WCAT Decision Number: WCAT-2004-00056-RB
WCAT Decision Date: January 09, 2004
Panel: S. Marlene Hill, Vice Chair

Introduction

The worker is appealing two decisions, made by officers of the Workers' Compensation Board (Board), contained in letters dated August 30, 2001 and February 28, 2002.

In the first letter the worker was advised that she did not have entitlement to rehabilitation benefits beyond August 26, 2001 since she refused to participate in finding work.

In the second appeal of February 28, 2002, the worker was advised of her pension entitlement. A permanent functional impairment assessment measured the worker's disability to equal 9.53 percent of a totally disabled person with an additional 1.33 percent to cover age adaptability for a total of 10.86 percent effective October 23, 2000, calculated on 100 percent of the Board's "net minimum rate". It was also determined that the worker did not have a long-term loss of earnings greater than provided by the functional award since she was considered able to access several suitable jobs which would match or exceed her pre-injury earnings

The worker requested withdrawal of the first appeal contained in letter dated August 30, 2001. The panel approved the withdrawal.

The worker's representative argues that the worker's percentage of disability is too small. As well, she submits that the worker is suffering a loss of earnings that should be compensated by the pension.

The respondent employer was invited but did not participate in the appeal.

Issue(s)

Whether the worker's pension award adequately measures her permanent impairment caused by the compensable injury. Included in this determination is whether the wage rate, the effective date, the percentage of functional impairment are correct and whether the worker has a long term loss of earnings greater than provided by the functional award.

The worker's representative did not make a submission on the effective date or wage rate of the pension. However, as noted in item #14.30 of the *Manual of Rules, Practices and Procedures* (MRPP), a Worker's Compensation Appeal Tribunal (WCAT) panel may address any aspect of an appealed pension decision.

Jurisdiction

The appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, The Appeal Division and Review Board were replaced by the WCAT. As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No.2), 2002*, section 38).

Under sections 250 (1) and (2) of the *Workers Compensation Act* (Act) WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. It must make its decisions on the merits and justice of the case. It must apply policies of the Board's board of directors which apply to the case, except in exceptional circumstances outlined in section 251 of the Act.

Under section 254 of the Act, WCAT has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined in an appeal before it.

Background

On January 3, 1997 the worker, a home care aide, injured her left arm, back and left wrist when she slipped and fell on ice.

The Board accepted her claim for a break to her left distal radius, a fracture at the T12 level of her thoracic spine and a fibro-cartilage tear in her left wrist. The injury to her wrist required several surgical repairs the last of which was performed on June 14, 2000. Her condition was determined to be in a state of medical plateau by October 22, 2000. She received wage loss benefits from January 6, 1997 until October 22, 2000.

Reasons and Findings

Percentage of permanent functional impairment

Section 23(1) of the Act provides in part that "Where permanent partial disability results from the injury, the impairment of earning capacity must be established from the nature and degree of the injury".

Board policy in item #39.00 of the *Rehabilitation Services and Claims Manual*, *Volume 1* (RSCM) describes this method of assessing permanent partial disabilities as the "loss of function/physical impairment" method. This is opposed to the "projected loss of earnings" method under section 23(3) of the Act.

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Item #39.10 and #39.11 of the RSCM describe the application of providing an extra percentage award depending on the age of the worker at the time of injury and when a worker has suffered multiple physical impairments.

Section 23(1) pension awards are further divided into scheduled and non-scheduled awards, known as the Permanent Disability Evaluation Schedule (PDES) (Appendix 4 to the RSCM). The Board also uses a software tool, the ARCON automated impairment rating system (AIRS), to help measure and calculate restrictions in a worker's range of motion.

In this case, a disability awards medical advisor (DAMA) examined the worker on January 17, 2002 in order to determine the extent of her permanent functional restrictions in her left wrist, forearm and upper back.

In terms of her subjective complaints of pain the doctor noted those complaints and the impact those complaints have on her activities of daily living:

- Constant pain in left 4th and 5th fingers;
- Constant throbbing ache left ulnar forearm;
- Mid upper arm aching when shoulder elevated;
- Occasional charley horse of left hand with clawing of 3rd 4th and 5th fingers;
- Decreased strength and gripping of left hand causing her to drop dishes;
- Increased pain with cold weather, with general activity such as holding a book, taking any weight on left hand and forearm, pressing against any surface such as a table;
- Constant swelling and fullness in the left forearm and wrist area;
- Numbness and tingling in the ulnar nerve distribution of the left hand and reduced sensation;
- A big knot felt in the middle of her back "like a fist";
- Back pain increases when twisting her torso and by slightly bending forward for example doing dishes, sitting, standing or walking for more than 15 to 20 minutes.
- Can drive short distances, is only able to do light lifting;
- No activities outside the home because of asthma;
- Does not load the dishwasher because of twisting, bending and increased back pain;
- No longer vacuums, bowls, ice skates, toboggans or dances;
- Reduction in the amount of time she is able to knit.

In terms of positive findings of the worker's medical condition, the DAMA noted reduced range of motion of the left wrist and thoracolumbar spine. He recommended a 2.6 percent of a totally disabled person award for the reduced sensation and grip in her left hand caused by a "mild motor ulnar nerve impairment".

The Board used the ARCON AIRS to calculate the worker's percentage of disability for restrictions in her wrist and back. It calculated the loss of range of motion in her left

wrist to equal 5.53 percent and in her back equal to 1.4 percent of a totally disabled person.

The Board disability awards officer reviewed the results of the DAMA's examination and the ARCON AIRS report and considered the results captured the worker's loss of function. The award also included 1.33 percent for age adaptability for a total award of 10.86 percent pension.

At the oral hearing the worker told the panel that she is in pain 24 hours a day. She stated that the last surgical repair made her wrist worse. The pain in her wrist and forearm swelling increases during the day. The arm pain awakens her after three to four hours of sleep at night. Her back causes spasms of pain when she moves the wrong way. She must be very careful how she moves to prevent the back spasm. She cannot wash her own dishes and described this activity of slightly bending over the sink as one of the worse positions for causing an increase in her back pain.

The worker's representative made an oral submission to the panel. She argued that the worker should be provided with an increase in the back award. She submits that the workers' back symptoms represent a greater functional impairment than provided by the scheduled award.

I have reviewed the evidence, and the report sent to appeal from the worker's attending physician dated March 22, 2002. The attending physician reviewed the permanent functional impairment assessment report. He stated that he agreed with the assessment but could not comment on the percentage of functional impairment assessed by the Board without more experience in "this field". However, I find no reason to alter the 6.93 percent allocated by the disability awards officer for the workers wrist and back loss of motion. Since there is no additional medical information to show that the range of motion findings placed into the ARCON system were incorrect.

I also find no reason to alter the 2.6 percent award for the worker's reduction in grip and strength and numbness in the hand and forearm caused by the ulnar nerve condition. The DAMA described the worker to have been left with "mild motor ulnar nerve impairment at the wrist and a moderate sensory paraesthesia and hyperesthesia". The PDES provides for a maximum award of eight percent of a totally disabled person for complete ulnar nerve denervation at the wrist. The worker did not suffer complete denervation of the ulnar nerve; consequently an award of up to that percentage is in order. I have not been provided with additional expert medical evidence showing the doctor's assessment of this impairment to be incorrect.

I have also reviewed the worker's subjective complaints of pain in her mid-back and those identified during the permanent functional impairment examination. I agree with the representative's submission that the worker's subjective complaints also represent a functional impairment. The worker is prevented from many normal functions as a result of the pain and spasms in her upper back. I find that these complaints cause a

.5 percent loss of function of a totally disabled person impairment over and above the 1.4 percent.

In accordance with policy item #39:11 the age adaptability may have to be recalculated as a result of the panel finding that increases the functional award by .5 percent.

The worker suffered multiple impairments. Policy item #39.12 discusses the possibility of two separate disabilities causing a greater disability than the separate effect of each. If the compensable injury causes more than one disability the policy permits an enhancement factor be added in respect of multiple disabilities. This policy was not reviewed at the time of the decision and I find that the worker is entitled to this determination.

Projected loss of earnings award

Section 23(3) provides in part that:

> 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 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.

Board policy in item #40.00 of the RSCM describes this method of assessing permanent partial disabilities as the projected loss of earnings method. The policy item also states that this method deals with situations where a compensable permanent disability is a significant factor in a worker's loss of earning potential or reduced employability.

Item #40.10 of the RSCM provides the assessment formula for this method of calculating pension awards. The assessment involves comparing the worker's average earnings that maximize the worker's long-term potential in suitable and reasonably available occupations. Item #40.12 provides further detail on what is considered a suitable and reasonable available occupation. In particular, item #40.12 provides that:

> In advising on the suitability of the claimant for reasonably available jobs, the rehabilitation consultant must have regard to the limitations imposed by the residual compensable disabilities of the claimant and assess the claimant's earnings potential in light of all possible rehabilitation measures that might be of assistance, including the possibility of retraining or other measures that may be appropriate to the particular worker.

The worker attended a six-hour functional capacity evaluation on September 27, 2000. This assessment confirmed that the worker's condition was in a state of plateau and the

resultant physical impairments prevented her from returning to her pre-injury occupation. The worker was considered able to perform "limited strength work which had occasional demands for sitting, standing, walking, climbing, bending, crouching, reaching and handling". The evaluator commented that the worker's profile was of an individual in moderate pain. He also recorded the worker to have stated that she was not able to return to any kind of work.

The rehabilitation consultant sought further clarification as to whether the worker's condition was in a state of plateau. The case manager offered the worker four weeks at a pain program, however the worker refused further treatment. The case manager then advised the worker in decision letter dated October 11, 2000 that temporary wage loss benefits would be terminated.

A rehabilitation consultant met with the worker on August 7 and 14, 2001 after which the functional capacity evaluation report of September 20, 2000 was sent to the worker on August 30, 2001. The worker was offered a further ten weeks of rehabilitation allowance while actively pursuing a self-directed job search from August 14th. She was to look for work in retail sales, customer service and switchboard/reception. The worker contacted the Board on August 20, 2001 advising that she was not medically able to participate in the vocational rehabilitation process. Her rehabilitation allowances were suspended on August 26, 2001.

The worker told the panel at the oral hearing that she is presently 62 years of age. She does not have a significant attachment to the work force. Her first work outside the home was as a care aid starting in 1986 with the respondent employer. Prior to 1986 she ran a boarding house. She feels that since her disabilities prevent her from properly caring for her own home she could not return to that type of work. She does not have a computer or know how to type.

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The worker stated that she would not be able to perform the jobs identified in her file because:

- in the parking booth job identified by the employability assessment, she would have to sit and use both hands;
- the information clerk job would require her to use both hands and use a computer
- foster parent work is not available to her
- home care is impossible since she cannot take care of herself or her own home without assistance
- retail clerk would require bending, lifting and twisting as well as use of both hands
- telephone soliciting is impossible stating after a few hang-ups "she would be in tears"

She also told the panel at the oral hearing that she did not actively look for work. She approached an employer regarding the requirements of customer service work. This employer advised her that unless she was able to use both of her hands, no employer would hire her. She could not also imagine any employer willing to employ her. She believed her disabilities made her competitively un-employable. She is unable to understand how the Board expects her to present herself as a viable employee to any employer.

Having reviewed all of the evidence, the weight of the evidence leads me to conclude that the worker is entitled to a projected loss of earnings award. I find that the jobs identified are neither suitable nor reasonably available to the worker in the long term. I also agree with the worker that, the combination of her age and disabilities, she is more than likely competitively unemployable.

The worker was not provided, nor is retraining reasonable in light of the workers disabilities, age and present education. I agree with the worker that without the use of both of her hands and back symptoms, she is severely limited in accessing any of the jobs identified in the functional capacity report.

Conclusion

I partially allow the appeal and vary the Board's February 28, 2002 decision to the following extent:

- The worker is entitled to an increase of .5 percent in her functional award;
- The worker is entitled to review of the age adaptability calculation;
- The worker is entitled to consideration of an enhancement factor added to her award in accordance with item #39.12 of the RSCM.
- The worker is entitled to a 100 percent loss of earnings award effective October 23, 2000.

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The other two aspects of the worker's pension award, the effective date, the wage rate, as granted in the Board's February 28, 2002 decision are confirmed.

The worker incurred the costs of obtaining a report from her attending physician dated March 22, 2002. The panel notes that this report was helpful in resolving the issues on this appeal. The panel orders that the Board reimburse the worker for these expenses under section 7 of the *Workers Compensation Act Appeal Regulation*.

S. Marlene Hill
Vice Chair

SMH/lco

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