WCAT Decision Number: WCAT-2004-00085-RB
WCAT Decision Date: **January 12, 2004**
Panel: Kathryn P. Wellington, Vice Chair

Introduction

The worker disputes a February 1, 2001 decision of an officer of the Workers' Compensation Board (Board) concerning his March 17, 1999 elbow claim. In a letter of that date a disability awards officer (DAO) informed the worker of the details of the pension the Board would provide. The DAO said that the Board estimated that the worker's permanent functional impairment was equal to 3.0 percent of a totally disabled person. The DAO added a further .03 percent enhancement due to the worker's age. The compensation wage rate represented 75 percent of the worker's monthly wage rate at the time of his injury; and the pension was effective September 30, 1999. Because the amount of the pension was small, the Board paid it as a lump sum. The DAO advised the worker that the award recognized any long-term effect on the worker's employability caused by his loss of function.

The worker disagreed with this estimate of his entitlement and initiated an appeal.

Issue(s)

Did the Board correctly estimate and calculate the worker's pension award?

Jurisdiction

This appeal was filed with the Review Board. On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (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).

WCAT may consider all questions of fact and law arising in an appeal but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the WCB's board of directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Relevant Background Information and Evidence

The worker is 49 years old. He is right handed. When he sustained his compensable 1999 elbow injury, he was employed as a plumber. On March 17, 1999, the worker fell from a van, striking his right elbow on a drill bit as he fell. He sustained a serious right elbow fracture (displaced, comminuted, radial head fracture). The worker underwent an arthrotomy and radial head excision. The consulting surgeon Dr. RL, indicated a guarded prognosis.

The worker submitted a claim for compensation benefits; which the Board accepted. In a May 17, 1999 decision letter a Board officer advised the worker of the long-term wage rate upon which his continued benefits would be calculated. The worker did not appeal that decision. Later, in July 1999, the Board adjusted the long-term wage rate upward.

The following brief chronology is necessary for an understanding of the worker's appeal.

During the worker's convalescence he attended Board-sponsored therapy programs, including a work-conditioning program and an occupational rehabilitation program.

The Board undertook a jobsite evaluation on August 11, 1999.

On August 13, 1999, the worker was provided with a custom-made splint.

On a physician's progress report (F11) dated August 24, 1999, the worker's attending physician recorded that the worker's elbow pain had not changed, but that he had early ulnar nerve neuropathy. The worker attended Dr. RL again in consultation on August 27, 1999. He presented with some paraesthesia in his fingers on occasion as well as complaints of general elbow pain and occasional mild right wrist pain. Dr. RL recommended that the worker undergo examination at the Visiting Specialists Clinic for a second opinion.

The worker returned to work in September 1999, after which he experienced an increase in his elbow pain. The Board concluded wage loss benefits on September 29, 1999, because the worker had returned to his pre-injury employment. When the worker was discharged from the occupational rehabilitation program on September 29, 1999, the program providers indicated that he was not at risk of injury on the job in light of the current status of his elbow. The plan providers noted, however, that the worker's elbow mechanics were altered by the injury and surgery and this might result in increased wear on the elbow joint.

On December 7, 1999 Dr. TG of the Visiting Specialist Clinic examined the worker and concluded that he could continue to work and should try to maintain or improve his strength. He assessed the worker's level of pain as not severe, and he concluded that the worker's pain might improve with time.
In February 2000, Dr. TG said the worker was fit to return to work without limitations.

The worker underwent examination for pension purposes on January 15, 2001. On examination he demonstrated abnormal motion on flexion and extension as well as abnormal motion on pronation and supination. These factors led to his scheduled award, to which the Board added a further 0.42 percent to recognize the worker's subjective complaints. The examination also set out several findings concerning grip weaknesses but these were not included in the assessment of the scheduled award. The results of this examination gave rise to the decision letter the worker currently disputes.

Hearing Evidence

The WCAT held a hearing on October 29, 2003. The worker attended with his representative and gave evidence. The employer did not attend the hearing or participate in the appeal. The panel accepted and marked as evidence a written submission from the worker's representative, which included new evidence under eight tabs.

Specifically:

Tab 1. chart notes
Tab 2. March 17, 2001 f11
Tab 3. March 21, 2001 elbow x-ray report
Tab 4. diagnostic imaging report dated July 17, 2001
Tab 5. August 2, 2002 summary of electroneuromyogram report findings of August 2, 2002
Tab 6. October 16, 2003 summary of findings and interpretation Dr. HAS
Tab 7. October 14, 2003 physiotherapy report
Tab 8. taxation reports for years 2000, 2001 and 2002

The worker provided his evidence under oath. Much of his evidence related to the impact of his symptoms on his ability to work as a plumber. The worker has worked as a plumber since 1980. He said he returned to work on a graduated basis after the injury in September 1999 although his physiotherapist thought this seemed a little early.

The worker said a number of his job duties are difficult now, given his remaining impairment. He uses hacksaws to cut pipe. This causes forearm and elbow pain. The worker uses hammers to insert the hangers in which the pipes are supported. The worker finds hammer use difficult because of the weight of the hammer and due to the fact that he must swing his arm. He needs to take extra time and must work at a slower pace in order to keep his symptoms at a reasonable level. He does not take pain medication any longer, having tried several analgesics without good results.

The worker told the panel he is trying to adapt to using his left hand. He has a major problem with overhead work. He experiences knot-like pain at shoulder level, and he uses his shoulder muscles to elevate his arm. He now uses cordless drills. He has

difficulty manipulating pipe wrenches. He has had to adapt his method in order to exert sufficient pressure on the pipes. He finds that, due to his reduced grip strength, he drops pliers. He needs to use both hands to manipulate crimping tools when sealing pipes and to manipulate other hand tools.

The worker has to carry heavy pipes and walk on scissor lifts. He often must use both arms to lift pipe onto his shoulders. All work positioning pipe is performed overhead. The worker works five days a week for eight hour shifts. He must climb ladders carrying cast iron fittings weighing 40-50 pounds in a sack slung over his shoulder. This causes a pulling sensation in his elbow. The worker requires help to shift weights off his back. He told the panel that he has lost some of his sense of balance on ladders and feels shaky now. The biggest problem for the worker is overhead work, and he works in that position about seven hours a day, he said.

The worker said that his fourth and fifth finger symptoms have changed dramatically since the pension assessment. His fifth finger is asleep all the time and he experiences a burning pain, while now his fourth finger is numb. The worker indicated that he has been informed that he has developed right elbow ulnar neuropathy and has decreased ulnar nerve conduction. He will require surgery to transpose his right ulnar nerve.

The worker uses Therabands to strengthen his right arm. He also exercises using a "worry ball" and putty. He applies cold to his elbow. He has lost some further time from work due to his elbow complaints and finds that now he must use his back to compensate for his weaker elbow.

Reasons and Findings

The worker's entitlement in this case is adjudicated under the provisions of the *Workers Compensation Act* (Act) that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). WCAT panels are bound by published policies of the Workers' Compensation Board (Board) pursuant to the *Workers Compensation Amendment Act, (No. 2), 2002* (Bill 63). Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) which relates to the former (pre-Bill 49) provisions of the Act.

The Act at sections 22 and 23 allows the Board to award pensions to injured workers who are left with residual effects from their work injuries or occupational diseases.

Board policies concerning pensions (permanent disability awards) are set out in the RSCM in chapter 6.

Permanent disability awards comprise several discrete decisions about the worker's entitlement; which taken together result in the quantum of the award. A WCAT panel may consider all of the elements of a pension award pursuant to item #14.30 of the *WCAT Manual of Rules, Practices and Procedures* (MRPP), although generally, WCAT

panels confine their decisions to issues raised on appeal by the appellants. In this case, the worker is represented by a qualified and experienced representative, who is very familiar with pension appeals. The panel agrees with the representative's appraisal of the pension elements that require review. The panel has considered the effective date of the award, the decision concerning long term loss of earnings and the decision to commute the pension and, finding no obvious error in these elements of the award, confirms them.

The worker and his representative disagree with the estimate of the worker's permanent functional impairment, the pension wage rate and the Board's decision not to award interest. The panel granted the representative additional time after the hearing to provide a written submission concerning interest. The panel acknowledges receipt of the representative's November 12, 2003 submission.

Did the Board correctly estimate the degree of the worker's permanent functional impairment?

The worker submits that the pension award overlooked undisputed compensable impairments including decreased grip and pinch strength and right wrist and forearm lost strength. In addition, the subjective award is too low. The panel has considered the representative's written submissions in this regard.

The panel has reviewed the January 16, 2001 permanent functional impairment evaluation [PFIE] report. Information about the worker's functional tolerances is consistent with the information the worker provided at the hearing. The worker demonstrated low right grip strength, low right key grip strength and low right palmar grip strength on testing. He also was assessed as demonstrating a pattern of fatigue during the palmar pinch grip test with his right hand. These findings, while included in the PFIE report, are not reflected in the ARCON-AIRS impairment rating report; which reflects only abnormal elbow motions.

The panel has reviewed the January 31, 2001 PFIE review memo on file, and observes that the memo makes no reference to the worker's significantly decreased grip strength, and no reference to symptoms below the elbow, although these are noted in the medical evidence, including the PFIE report. The panel notes that, according to the physiotherapist's October 14, 2003 report [see tab 7] the worker continues to have decreased grip strengths on the right. These impairments have been overlooked.

The panel finds that the worker is entitled to have his permanent functional award increased to reflect his significantly decreased grip strengths and problems involving his forearm and wrist.

The panel has reviewed the permanent disability evaluation schedule as it pertains to the upper extremity. The schedule does not provide guidance for measuring the sort of disability with which the worker presents. Complete immobility of an elbow joint is

estimated as 20 percent of total disability. The Board has awarded 2.58 percent for the worker's decreased elbow flexion, extension, pronation and supination alone. In light of the further weakness of grip strengths and other objective findings which are well documented on file and in the representative's submission, the panel finds that the worker's total physical impairments [in respect of those conditions the Board currently accepts] are properly assessed at 5 percent of a totally disabled person.

The worker has developed an ulnar neuropathy confirmed on testing. This corresponds to the worker's complaints of increased constant numbness in his fingers. The panel notes that the Board has yet to adjudicate whether this condition is a compensable consequence of the work injury. The panel understands that the worker will undergo surgery to transpose his right ulnar nerve. This surgery, if successful, may be expected to eliminate or reduce the sensory losses the worker currently experiences. Findings related to this condition are not included in the panel's assessment concerning the worker's level of permanent functional impairment.

The panel directs the Board to determine whether the worker's ulnar neuropathy meets the criteria set out in policy #22.00. If the condition is determined to be a consequence of the work injury, the panel directs the Board to evaluate whether there are permanent effects from this condition or the resulting surgery, and whether the effects of the condition entitle the worker to a further increase in his pension award, pursuant to policy item #39.40 [sensory losses]. The panel appreciates that the Board likely will not be able to evaluate the extent of any permanent effects until after the worker has undergone surgery and convalescence.

The panel has considered whether the worker is entitled to an increased award for his subjective complaints. The worker's representative has asserted that an award of 0.42 percent for subjective complaints is too low and is contrary to policies #39.00 and #39.10 and the objective medical evidence on file. The panel is inclined to agree that the award is not adequate.

In the January 31, 2001 memo on file, the DAO indicated that the award of 0.42 percent was intended to recognize the worker's subjective complaints. The DAO arrived at this figure apparently by simply rounding off the total impairment figure to the next highest whole number. In the panel's view this figure does not adequately compensate the worker for the impact of his subjective complaints on his employability.

The panel interprets the evidence as supporting a conclusion that the worker's complaints are in keeping with his injury, and are made worse by the motions his job requires. He reports ongoing and now chronic pain that is not alleviated by the medications he has tried. Having interviewed the worker, the panel concluded that he was possessed of a stoical nature, and had tried to work within the limitations of his symptoms, however, he has lost some time from work due to his ongoing complaints, and he has indicated that his symptoms interfere with his ability to perform some of his job duties. The panel has concluded that this likely is the case. Furthermore, due to his

subjective complaints the worker has found it necessary to modify the manner in which he works in ways that may affect his work speed and therefore his competitiveness in his trade.

The worker is employed in heavy work that requires him to use his dominant right arm in awkward postures and to manipulate hand tools in ways that irritate his elbow and wrist. He has to negotiate ladders, while carrying heavy objects, and this requires that he be able to rely on his arms to support his weight as he climbs. The nature of the work is such that the worker's pain levels may be expected to adversely affect his access to some heavier plumbing jobs. The panel notes the worker's evidence about the difficulty he has climbing ladders now, as well as handling certain equipment.

The worker is developing post-traumatic arthritis at the site of the compensable injury, as doctors predicted he would. He also has bone chips at the site of his fractures. This suggests to the panel that the worker's pain and fatigability are not of a temporary nature; and likely will not be improved after surgery to transposition his ulnar nerve. Furthermore, the nature of the work is such that likely it will affect the development of the worker's post-traumatic arthritis, due to the constant stresses on his right elbow from heavy lifting and manipulation of tools, including wrenches. The panel anticipates that the pain attributable to arthritis will likely continue at its present level or worsen as the worker's arthritis develops. In the panel's view the worker's subjective complaints, not including symptoms related to ulnar neuropathy, justify a much higher award. The panel notes that the worker is coping without medication because the analgesics he has tried have not worked.

The panel finds that the worker's subjective award should be increased to 3.0 percent.

The panel finds that the worker's permanent functional impairment and subjective complaints are equal to 8.0 percent of a totally disabled person. In light of this finding the panel directs the Board to recalculate the portion added to the award in respect of age adaptability to conform to policy item #39.11.

What is the correct pension wage rate?

The DAO based the worker's pension on his long term earnings in the period January 1, 1994 to March 17, 1999. The Board noted that the worker's monthly earnings were variable. The panel notes that the worker had asked the Board to calculate his long-term wage rate with reference to his earnings in the five years prior to injury because in the year prior to injury he had been unemployed and looking for work. The worker's earnings for the five years prior to injury are set out in a July 6, 1999 memo on file. The panel notes that these earnings are significantly lower than the earnings the worker reported at the time of the injury in 1999 and the earnings he received subsequently as a result of his continued employment with the accident employer.

The worker and his representative submit that the pension wage rate [as opposed to the long term wage rate] ought to be based on the date of injury rate of $760.00 per week.

The representative provided evidence that:

- But for the injury the worker would have had steady employment well into the future with the accident employer. As a result of the injury, the employer had to hire someone else to replace the worker.

- After his injury the worker returned to work with the accident employer and also had earnings with another non-union employer.

The panel concludes that, while the long-term wage rate was properly calculated with reference to the worker's earnings in the five years prior to injury, the worker's earnings at the date of injury best reflect his earnings for pension purposes. Date of injury earnings reflect his actual loss as a result of his residual impairment as he had a steady job with future prospects of work well into the future. With the benefit of hindsight the panel can say that the worker has in fact, for the most part, continued with the employment he had at the time of his injury. Use of the earnings in the five years prior to injury would significantly underestimate the worker's future earnings from employment with the unionized employer.

The panel notes that the worker's earnings since his return to work are still somewhat variable. He took time off from work in order to obtain a coaching level certificate for coaching children's baseball and he had further compensable back injuries in 2002. However, he continues to work for the injury employer, and he also augments his income with non-union work. The panel concludes that, while not perfect, the date of injury earnings is the best reflection of the worker's earnings for pension purposes, because the earnings in the five years prior to injury under-compensate the worker in the panel's view.

The panel directs the Board to recalculate the worker's pension with reference to his earnings at the date of injury.

Conclusion

The panel increases the worker's award for objective findings to 5 percent to recognize grip weakness. The panel directs the Board to recalculate the portion of the scheduled award that relates to age adaptability.

The panel finds that the award in respect of the worker's subjective complaints is inadequate. The panel finds that the worker is entitled to an award of 3 percent for his subjective complaints, not including complaints of ulnar neuropathy.

The panel refers the claim file back to the Board to determine whether the worker's ulnar neuropathy is a compensable consequence of his work injury. If that condition is compensable, the panel directs the Board to determine whether the worker has any residual impairment as a result of that ulnar neuropathy as soon as the condition stabilises.

The panel finds that the pension wage rate is properly calculated with reference to the worker's day of injury wage rate, and directs the Board to recalculate the pension on that basis.

Interest

The panel acknowledges and has considered the representative's submission concerning the worker's entitlement to interest on all retroactive pension payments. Policy item #50.00 allows the Board to pay interest to workers or employers under certain circumstances. These include the following:

- The retroactive payment is to a worker or employer in respect of a wage-loss payment (provided under sections 29 and 30 of the *Act*) or a permanent disability lump-sum payment (provided under sections 22 and 23 of the *Act*).
- It has been determined that there was a blatant Board error that necessitated the retroactive payment. For an error to be "blatant" it must be an obvious and overriding error. For example, the error must be one that had the Board officer known that he or she was making the error at the time, it would have caused the officer to change the course of reasoning and the outcome. A "blatant" error cannot be characterized as an understandable error based on misjudgment. Rather, it describes a glaring error that no reasonable person should make.

The representative has asserted, in part, that the worker is entitled to interest on his award because the Board made several blatant and patently unreasonable errors of law and binding policy by noting but failing to consider the multiple, undisputed and objective evidence of the worker's impairments to his grip and pinch strength in estimating his percentage of total disability.

The representative has asserted, as well, that the November 1, 2001 policy changes to policy item #50.00 "Interest" do not apply to this case because when the policy changed on November 1, 2001 the worker's pension decision had been appealed to the Review Board and thus, was a case currently under adjudication at the Review Board. The representative has provided copies of a March 1, 1999 decision of the Governors concerning retroactivity of policy changes, which stated in part that:

> The policy change may occur as a result of an amendment to the *Workers Compensation Act*, the *Criminal Injury Compensation Act* or the *Workplace Act* or some other statute. The presumption in these cases, unless expressly or necessarily implied from the language, purpose or circumstances of the statute, is that the changed policy will not apply retroactively before the date on which the new policy was approved.

The panel agrees with the representative's characterization of blatant Board error in this case. The worker's diminished grip strengths were clearly set out in the PFIE report and could not reasonably have been mistaken for the assessments of decreased range of motion. Accordingly, the panel finds that the worker is entitled to interest on the retroactive portion of his pension award pursuant to policy item #50.00.

The panel allows the worker's appeal and varies the February 1, 2001 decision.

The worker lost one day of work in order to attend his hearing. He traveled approximately 70 km each way to attend his hearing. The worker incurred expenses associated with obtaining medical reports for his hearing. The panel orders reimbursement of the worker's time loss, travel costs and the expenses of obtaining medical records in support of his appeal, pursuant to section 7 of the *Workers Compensation Act Appeal Regulation*.

Kathryn P. Wellington
Vice Chair

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