WCAT Decision Number: WCAT-2004-00063
WCAT Decision Date: **January 09, 2004**
Panel: Daphne Dukelow, Vice Chair

Introduction

The worker's 1999 claim for compensation was accepted for a low back injury. Ultimately, in 2002, a panel of the Appeal Division found that the worker's claim should be accepted for permanent aggravation of the worker's pre-existing degenerative lumbar spine condition. The worker was assessed for permanent functional impairment and awarded a pension of two percent of total. The worker was advised formally of this decision in a letter dated February 7, 2003. The worker appealed to the Review Division from that decision. The Review Division decision upholds this decision. The worker now appeals concerning this issue to this panel.

The worker appeals from the portion of the Review Division decision dated July 7, 2003 dealing with his pension award made on a functional basis. The worker is not appealing concerning a possible loss of earnings award since that matter has been referred back to the Board by the review officer's decision. The Review officer's decision dealt with an issue concerning vocational rehabilitation. The vocational rehabilitation issue is not before me.

Issue(s)

The issue in this appeal is whether the worker's functional award of two percent of total should be increased.

Jurisdiction

The worker's appeal is permitted by section 239 of the *Workers Compensation Act* (Act). Section 239(2)(b) provides that a decision by a review officer respecting matters referred to in section 16 of the Act, that is vocational rehabilitation, may not be appealed to the appeal tribunal (WCAT).

The worker requested that this appeal proceed by way of read and review. I agree that an oral hearing is not required to consider this appeal fairly. The employer is not participating in this appeal although advised of its right to do so. Counsel for the worker has provided a written submission.

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Background and Evidence

The worker injured his lower back while lifting a sheet of plywood. By an Appeal Division decision dated April 30, 2002, the worker's claim was accepted for permanent aggravation of the worker's pre-existing degenerative lumbar spine condition. In order to implement the Appeal Division decision, the Board undertook a permanent partial disability assessment. By letter dated February 7, 2003, the worker was advised that he had been awarded a pension of two percent of total on a functional basis. Another decision letter dated February 7, 2003 advised the worker that he was not eligible for vocational rehabilitation assistance. The worker appealed to the Review Division from both of these decisions.

The review officer confirmed the Board's decision to grant a two percent permanent partial disability award. It is this portion of the review officer's decision which the worker challenges on this appeal.

The review officer relied on the opinion of the physician who conducted the permanent functional impairment examination of the worker. The physician stated that the range of motion measurements were likely reliable. However, he noted that they were more restricted than would be expected given other medical information. Therefore, the Board officer assessed the permanent functional impairment rating on a judgment basis rather than on the basis of the range of motion measurements. The result was the two percent award now under appeal. The review officer found that the worker's pain was likely to fluctuate from time to time and therefore his range of motion would fluctuate. As a result, the review officer found that it was best to determine the level of functional impairment on a judgment basis. The review officer accepted the reasoning of the Board officer who made the original decision.

The Board officer had considered the report from the permanent functional impairment assessment. In his memo to file, the Board officer noted that the physician who provided the assessment report had, in turn, noted that the worker's limitation of mobility in his lumbar spine was greater than would be expected from the diagnosed condition of lumbar strain. The Board officer noted that the worker was described as approaching the movements of the spine tentatively and slowly. The examiner felt that the worker was showing variable objective signs of effort. Also, the worker did not complete all tests requested of him. The Board officer concluded that the range of motion tests were not reliable to form the basis for determination of the worker's permanent functional impairment of range of motion in his lumbar spine.

The review officer determined that the Board should assess the worker's potential loss of earnings after conducting an employability assessment. The worker is not challenging this portion of the review officer's decision.

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The review officer also referred the worker back to the Board for further consideration of his eligibility for vocational rehabilitation assistance. The worker is not challenging this portion of the review officer's decision.

Reasons and Findings

Counsel for the worker takes issue with the basis for the finding of the review officer in relation to the worker's permanent functional impairment assessment. He argues that since the physician doing the assessment stated that the range of motion measurements were reliable, the award should be based on the range of motion measurements and not on a judgment basis. He notes that the worker met 40 out of 40 criteria for consistency of effort.

While I appreciate counsel's point concerning the consistency ratings in the testing done to determine the worker's permanent functional impairment, I am not convinced that the decisions of the adjudicators who have considered this issue should be changed on that basis. I am in agreement with the reasoning employed by the Board officer and by the review officer.

Item #39.00 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM), the policy applicable at the time the assessment was carried out, points out that under section 23(1) of the Act, the impairment of earning capacity must be "estimated from the nature and degree of injury". Item #39.10 points out that the Permanent Disability Evaluation Schedule contained in the RSCM is a set of "guide-rules, not a set of fixed rules". The disability awards officer is still free to apply other relevant variables. In my view this is what the disability awards case manager, the Board officer, did. He took into account the diagnosed injury and the comments of the examining physician when considering the actual range of motion measurements. Also, I consider it important to note that the condition accepted under the claim (the "nature of the injury") is permanent aggravation of pre-existing degenerative condition of the lumbar spine.

The Schedule, itself, notes under the heading, "The Spine" that it is difficult to assess range of motion of the spine. Thus it is appropriate to take into account other relevant factors as contemplated by item #39.10. Although the range of motion tests were found to be reliable that does not mean that they should be taken at face value to assess the worker's impairment resulting from his compensable injury. I agree with the review officer that it was appropriate for the disability awards officer to determine the worker's level of impairment on a judgment basis and not mathematically on the basis of the range of motion tests. The worker has not presented evidence to contradict the findings made by the disability awards officer.

I am not persuaded that the review officer's or the Board officer's decision concerning the level of functional impairment should be changed or that their decisions in this regard are in error.

The worker's counsel did not ask me to address the loss of earnings pension issue. I will make one comment on this issue. I agree with the review officer that any decision concerning a possible loss of earnings pension award is premature at this point given the review officer's decision concerning vocational rehabilitation assistance. As I noted above, the review officer has directed the Board to conduct a loss of earnings assessment after the vocational rehabilitation consultant completes an employability assessment of the worker.

No expenses were requested in relation to this appeal.

Conclusion

I deny the worker's appeal. I confirm the decision of the review officer. The worker's permanent functional impairment in relation to his compensable injury is assessed properly at two percent of total.

Daphne Dukelow
Vice Chair

DD/jda

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