT chair would apply a less stringent standard, it would not have used the term contained in the core reviewer's analysis, which has been the subject of such extensive judicial commentary. I find the application of the patently unreasonable standard requires the determination of whether the policy in question can be rationally supported by the Act and regulations.
>
> In considering the application of the standard of patent unreasonableness to the matter before me, I must accept that statutory provisions are often

[4] Published decisions are available at: http://www.worksafebc.com/publications/wc_reporter/default.asp.
[5] Report available at: http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf.

> capable of more than one interpretation and that there may be a variety of viable policy options through which a statutory provision may be implemented. It is clear from the use of the patent unreasonableness standard in section 251 that the Legislature did not intend that the section 251 process be invoked where a policy of the board of directors fails to reflect the most correct interpretation of the relevant statutory provisions but is not patently unreasonable.

While the arguments raised would certainly have been relevant to the question of whether, from a policy perspective, section 251(1) ought to have set out a less stringent standard than patent unreasonableness, the Legislature did not do so.

In their submissions regarding this determination, the Workers' Compensation Advocacy Group refers to the December 6, 2004 judgment of Madam Justice Boyd in *Switzer v. British Columbia (Workers' Compensation Board) et al.,* 2004 BCSC 1616[6] *(Switzer)* in which she made the following comments in paragraphs 24 and 25:

> [24] By virtue of the provisions of s. 250(2), the petitioner submits WCAT is bound to apply the policies of the Board. While prior to March 2003, the WCAT could exercise a broad discretion and question policy guidelines and their applicability to individual cases, the petitioner says that discretion has now been strictly limited. Although s. 251 of the *Act* provides a process for review of the Board's policies, the petitioner says the new statutory review process only allows for a successful challenge of the WCAT's decision where such decisions are found to be "patently unreasonable" (s. 251(1)). He submits such a review allows no latitude for a challenge on the ground of correctness, the standard which he says ought to apply where the underlying complaint is the unlawfulness of the policy itself. Further the petitioner submits that in the end result, even if the statutory appeal was successful, the WCAT remains statutorily bound to simply refer the matter back to the WCAT Chair to determine whether or not the policy should be applied (s. 251(2)(3)). Thus, the petitioner says that the entire statutory appeal process is a circuitous, internal process, and implicitly, an inadequate remedy. …
>
> [25] I am not persuaded that the petitioner's submission has any merit. I am not prepared to assume that had the petitioner's present challenge been properly launched before the WCAT, that tribunal would not have found the retroactive policy to be either illegal or not authorized by law. While the WCAT is required to follow applicable Board policy, it "must make its decision on the merits and justice of the case" (s. 250(2)). **The WCAT has the ability to determine a policy is *ultra vires*, upon which**

[6] Judgment available at: http://www.courts.gov.bc.ca/jdb-txt/sc/04/16/2004bcsc1616.htm

> **review the correctness policy would likely apply. (see s. 58(2)(c) and 58(3)(d) of the *Administrative Tribunals Act*).**
>
> [emphasis added]

I acknowledge that the Court's *obiter* (said in passing) comment can be interpreted as a statement that WCAT "likely" has the authority to apply the correctness standard in determining whether a policy is *ultra vires* the Act. However, given that the Court referred to the provisions of the *Administrative Tribunals Act* (ATA) that apply on judicial review of a WCAT decision rather than to the process in section 251 of the Act, it is also possible that the Court was referring to the standard on judicial review of certain WCAT decisions. As it is not clear to me how sections 58(2)(c) and 58(3)(d) of the ATA would operate to change the standard of review set out in section 251 of the Act, consideration of *Switzer* does not cause me to alter my conclusion regarding the standard of review under section 251.

The Workers' Advisers Office refers to comments made by the then Minister of Skills Development and Labour, Graham Bruce, during the Committee Stage of the *Workers Compensation Amendment Act (No.2), 2002* (Bill 63) (*Hansard*, 9 (28 October 2002) at 4113-4121 and *Hansard,* 9 (29 October 2002) at 4123-4129[7]). The following are the comments identified by the Workers' Advisers Office as well as some further comments of the Minister, which I have found relevant:

> [WCAT panels] are required to adhere to the policy of the Board. They can't make decisions outside the policy of the board, but if they're finding that, in fact, there are changes that the board needs to re-address not on the individual case but in respect to the policy, they can send that back to the board and require the board to look at it. The board, in the end, makes that final decision relative to policy.
>
> . . .
>
> Workers Compensation Appeal Tribunal must, in the determinations, pay attention to the policy of the Workers Compensation Board, and they must be consistent with a policy that's set. By our belief of that, we will get better quality decisions made. As I was mentioning, there still then is a reporting process.
>
> If the Workers Compensation Appeal Tribunal is finding that they're having difficulty dealing with that policy in their determinations of the board, then those matters can flow back to the board for the board to review its policies. But the board's policies are final. All of the adjudication must be undertaken in the context of the policies that were set by the board.

[7] *Hansard* available at: http://www.leg.bc.ca/hansard/37th3rd/index.htm.

> It would be hoped that if there were inconsistencies in this, the board would look closely at their decision, at the policies they put in place, and may effect a change. But, ultimately, the board determines the policies.
> . . .
> …The Workers Compensation Appeal Tribunal can put it back to the board for the board to review that policy, and the board has 90 days to reflect on that and either offer a change or stand by its own policy.
> . . .
> Although the Workers Compensation Appeal Tribunal is external to the board, they also have a process of reporting back to the board if there are apparent inconsistencies in respect of the policy that's been set. Ultimately, the Workers Compensation Appeal Tribunal could return an issue of policy to the board relative to a case, but the board's decision in respect to policy would be final. The appeal tribunal would then have to, if that was the case, live within the policy as it had been set out by the Workers Compensation Board.
> . . .
> As I've mentioned earlier, there is a flowback process in which the Workers Compensation Appeal Tribunal can report back to the Workers Compensation Board where they feel there are inconsistencies coming forward in the workplace or in the policy that was developed by the board and that the board should reconsider their policies. But at the end of the day, the board's policies are the overriding basis of how decisions are made and how appeals are heard. [reproduced as written]

While the former Minister's comments are of assistance in determining the legislative intent of section 251, in the absence of any specific discussion of the use of the term "patently unreasonable" in section 251(1), I am not convinced that the Legislature intended that a lower standard than that on which there has been ample judicial commentary would be applied by the WCAT chair under section 251.

(b) Scope of the WCAT Chair's Authority under section 251

The test set out in section 251(1) is whether "the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations". The vice chair contends that the impugned policy fetters the discretion of decision-makers, who are granting awards for chronic pain under the former section 23(1).

In *Sullivan and Driedger on the Construction of Statutes*[8], Professor Sullivan discusses fettering of discretion at pages 92 to 93. She states, in part:

> Discretion, once conferred, may not be restricted or fettered in scope.
>
> Often, for ease of administration and in the interest of consistency, tribunals have issued guidelines indicating the considerations and criteria by which they will be guided in the exercise of their discretion. A policy may be issued to explain how a tribunal interprets a particular statutory provision. The publication of policies and guidelines is an admirable practice. It gives those in the industry advance knowledge of the tribunal's opinion on various subjects so that they may govern their affairs accordingly. …
>
> However, care must be taken so that guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. A balance must be struck between ensuring uniformity and allowing flexibility in the exercise of discretion. The tribunal cannot fetter its discretion by treating the guidelines as binding rules and refuse to consider other valid and relevant criteria. "The discretion is given by statute and the formulation and adoption of general policy guidelines cannot confine it". …
>
> Conversely, because people may arrange their affairs in reliance on published policy, departures from policy in specific cases should be explained.
>
> [footnotes deleted]

Fettering of discretion is a common law concept. Accordingly, the vice chair's referral raises the question of whether a policy that offends a common law principle can be said to be "so patently unreasonable that it is not capable of being supported by the Act".

A discussion of policy options that arise in situations in which a statute grants a discretion is found in *Skyline Roofing* v. *Alberta (WCB)*, [2001] 10 W.W.R. 651 (Alta. Q.B.). At page 685, the Court stated:

> The particular issue here is whether a statutory policy can narrow or foreclose or "fetter" a discretion granted by the statute. If the statute creates a discretionary power, can the policy specify some or all of the circumstances in which the discretion must be exercised in a particular

[8] Ruth Sullivan, ed., *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002).

> type of case? As has been seen, an informal policy cannot fetter a discretion granted by statute. Does the fettering rule apply to policies authorized by statute? A policy could potentially operate in a number of ways:
>
> (a) The policy could be a fixed and inflexible rule that applies in every case. The policy exhausts the discretion.
> (b) The policy could create a presumption, but each Applicant could argue why the policy should not apply in a particular case.
> (c) [T]he policy could be a summary and weighing of factual and discretionary factors that apply in most cases, but in each particular case the decision-maker must decide if the policy should be applied, an exception should be made, or the policy should be modified.
> (d) The policy could be considered along with all other relevant factors, but it should not be given special weight in individual cases.

In my view, there are circumstances in which the creation of a fixed and inflexible rule through policy would clearly constitute a patently unreasonable application of a provision of the Act. In *WCAT Decision #2003-01800-AD*, I considered the question of whether item #67.21 (Class Averages/New Entrants to Labour Force) of RSCM I was patently unreasonable under the former section 33(1) of the Act. The former section 33(1) sets out a number of options for the Board to consider in establishing the average earnings and earning capacity of a worker and concludes by stating:

> … except that where, owing to the shortness of time during which the worker was in the employment of his or her employer, or in any employment, or the casual nature of his or her employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment.

The principle arising out of this statement is that it may be more equitable in some circumstances to base a worker's wage rate on the class average rather than the wage rate that would be applicable if historical earnings were used. However, it appeared

that item #67.21 might prevent the use of a class average if it results in an increase in the worker's average earnings because it states:

> If the class average is equal to or greater than the worker's rate of pay at the date of injury no change is **usually** made in the compensation rate. If the class average is lower, the compensation **may** be reduced accordingly.
>
> [emphasis added]

I concluded that this provision was not patently unreasonable under section 33 because the use of the words "usually" and "may" left sufficient discretion with the decision-maker to enable the intention of the former section 33(1) to be followed. Had these words been absent from the policy, I may have found it to be patently unreasonable under the Act because the policy would have the effect of eliminating the discretion explicitly granted under section 33(1) to apply a class average that increases the average earnings, where it is more equitable to do so.

As I understand the vice chair's referral in this case, she would not object to the impugned policy if it provided that awards for chronic pain will "usually" be 2.5% of total. Her objection is that the policy prescribes that all chronic pain awards must be 2.5% of total.

The current section 82(1)(a) of the Act provides that the board of directors must set policies. A general question that arises under the common law is whether, in setting policies, the board of directors can establish a fixed and inflexible rule that applies in every case. This question must be considered in the context of the current sections 99(2) and 250(2) of the Act, which respectively require the Board and WCAT, in making their decisions in individual cases, to "apply a policy of the board of directors that is applicable in that case".

In *Yukon (Workers' Compensation Appeal Tribunal)* v. *Yukon (Workers' Compensation Health and Safety Board)*, 2005 YKSC 5 (*Yukon*), the Yukon Territory Supreme Court considered whether the members of the Workers' Compensation Health and Safety Board had fettered their discretion in establishing a policy. The Court stated:

> 55 The classic definition of the fettering of discretion can be found in H.E.U. Local 180 v. Peace Arch District Hospital (1989), 35 B.C.L.R. (2d) 64 (B.C.C.A.) where the Court quoted S.A. de Smith, Judicial Review Administrative Action, 4th ed. at page 311 as follows:
>
> > A tribunal entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. Thus, a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied

> indiscriminately to all cases before it; but its statutory discretion may be wide enough to justify the adoption of a rule not to award any costs save in exceptional circumstances, as distinct from a rule never to award any costs at all.
>
> 56 **It is my view that the concept of fettering one's discretion is a common law principle that could apply to the board or an appeal committee. Under this Act however, the concept of fettering has a much reduced scope or application. The board is empowered to make policy and the policy is binding upon the appeal committee.** In circumstances where there was no statutory authority to make binding policy, it would be appropriate to argue that an administrative policy could result in fettering the discretion of a board or tribunal. **The concept of fettering, in my view, cannot apply to the policy itself which is mandated by legislation so long as it is within the objectives of the Act or "the margin of manoeuvre contemplated by the legislature".** See Re Lewis and Superintendent of Motor Vehicles for British Columbia, [1980] B.C.J. No. 1433, at page 528.
>
> 57 I do not rule out the application of fettering to a board or appeal committee decision but simply state that the board policy itself cannot be a fetter by virtue of its statutory mandate.
>
> [emphasis added]

In light of this judgment and the board of directors' statutory authority to establish binding policies, a question arises regarding the extent to which the common law principles regarding fettering of discretion are applicable to their policy-making function. Assuming these common law principles continue to apply, the related question that arises is whether a policy that fetters discretion generally would be patently unreasonable under the Act for the purposes of section 251. The Court in *Yukon* appears to accept that the board of directors could establish a policy that is a fixed and inflexible rule that exhausts the discretion granted by the Act, provided the policy is "within the objectives of the Act or 'the margin of manoeuvre contemplated by the legislature'".

In this case, I find I do not need to reach a conclusion on the extent to which the common law principles regarding fettering of discretion are applicable to the policy-making of the board of directors. I find the question of whether the impugned policy is patently unreasonable under the Act can be resolved by considering it in the context of the former section 23.

(c) Development of the Chronic Pain Policy

The development of policies related to chronic pain raises significant challenges. In *Nova Scotia (Workers' Compensation Board)* v. *Martin; Nova Scotia (Workers' Compensation Board)* v. *Laseur,* 2003 SCC 54 (*Martin*), the Supreme Court of Canada concluded that the Nova Scotia scheme for compensation for chronic pain contravened section 15(1) of the *Canadian Charter of Rights and Freedoms* because it discriminated on the basis of disability. The introduction section of the judgment starts with the following discussion of chronic pain and the challenges facing workers' compensation systems in adjudicating entitlement to benefits for chronic pain:

> Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians.

In its 1999 report[9], the Royal Commission on Workers' Compensation in British Columbia discussed compensation for consequences of compensable injuries, such as "pain and suffering", under the title "Compensation For Non-economic Loss" (see pages 84 to 89 of Volume II, Chapter 1 of the report). The majority concluded that "earnings loss should be the primary basis for compensation" (at page 85). However, they also concluded that a lump sum payment in lieu of a permanent functional impairment or disfigurement award should be granted for non-economic loss.

[9] British Columbia, Royal Commission on Workers' Compensation in British Columbia, *For the Common Good: Final Report of the Royal Commission on Workers' Compensation in British Columbia* (Victoria: Crown Publications Inc., 1999) (Chair: Gurmail S. Gill) (available at: http://www.qp.gov.bc.ca/rcwc/).

In the Core Review, the core reviewer considered chronic pain (at pages 219 to 231). His recommendations regarding permanent disability awards for chronic pain included the following:

- The Act should require the Board to establish a rating schedule for determining entitlement to permanent partial disability awards for chronic pain. The schedule should have three or four levels of permanent impairment that take into account the "severity of the pain, activity restrictions, emotional distress, pain behaviours, and treatment received". The schedule should have a statutory maximum of 20%. He noted the classification system for impairment due to pain proposed by the American Medical Association *Guides to the Evaluation of Permanent Impairment*, 5th edition revised (AMA Guides).

- Section 23 of the Act should be amended to exclude section 23(3) awards for chronic pain.

Prior to the development of the impugned policy, the former Policy and Regulation Development Bureau of the Board (Policy Bureau) underwent a consultation process with the workers' compensation community. To assist in the process, the Policy Bureau issued an October 16, 2002 discussion paper entitled "Chronic Pain"[10], which it made publicly available. In this determination, I will refer to that paper as the Chronic Pain Discussion Paper. The paper outlined the approaches taken to chronic pain in other Canadian jurisdictions and set out a variety of policy options. Had they been implemented, some of the other options would have resulted in permanent partial disability pensions for chronic pain in excess of 2.5% of a totally disabled person.

In their submission, the Employers' Advisers Office contend that, in setting a fixed award of 2.5% of total, the policy-makers took into account policy considerations arising out of options reviewed in the Chronic Pain Discussion Paper, which they summarize as follows:

> a) the options obviate concerns about classifying a worker's pain into a multi-tiered system where there is not adequate scientific evidence in support of such a system;
> b) the options would limit the number of claims and the costs associated with compensating for chronic pain; and
> c) the options would result in clearer policy which will result in more consistent application.

The Chronic Pain Discussion Paper also identified the desirability of setting a policy that would not result in large numbers of reviews and appeals.

[10] Discussion paper available at: http://www.worksafebc.com/law_and_policy/archived_information/policy_discussion_papers/law_60_10_90.asp.

(d) Are awards under item #39.01 scheduled awards under section 23(2)?

Prior to embarking upon my analysis of the impugned provision in the context of the former sections 23(1) and 23(3) of the Act, I have considered the question of whether awards under item #39.01 of RSCM I are scheduled awards under the former section 23(2) of the Act. That section permits the Board to "compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations" and states that the schedule "may be used as a guide" in determining entitlement to permanent disability benefits. Accordingly, if chronic pain awards are scheduled awards, the 2.5% award prescribed by the impugned policy might be viewed as a starting point rather than the award that is to be granted in all cases that meet the requirements of item #39.01.

In accordance with section 23(2), the Board has established a Permanent Disability Evaluation Schedule (PDES), which is amended from time to time. The PDES is set out in Appendices 4 of RSCM I and II. The PDES in RSCM II is applicable to all pension assessments or reassessments undertaken on or after August 1, 2003. The schedule is discussed in item #39.10 (*Scheduled Awards Permanent Disability Evaluation Schedule*) of RSCM I and II. It states that the PDES constitutes a set of "guide-rules" rather than "fixed rules" and that other variables "relating to the degree of physical impairment" may be considered when a pension award is established.

The question of whether a pension is a scheduled award is relevant to a number of matters, including:

- WCAT's jurisdiction under the current section 239(2)(c) of the Act;
- the applicability of item #39.11 (Age Adaptability Factor) of RSCM I;
- the applicability of item #39.12 (Enhancement) of RSCM I; and
- the application of item #39.13 (Devaluation) of RSCM I.

Item #39.50 (Non-Scheduled Awards) of RSCM I indicates that non-scheduled awards are granted for impairment in parts of the body not listed in the PDES. It provides that the percentage of disability is established by the Board officers using "their own judgment to arrive at a percentage of disability appropriate to the particular claimant's impairment".

Item #39.01 of RSCM I does not specifically characterize chronic pain awards as scheduled or non-scheduled awards. The Workers' Compensation Advocacy Group and the Workers' Advisers Office submit chronic pain awards are not scheduled awards under section 23(2).

In *WCAT Decision #2004-04324*, dated August 18, 2004, a vice chair considered the question of whether an award under item #39.01 constitutes a scheduled award for the purposes of establishing WCAT's jurisdiction under the current section 239(2)(c) of the

Act. The panel concluded that it is not a scheduled award. In particular, the panel noted that chronic pain is not included in the PDES. This approach has generally been followed in other WCAT decisions. I agree with this approach and conclude that an award under the impugned policy is not a scheduled award under the former section 23(2) of the Act.

I also note that an award under the impugned policy does not fit into the description of a non-scheduled award set out in item #39.50 because the amount of the award is not a matter of judgment. This raises the question of whether the impugned policy fits into a third category of pension award that is neither a scheduled nor a non-scheduled award (within the meaning of item #39.50). An example of such an award arises under item #39.41 (Loss of Taste and/or Smell) of RSCM I, which states, in part:

> Although there is not a scheduled award for the loss of either or both of these senses, the Board's policy is to allow 3% for a loss of smell. This includes the partial loss of taste, which always in practice accompanies a complete loss of smell. A loss of taste alone is regarded as a non-scheduled award.

The 3% award for complete loss of smell and partial loss of taste is neither a scheduled nor a non-scheduled award under item #39.50. It is possible that, similarly, the policy-makers intended that the chronic pain policy in item #39.01 of RSCM I would fall under neither category. The board of directors may wish to amend item #39.01 of RSCM I and item #39.02 of RSCM II to provide further guidance and clarity in this regard.

The third option identified in the Chronic Pain Discussion Paper (see pages 14 to 15) contemplated adding an award for non-specific chronic pain to the PDES. In her referral memorandum, the vice chair indicated that her view of the impugned policy would be different if the 2.5% award were included in the PDES. She said:

> As noted above, the introduction to the PDES expressly states that it does not provide a fixed result that can be mechanically applied:
>
> > The Schedule does not necessarily determine the final amount of the section 23(1) award. The Board is free to take other factors into account. Thus, the Schedule provides a guideline or starting point for the measurement rather than providing a fixed result.
>
> Whether this is, in fact, the case in practice, this type of language would appear to leave room for the exercise of discretion as necessitated by individual circumstances that may arise on the merits of each case. Moreover, it is a signal that the policy makers were live to the issue of fettering and attempted to design the schedule so as to foreclose any challenge on that basis.

(e) Is the impugned policy patently unreasonable under the former section 23 of the Act?

The first matter I have considered is whether the vice chair is correct in her assertion that item #39.01 does not grant the decision-maker the discretion to grant an award greater or less than 2.5% of total.

The first paragraph of item #39.01 states:

> **This policy sets out guidelines for the assessment of section 23(1) awards** for workers who experience disproportionate disabling chronic pain as a compensable consequence of a physical or psychological work injury.
>
> [emphasis added]

In the referral memorandum, the vice chair stated:

> [Item #39.01] starts out by stating that it is providing "guidelines for the assessment of section 23(1) awards", however the subsequent language of the policy contains virtually no modifying language from which to infer flexibility in terms of application of the policy.

I have considered whether the use of the word "guidelines" in this paragraph means that the designation of 2.5% of total as the award for chronic pain is intended to be a guideline from which decision-makers can depart in individual cases. I agree with the vice chair's conclusion in this regard.

I note there is no suggestion in the impugned policy that the 2.5% is meant to merely be a guideline or starting point for assessing the award. The impugned policy simply states that the award will be "equal to 2.5% of total". I have reviewed Practice Directive #61, *Pain and Chronic Pain*[11]. Practice directives do not constitute published policies of the board of directors and, accordingly, WCAT is not required to apply them. However, they provide guidance as to the manner in which the Board is interpreting a particular policy and they promote consistency of decision-making. There is no indication in Practice Directive #61 that 2.5% is anything other than a fixed award. I conclude that the impugned policy provides for a fixed award in the amount of 2.5% of total without granting any discretion to the decision-maker to depart from the award of 2.5%.

[11] Effective date January 1, 2003 and amended on January 1, 2004, available at: http://www.worksafebc.com/law_and_policy/practice_directives/compensation_practices/assets/pdf/prac_dir_61.pdf.

Having determined that the former section 23(2) is inapplicable and that item #39.01 does not grant the discretion to set an award at an amount other than 2.5% of total, I turn to the question of whether the impugned policy is patently unreasonable in the context of the former sections 23(1) and 23(3) of the Act.

In her referral memo, the vice chair stated, in part:

> To the extent that the chronic pain policy fails to take into account the variable effects that chronic pain may have on individual workers, the policy may be considered inconsistent with the purpose of [section 23(1)]. The policy, in failing to take into account the impairment of earning capacity of the specific individual worker, is inconsistent with the purpose of section 23(1). That inconsistency undermines the statutory support for the policy.

The former section 23(1) provides that permanent partial disability awards are granted for "impairment of earning capacity". However, rather than prescribing a formula for calculating the precise extent to which earning capacity has been affected by the injury for each individual worker, it provides that "the impairment of earning capacity must be estimated from the nature and degree of the injury".

"Estimate" is defined in the *Concise Oxford English Dictionary* (11th ed.) (Oxford) as "an approximate calculation or judgement". Since section 23(1) requires an estimate or approximate calculation of impairment of earning capacity rather than a precise calculation, the historical approach to its application has been to grant a more generalized award rather than one that is specific to the individual worker's diminished earning capacity.

In his 1952 royal commission report[12], Mr. Justice Sloan made the following comments regarding the physical impairment method for establishing disability pensions under section 23(1):

> The physical-impairment theory is based upon mass values and mass averages. Some injured men under this method get relatively more than they would under an individual valuation basis; others get less. Collectively, the long-term average takes care of the differences, and in the main the result is that the average injured workman receives a just recompense for loss of wages, real or potential, over a period of years.

[12] British Columbia, Royal Commission on the Workmen's Compensation Act and Board, *Report of the Commissioner* (Victoria: D. McDiarmid, Printer to the Queen, 1952) at 155 (Commissioner: Gordon McG. Sloan) p. 155.

In his 1966 royal commission report[13], Mr. Justice Tysoe stated:

> The percentage of impairment of earning capacity allotted under the schedule or awarded in a judgment (non-scheduled) award represents an effort to state in terms of percentages, and on the average, the extent to which the particular disability will impair the workman's ability to earn. In arriving at this percentage, those preparing the schedule, or in the case of a judgement award those making the award, have had regard to the ability of the workman to do average labouring work. That is to say, regard is not had to the particular class of employment in which the particular workman has been engaged at the time of the injury.

The former section 23(3) provides an alternative approach to establishing permanent partial disability pensions that involves comparing a worker's average earnings before the injury with "the average amount which the worker is earning or is able to earn in some suitable occupation after the injury". Accordingly, awards under section 23(3) involve compensating for impairment of earning capacity on the basis of a more precise calculation rather than the more generalized approach that arises under section 23(1). The method under section 23(3) is known as the projected loss of earnings method. Item #38.00 (Permanent Partial Disability) of RSCM I provides:

> The Board has two basic methods of assessing permanent partial disabilities. These are:
>
> 1. Loss of function/physical impairment method.
> 2. The projected loss of earnings method.
>
> The use of these two methods is termed the "Dual System". These two methods are considered in every case where applicable, the amount of the pension being the higher of the two figures produced by the two methods.

Under the applicable policies in RSCM I, if the calculation of the pension award under the projected loss of earnings method will result in a greater pension than that estimated under the physical impairment method, the Board will generally award the pension using the projected loss of earnings method.

Prior to 1991, Board policy was set by the commissioners of the Board. While section 23(3) had been enacted prior to 1973, the former commissioners did not introduce the concept of granting permanent partial disability pensions on a projected loss of earnings

[13] British Columbia, Commission of Inquiry Workmen's Compensation Act, *Report of the Commissioner* (Victoria: A. Sutton, Printer to the Queen, 1966) at 273 (Commissioner: The Honourable Charles W. Tysoe).

basis until they issued *Decision No. 8* (Re The Measurement of Partial Disability), dated October 2, 1973 (1 WCR 27). In that decision, they established the dual system for assessing permanent disability pensions involving the spinal column. In 1977, the dual system was extended to non-spinal injuries and it continues to apply to pensions assessed under the former section 23. As stated earlier, Bill 49 resulted in significant amendments to section 23.

In *Decision No. 8,* the former commissioners recognized that pensions established under the physical impairment method did not always reflect the loss of earning capacity resulting from the injury. In describing the advantages of the physical impairment method, they noted it encouraged rehabilitation because the worker was entitled to the pension as well as any earnings from employment. In addition, they noted that the actuaries could calculate a capital sum for the pension, which could be charged to the applicable class. They also stated (at page 30):

> Other advantages claimed for the simple physical impairment method are administrative efficiency, avoiding any risk of the abuse of administrative discretion, and producing uniformity, at least measured in one dimension, by applying the same percentage rate to those with similar injuries.

Although they identified advantages of the physical impairment method, they also expressed their concerns about the system. They noted Mr. Justice Sloan's description of the system as being based on "mass values and mass averages" and the rationale he had identified and stated (at page 31):

> With respect, however, it is difficult to find this rationale convincing. If one claimant is being grossly under-compensated in comparison with actual loss of earning capacity, and if another claimant is being grossly over-compensated to the same extent, should we really take comfort in the thought that the average claimant is being fairly treated, or that the right amount is being paid out in total? There is no such thing as justice on the average.

Although the former commissioners recognized the shortcomings of the physical impairment method, they decided not to alter that method. Instead, as stated earlier, they introduced the dual system for permanent partial disability awards for injuries to the spine so that pensions could be granted using the projected loss of earnings method in appropriate cases.

In *Decision No. 394* (Re The Dual System of Measuring Disability), dated April 18, 1985 (6 WCR 23), the former commissioners again commented that the dual system was introduced in order to address the shortcomings of the physical impairment method. They commented:

> The physical impairment method can be criticized on the ground that it calculates only the average loss resulting from a disability and is, therefore, prejudicial to workers whose loss from their disability is above average.

More recently, the core reviewer, who referred to the physical impairment method as the functional method, stated (at pages 190 to 191 of the Core Review):

> [T]he functional method estimates the worker's impairment of earning capacity from the "nature and degree of the injury". In determining the worker's impairment of earning capacity for the purposes of Section 23(1), the WCB makes extensive use of [the PDES], which sets out the percentages of impairment to be assigned to numerous specified disabilities. The intent is that the same percentage of impairment is to be applied to all workers who suffer a similar work-related disability. In other words, the pension award under the loss of function method is intended to cover the presumed average impairment of earning capacity suffered by the average worker arising from the same type of disability.

It is apparent that the physical impairment method established under the former section 23(1) can potentially result in workers being over-compensated or under-compensated for their impairment of earning capacity. An example involving over-compensation may arise when a worker in a relatively sedentary job has an injury that results in a significant permanent partial disability under the PDES but is not disabled from working in that job. In spite of the fact that his or her actual earning capacity may not have been affected, he or she will be granted a pension under section 23(1). The justification for this appears to be the disability has the potential to adversely affect earning capacity. In *Decision No. 8,* the former commissioners provided the following explanation (at page 28):

> It has been suggested that the existence of a physical handicap in such cases may still involve reduced prospects of promotion, restriction in the scope of future employment, and a reduced capacity to compete in the open labour market in the event of the present job being terminated. Moreover it has been argued, though not necessarily correctly, that men with physical disabilities tend to become static, that they seek security in low-paying jobs and lose the opportunities formerly open to them to

> advance in their own work and in other fields. Compensation paid for these reasons might be labeled as being for "presumed loss of earning capacity".
>
> [footnote deleted]

To the extent that the 2.5% award established under the impugned policy may appear to over-compensate workers whose chronic pain has a lesser effect on earning capacity, I find the impugned policy is not patently unreasonable.

In circumstances in which 2.5% does not adequately compensate for a worker's impairment of earning capacity, the former section 23(3) of the Act and the related policies in RSCM I grant decision-makers the discretion to establish the pension using the projected loss of earnings method. In their submissions, the Workers' Advisers Office concedes that, "[p]rior to [Bill 49], in most cases the functional impairment award given for permanent disability was not crucial as the impact of the disability was often recognized by the payment of loss of earnings awards under section 23(3)". In light of the discretion to grant an award using the projected loss of earnings method, I do not find the impugned policy to be patently unreasonable. Unlike the legislation that was before the Supreme Court of Canada in *Martin*, under section 23(3) there is an individualized evaluation of the impairment of earning capacity of workers with compensable chronic pain.

In light of this analysis, I disagree with the vice chair's contention that awards under section 23(1) must "take into account the impairment of earning capacity of the specific individual worker". However, I agree with various statements in the referral memorandum that reference the requirement in section 23(1) that the "nature and degree of the injury" must be taken into account in establishing a pension under section 23(1). In their submission, the Workers' Advisers Office stated, in part:

> We submit that the words [*sic*] "estimate" and the specific references to the worker's disability and injury indicate that section 23(1) requires an exercise of discretion or judgment in estimating the compensation to be paid. Consideration needs to be given to the specific injury and disability of the worker.

The former section 23(1) requires that the impairment of earning capacity "be estimated from the nature and degree of the injury". "Nature" is defined in Oxford as "the basic or inherent features, qualities, or character of a person or thing" and in *Black's Law Dictionary* (8th ed.) (Black's) as "a fundamental quality that distinguishes one thing to another; the essence of something". "Degree" is defined in Oxford as "the amount, level or extent to which something happens or is present" and in Black's as "a stage in intensity". Therefore, I agree that the former section 23(1) can be interpreted as requiring that the Board officer assessing an award for chronic pain consider both the nature of chronic pain and the extent or stage in intensity of the chronic pain.

It is arguable that the fixed award of 2.5% does not allow the decision-maker to appropriately consider the degree of the injury and that the better approach to the application of section 23(1) would be to grant the decision-maker the discretion to do so. If I was required to determine whether the impugned policy involved the correct or best application of section 23(1), I would have some doubts about whether the WCAT panel should be required to apply it. However, my task in this determination is not to identify the best policy option but to determine whether the impugned policy can be said to be rationally supported by the Act.

It is apparent from the Chronic Pain Discussion Paper that the policy-makers rejected the concept of establishing awards for various levels of chronic pain because of the inability to objectively verify various levels of pain. However, item #39.01 sets out thresholds that must be met in order for a worker to be entitled to an award for chronic pain. If the pain is specific chronic pain, it must be "disproportionate to the associated objective physical or psychological impairment". If it is non-specific chronic pain, it again must be "disproportionate". Disproportionate pain is defined as "pain that is significantly greater than what would be reasonably expected given the type and nature of injury or disease".

In light of these thresholds, it is viable to conclude that item #39.01 takes the degree or extent of the injury into account by establishing the threshold criteria for a worker becoming eligible for a chronic pain award. I note section 23(1) has a long history of being viewed as establishing a method for determining impairment of earning capacity based on averages rather than the circumstances of individual workers. Significantly, the broad discretion granted under section 23(3) of the Act and the related policies in RSCM I enables decision-makers to apply the projected loss of earnings method when the 2.5% award does not adequately compensate the worker for his or her impairment of earning capacity. In light of the long established approach to the application of section 23(1), coupled with the broad discretion granted by section 23(3), I conclude that the impugned policy is not clearly irrational or patently unreasonable under the Act.

Mr. Paterson submits that the impugned policy is patently unreasonable on the basis that 2.5% is simply too low in general. In her referral memorandum, the vice chair notes that 2.5% is significantly lower than the statutory maximum of 20% recommended by the core reviewer and lower than the awards granted in some other jurisdictions. She contends that 2.5% may be much too low in some cases. She notes:

> As an example, an award of 2.5% is equal to the percentage awarded for the loss of a little finger. This figure must compensate workers with the most severe chronic pain complaints under the chronic pain policy.

The Chronic Pain Discussion Paper states that historically the average award granted by the Board for subjective complaints, including chronic pain, has been in the range of 0 to 2.5%. The paper states that the implementation of the core reviewer's

recommendation to use a classification system such as that proposed in the AMA Guides to assess permanent disability for chronic pain had certain disadvantages. For instance, the AMA Guides assist in measuring impairment rather than disability and the latter is measured under section 23(1). In addition, the paper states (at page 9), "[t]here is considerable difficulty in distinguishing between the various levels of chronic pain, given the current inability of science to objectively verify pain". This comment is consistent with the observation of the Supreme Court of Canada in *Martin* that chronic pain is a condition "whose existence is not supported by objective findings at the site of the injury under current medical techniques".

In *Martin*, the Supreme Court of Canada recognized the difficulty in assessing chronic pain. While Mr. Paterson contends that 2.5% is simply too low, the vice chair's concern is that it may be too low in some cases. Again I note that section 23(3) of the Act and the related policies enable the decision-maker to grant a pension on a projected loss of earnings basis in cases where the 2.5% does not adequately compensate a worker for impairment of earning capacity. In the context of the dual system, I do not find the fixed amount of 2.5% of total set out in the impugned policy to be patently unreasonable.

I agree with the vice chair's contention that the impugned policy fetters the discretion of decision-makers to apply their judgment in determining the percentage awarded for chronic pain under section 23(1). Item #39.01 limits the exercise of judgment of decision-makers to the question of whether the threshold criteria for granting a chronic pain award have been met. However, for the reasons I have stated, I do not find the impugned policy to be patently unreasonable under the general context of section 23 and the policies related to the dual system for assessing permanent partial disability.

As a result of my analysis of section 23, I have found it unnecessary to consider whether, in light of *Yukon*, the board of directors can establish a policy that is a fixed and inflexible rule that exhausts the discretion granted by the Act, provided the policy is "within the objectives of the Act or 'the margin of manoeuvre contemplated by the legislature'". However, I note the following comment in the newly released judgment of the Supreme Court of British Columbia in *Western Stevedoring Co. Ltd. v. W.C.B.,* 2005 BCSC 1650:

> [10] Under section 82 of the *Workers Compensation Act*, the board of directors of the Board is required to establish "policies" regarding compensation. The word "policy" may be somewhat misleading, since the "policies" are effectively inflexible rules. Their existence is authorized by statute, so as long as the policies adopted are within the board of directors' jurisdiction, no issues of unlawful fettering of discretion arise.

9. Item #39.02 of RSCM II

As stated earlier, I have concluded that the question of whether item #39.02 of RSCM II is patently unreasonable under the Act is beyond the scope of the referral before me.

The submissions from the Workers' Compensation Advocacy Group and the Workers' Advisers Office are largely focused on item #39.02 of RSCM II. Their concern is that, in the context of the current section 23(3) of the Act, the granting of loss of earnings pensions will be severely restricted. On that basis, they are of the view that it is patently unreasonable to restrict pensions for chronic pain to impairment of 2.5% total.

Although my analysis in this determination relies heavily on the availability of the projected loss of earnings method, I do not intend my conclusion to mean that item #39.02 of RSCM II is patently unreasonable in light of the amendments to section 23(3) and the related policies that flowed from Bill 49. That question is not before me in this determination.

10. Legal Expenses

Mr. Paterson requests that the worker be reimbursed for legal expenses related to this determination. Section 7(2) of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, provides:

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

I consider this determination to be a proceeding related to the appeal within the meaning of section 7(2). Accordingly, I am not authorized to order reimbursement of the worker's legal expenses.

11. Conclusion

The impugned policy in item #39.01 of RSCM I is not patently unreasonable. Pursuant to section 251(4) of the Act, I return this matter to the vice chair who must apply the policy in rendering her decision on the worker's appeal.

Jill Callan
Chair

JC:dlh

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