BRITISH COLUMBIA **WCAT** ***Workers' Compensation Appeal Tribunal*** MEMORANDUM

June 24, 2004

Memo to:	Jill Callan, Chair Workers' Compensation Appeal Tribunal
Memo from:	Kathryn Wellington, Vice Chair Workers' Compensation Appeal Tribunal
RE:	Section 251(2) Referral
Date of Decision:	November 26, 2003

This memo concerns Section 251 of the *Workers Compensation Act* (Act) and policy #12.40 of the WCAT *Manual of Rules, Practices and Procedures* (MRPP).

Section 251(1) of the Act says that the appeal tribunal may refuse to apply an applicable policy of the board of directors if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. MRPP policy #12.40 instructs that if a WCAT panel considers that an applicable policy of the board of directors should not be applied on that basis, the issue must be referred to the chair and the appeal proceedings must be suspended until a determination is made as to whether the policy should be applied. In this case, the policy I am referring for your consideration is item #39.01 (amended January 1, 2003 in volume I) and later called item #39.02 in volume II of the *Rehabilitation Services and Claims Manual* (RSCM II), which concerns awards for chronic pain.

By way of background, this appeal concerns the worker's entitlement to a pension under her 1995 low back claim. The worker disputes a November 26, 2003 decision of a review officer of the Workers Compensation Review Division (Review Division) which upheld the June 12, 2003 decision of an officer of the Workers Compensation Board (Board). In the June 12, 2003 decision, a disability awards officer (DAO) advised the worker that her permanent functional impairment was equal to 2.2% of a totally disabled person. On reviewing the pension decision the review officer confirmed the award for an aggravation of the worker's pre-existing osteoarthritis of the lumbar spine; declined to provide a further award to recognise the worker's pain; declined to award interest on the award and declined to reimburse the worker for legal costs.

The worker disagreed with this decision and initiated an appeal to the Workers' Compensation Appeal Tribunal (WCAT).

This memo concerns the part of the decision that relates to the worker's entitlement to an additional award for chronic pain.

In my assertion, policy item #39.01 in volume I and #39.02 in volume II of the RSCM are not supported by section 23(1) of the Act and therefore are not lawful within the meaning of section 251 of the Act. This argument is supported by the following propositions:

- To the extent that the policy fails to take into account the variable effects that chronic pain may have on the earning capacity of individual workers, the policy is inconsistent with the purpose of section 23(1).

- The policy fetters the discretion of the decision-maker to estimate the impairment of earning capacity of workers suffering from chronic pain and then to determine an appropriate permanent disability award under section 23(1).

The following facts are relevant to this worker's pain condition:

- She has not worked since 1995 due to her pain complaints.

- She experiences severe low back (and bilateral shoulder) pain every day, and requires daily anti-inflammatory medication.

- She has significantly restricted her daily routine in order to cope with her pain complaints.

- She has restricted tolerances for many physical activities.

- She sees herself as 100% disabled and has taken on a sick role (i.e. she applied for and received provincial disability benefits and received level 2 benefits from 1998 to 2003).

- Her attending physician indicates that she cannot work full time and is limited to sedentary employment.

- At the pension assessment the worker was described as more restricted in some movements than expected.

Policy item #39.01 as it existed prior to January 1, 2003, did not restrict the percentage that could be awarded for subjective complaints. In the past when panels considering appeals have given additional awards for pain, most awards have approximated 2.5%. Where subjective complaint awards have exceeded 2.5%, as they have occasionally, the panels reasoned that the worker's pain was worse than the level of pain described in *Decision No. 318*. Panels primarily looked at the impact of pain on a worker's ability to do certain physical activities. They were extremely conservative in their awards and it is not clear that the percentages awarded were based on actuarial research about the effect of chronic pain on long term earnings.

When they increased subjective awards, appeal panels cited such reasons as:

- Inability of the worker to stand for eight hours a day
- Inability to use tools
- Loss of strength
- Difficulty lifting
- Inability to ambulate, or difficulty with balance
- Instability
- Difficulty with concentration and memory or cognitive function

All of these factors were viewed as having resulted from the worker's pain.

Some other factors, in my view, increase the likelihood of impaired earning capacity when these factors are present either alone or in concert with the aforementioned ones.

In my experience, evidence of certain factors makes the possibility of a future disruption of earnings due to pain effects much more likely. These factors include:

- Pain that limits use of a major weight-bearing joint

- Pain of a nature and degree that affects concentration, memory, cognition or mood

- Pain that is intractable and is not relieved by any pain control modality

- Pain that has adversely affected interpersonal relationships

- Pain that regularly impairs sleep or results in significant weight fluctuations

- Reliance on prescription medications of a type known to result in habituation or known to have significant adverse side effects, such as liver or kidney damage if used over the long term.

- Increased alcohol or street drug consumption to augment or replace analgesics.

This list is not exhaustive, but the presence of these factors increases the likelihood that the worker will lose time from work; will be unable to compete on an equal footing with other able-bodied workers for promotions; or will have to cut short his career due to the effects of his pain. I consider that where I give an award for pain, I am obliged to base my decision on factors such as I have enumerated. Section 23(1) of the Act requires me to estimate the impairment of earning capacity from the nature and degree of the injury. The arbitrary 2.5% award dictated by the chronic pain policy prevents me from considering the evidence in order to arrive at a decision that has regard for the merits and justice of each case. This means that I am not able to provide reasons for my decision beyond stating that the policy says I must award 2.5 or nothing.

I note that the Board's chronic pain policy results in workers with permanent chronic pain being treated very differently than workers with psychological conditions even when the two conditions result in essentially similar symptoms. I have reviewed the Board's *Schedule for Psychological Disability* and also the *Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV-TR*) concerning pain disorders associated with psychological factors and with pain disorders associated with a general medical condition. The Board does not give psychological awards for pain, but where psychological impairments produce similar problems to those seen with chronic pain, the Board compensates at a level that exceeds most awards for physical impairments and significantly exceeds the 2.5% stipulated by the chronic pain policy.

The Board recognises at policy item #115 of the Schedule that emotional (mental) and behavioural disturbances which relate to impairment of activities of daily living, social functioning, concentration and adaptation are compensable. Mild impairments, which are compatible with some but not all useful functioning, warrant awards ranging from 0.0 to 25%.

The effect of the policy item #39.01 as it existed as of January 2003 and subsequently #39.02 is that no longer will I be able to take notice of the factors which, in my view are most likely to have a profound impact on the worker's long-term earning capacity.

Changes to the permanent disability award scheme under Bill 49 and recommendations by the Winter Report prompted a review of pain policies by the Board's Policy and Regulation Development Bureau (the "Policy Bureau"). The Policy Bureau developed a discussion paper dated October 16, 2002 regarding compensation for chronic pain in cases of permanent disability.

The Policy Bureau's discussion paper outlined five options:

1. To maintain the status quo:

   Chronic pain amenable to treatment would continue to be regarded as a temporary disability. Subjective complaints of pain would be considered in determining permanent disability awards.

2. To adopt the Winter recommendations:

   A section 23(1) award would be provided to a worker who suffers chronic pain arising from a compensable injury or illness, where the evidence indicates that the chronic pain is likely to adversely impact the worker's earning capacity. The Board would create a schedule to determine the impact on earning capacity as a result of chronic pain arising from a compensable injury. The Schedule would contain 3-4 levels of permanent impairment with a statutory maximum of 20% impairment. The levels may be based on the classes of impairment due to pain – mild, moderate, moderately severe, and severe – proposed by the AMA Guides (5^{th} ed.). This percentage of impairment would cover the chronic pain as well as any other related condition arising from the chronic pain. Workers would not be entitled to be assessed for a section 23(3) award arising from chronic pain or any related condition.

3. To limit section 23(1) consideration for non-specific chronic pain only.

4. To limit section 23(1) consideration for specific chronic pain only.

5. To adopt the Nova Scotia model.

   Compensation entitlement would be limited to the duration of pain treatment. Pain-specific healthcare services would be limited to the treatment phase.

The review process culminated in the revision of what was formerly item #39.01 ("Subjective Complaints"). *Resolution #2002/11/19-04* of the Panel of Administrators refers to the need to update Board policy to reflect current scientific and clinical information regarding chronic pain and to address concerns raised by stakeholders concerning the lack of clarity with respect to section 23(1) awards for chronic pain.

The Board did not adopt Winter's recommendation of a scheduled range of awards for chronic pain. Moreover, Winter's suggested statutory maximum of 20% is significantly higher than the current policy cap of 2.5%. The Policy Bureau's discussion paper provides some indication as to why the policy developed the way it did. In discussing the implications of the Winter recommendations (Option 2), the paper refers to the fact that it would be impossible for clinicians to objectively measure and find evidence of pain that would correspond to the levels of pain set out in the AMA Guides, and that the methodology proposed by the AMA guides has not been used or tested on a widespread basis. The Winter Report acknowledged the difficulties associated with the AMA Guides, but maintained that the Board could not avoid the task of quantifying the estimated percentage of earning capacity for each level of impairment (see p. 227).

I take the position that the Board's chronic pain policy is not capable of being supported by the language of the Act.

Section 23(1) of the Act provides compensation for permanent partial disabilities or disfigurements. The Board is obliged to "estimate the impairment of earning capacity from the nature and degree of the injury."

In my view section 23(1)(2) requires the Board to estimate the impairment of earning capacity resulting from the injury in reference to the specific injured worker. If so, then in cases where 2.5% does not correspond to the disability of the particular worker due to chronic pain, the fixed award would appear to be both deficient in achieving this purpose and inconsistent with the intent of the provision.

Chronic pain affects the earning capacity of workers in very different ways. Variable factors may include the severity of the pain, the capacity of the worker to cope with the pain and the nature of the pre-injury occupation. The chronic pain policy provides what may be termed a "gateway assessment" to determine eligibility for an award under section 23(1), but there is no secondary assessment to take into account the effect of the chronic pain on the individual worker's earning capacity. Rather, the policy provides a fixed percentage to be awarded.

Unlike the PDES which purports to provide percentages as a "guideline or starting point" for determining section 23(1) awards, the chronic pain policy sets out a fixed amount that has been pre-determined by the Board to fairly estimate the worker's impairment of earning capacity due to chronic pain. The policy 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.

While this may have considerable administrative appeal, it is not clear that 2.5% is an appropriate value. By way of comparison, the Winter recommendation was to create a range of percentages corresponding with the severity of the pain with an overall statutory maximum of 20%. On a purely numeric basis, awards for chronic pain under the policy fall significantly short of the recommended maximum. 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.

As noted above, the Policy Bureau's discussion paper refers to the "impossibility" of providing objective medical evidence to correspond with the levels of impairment proposed by the AMA Guides. However, two other jurisdictions - Ontario and Alberta – have managed to devise compensation schemes based on levels of impairment.

In Ontario, chronic pain is treated as a mental impairment and awards are assessed subject to the following rating schedule: minor impairment of total person 10%; moderate impairment of total person 15 - 25%; major impairment of total person 30 - 50%; and, severe impairment of total person 60 - 80%[2]. According to a document by the Nova Scotia Workers' Compensation Board entitled, *Responding to the Supreme Court of Canada Decision on Chronic Pain – WCB Recommendations to Government* (March 12, 2004) at 31, Ontario

[2] WCB Briefing Paper, *Chronic Pain* (September 24, 2001) at 11.

estimates that the average impairment award for chronic pain is in the range of 10 - 25%.[3]

In Alberta, the Board considers chronic pain cases under policy #03-01/II/7.[4] The scale used is as follows: no impairment 0%; minimal impairment 1-10%; mild impairment 11-30%; moderate impairment 31-50%; and, severe impairment 51-75%.[5]

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 the section. 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 duty of the decision-maker under section 23(1) is to estimate the impairment of earning capacity from the nature and degree of the injury and then to compensate the worker accordingly. The estimation involves an element of discretion on the part of the decision-maker.

The chronic pain policy sets a fixed rate of compensation for every worker that meets the criteria for a permanent partial disability award for chronic pain. While there is consideration of the individual worker for the purposes of eligibility, once the primary entitlement issue is resolved, the actual award is dictated by the 2.5%. There 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. This is the case notwithstanding that the legislature refrained from including a statutory maximum for chronic pain compensation.

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.

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[3] Available online at: http://www.wcb.ns.ca/>.
[4] Available online at: <http://www.wcb.ab.ca/policy/manual/0301p2a7.asp>.
[5] Nova Scotia Workers' Compensation Board, *Responding to the Supreme Court of Canada Decision on Chronic Pain – WCB Recommendations to Government* (March 12, 2004) at 27.

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.

In contrast, apart from the opening line referring to "guidelines", it is difficult to interpret the language of the chronic pain policy, and in particular the final paragraph, as anything other than directing a fixed and inflexible result. The inflexibility of the policy is buttressed by section 250(2) which makes Board policy binding on the appeal tribunal. This effectively insulates the quantum of the award for chronic pain from appeal.

To summarize, I conclude that the Board's chronic pain policy fetters the discretion of the decision-maker to compensate for chronic pain under section 23(1). When considering whether the policy is "patently unreasonable", this argument may be considered in combination with the argument that the policy is inconsistent with the purpose of section 23(1).

For the above reasons, I am referring this matter to your attention at this time, and I ask that the worker's appeal be suspended.

Kathryn Wellington
Vice Chair