WCAT Decision Number: WCAT-2004-00099-AD
WCAT Decision Date: **January 12, 2004**
Panel: Michael Carleton, Vice Chair

Introduction

The worker appeals the January 10, 2003 findings of a panel of the Workers' Compensation Review Board (Review Board) concerning the extent of his entitlement to an award for permanent partial disability. The Review Board panel had considered the decision of a disability awards officer, dated February 5, 2002, which provided details of the worker's entitlement to an award for permanent partial disability. The Review Board panel concluded that the disability awards officer had appropriately determined the percentage of disability, the effective date of the award and the pension wage rate, but had prematurely reached a conclusion that the worker would not sustain a loss of earnings, as the Board's Vocational Rehabilitation Department was then still assisting the worker in his vocational rehabilitation, and the worker's maximized earnings were not yet known.

On review of the worker's submissions, the main focus of his appeal appears to be the quantum of his award, which he submits does not take into consideration the extent of his subjective complaints. I do not intend to disturb the Review Board finding that the issue of loss of earnings is premature, as the worker has not raised that issue in his submissions. The worker has also not contested the issue of the effective date and the pension wage rate.

Issue(s)

Does the quantum of the award for permanent partial disability accurately reflect the extent of the worker's functional impairment, including his subjective complaints?

Jurisdiction

This appeal was filed with the Appeal Division. On March 3, 2003, the Appeal Division and the Review Board were replaced by WCAT. As this appeal had not been considered by an Appeal Division panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 39.)

Background and Evidence

The worker sustained an injury to his right thumb on September 8, 1998, resulting in a radial collateral ligament injury and dorsal capsular injury causing ulnar deviation and

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volar subluxation of the proximal phalanx. The worker subsequently underwent surgery to repair the dorsal capsule and the radial collateral ligament.

The worker attended a permanent functional impairment evaluation on January 23, 2002. The worker reported that his main complaint was that he has ongoing pain in his right thumb and is not able to work at his pre-injury job as an assembler/painter. At the time of the examination the worker was taking two Tylenol #3 tablets every four hours for pain and Novo Sertrailine for depression (three tablets once a day). A functional tolerance chart contained in the impairment evaluation report recorded a number of changes reported by the worker regarding his functional tolerance for various activities, including ladder-climbing, crawling, driving, fingering, and handling. The worker said he now drives with his left hand and rests the right hand, and he said he holds a pen between his index and middle fingers when writing. He said when gripping he gets a shooting pain in his right thumb. He described decreased strength in the right hand and generally uses the left hand to grip.

The ARCON computerized impairment rating system calculated the impairment in the worker's right thumb to be equal to 7.69 percent of total. The physician who conducted the examination, Dr. Khunkhun expressed the opinion that the range of motion (ROM) findings may not be reliable. He said that despite the unreliability of the testing, in his opinion "the [ROM] findings likely reflect the client's injuries and subsequent surgeries." Dr. Khunkhun said the non-ROM findings appear to be consistent with the client's injury.

On reviewing the assessment results, the disability awards officer indicated in a February 4, 2002 memo that he accepted that the impairment due to right-hand abnormal motion was equal to 7.69 percent. It was determined that an overall award of 8.0 percent of total would be provided, to take into consideration both the functional impairment and any subjective complaints, including cold intolerance.

Although the disability awards officer indicated that further consideration might have to be given to the issue of loss of earnings, in the February 5, 2002 decision that followed, the disability awards officer indicated that the functional award of 8.0 percent recognized the long-term effect on the worker's employability resulting from his impairment.

In proceeding with an appeal to the Review Board the worker's physician, Dr. Richardson, provided a letter, containing the following information concerning the worker's medication intake and pain complaints:

> This is to verify that he requires the following medications; Luvox 100 mg at bedtime for depression, Amitriptyline 50 mg daily at bedtime for difficulty sleeping and a maximum dosage allowable of Tylenol #3 on a daily basis for chronic pain.

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In providing the January 10, 2003 findings, the Review Board vice chair noted that the disability awards officer's February 4, 2002 memo indicated that the disability awards officer took into account both the functional impairment and the subjective complaints in determining the worker's entitlement to an award of 8.0 percent of total. The Review Board vice chair concluded that Dr. Richardson's letter of November 20, 2002 described the type of medication that the worker takes for his ongoing problems and "was not written with respect to the issue of percentage of disability." It was concluded that the Board had accurately determined the worker's entitlement to an award for permanent partial disability, on the basis of both the reduced ROM and the subjective complaints.

Submissions

In a submission that was received on January 23, 2003, the worker said the discomfort he is having affects him at home and at work. He said he has now taken an airbrake course, which he passed, but because of the medication intake he is not allowed to operate a vehicle. He said it would be difficult to achieve his pre-injury wages.

In a September 22, 2003 submission the worker said a hand specialist had prescribed a brace to help ease his pain. He said even with taking Amitriptyline, on a good night he averages six hours of sleep. He said he lives with pain every day, for which he takes medications. He finds it difficult to stay focused or awake while attending school under Board sponsorship.

Attached to the worker's submission were various documents, including copies of claim log entries from May 13, 2003 to June 23, 2003. A June 23, 2003 memo from a Board medical advisor, Dr. Evans, indicated that it had been confirmed in conversation with the worker's physician, Dr. Richardson, that the worker was taking Amitriptyline as a "pain adjuvant." Dr. Evans expressed the opinion that the likelihood is equally balanced that the pain in the worker's thumb is related to the injury he sustained and to the treatment he received under the claim. He said the ongoing use of Tylenol #3, Gabapentin and Amitriptyline had been prescribed for pain.

The worker also attached a receipt for replacement eyeglasses. He said he had recently found out from a specialist that extensive use of Tylenol #3 with codeine causes deterioration of the eyes. (A later claim log entry dated September 16, 2003 from a case manager confirmed that Tylenol #3, Amitriptyline and Gabapentin had been accepted under the claim for treatment of the worker's pain.)

Reasons and Findings

Although Dr. Khunkhun expressed the opinion that the ROM findings may not be all that reliable, the worker's impairment under the ARCON computerized impairment rating system calculated the worker's impairment for loss of ROM as 7.69 percent. I interpret Dr. Khunkhun's statement, that the ROM findings likely reflect the worker's "injury and subsequent surgery," to mean that the worker's functional impairment, including

reduced strength, did not likely exceed 7.69 percent. Based on the examination findings and Dr. Khunkhun's expert opinion, I have concluded that the worker's functional impairment arising from reduced ROM and strength is likely equal to 7.69 percent.

Although the disability awards officer provided an additional award of 0.31 percent to take into consideration the worker's subjective complaints, I have concluded that the weight of evidence indicates that the worker's subjective complaints exceed 0.31 percent. The worker has consistently maintained that ongoing pain in his right thumb is his main complaint. He has significant medication intake associated with that pain, and the Board has recently determined that the use of three medications to assist the worker to cope with that pain is acceptable under his claim. The worker's evidence, which I accept, is that the pain limits or reduces his ability to perform a number of activities that he formerly performed in his employment. He is also limited in his home and recreational activities by pain.

Although the Review Board vice chair did not consider that Dr. Richardson's November 20, 2002 letter, describing the worker's medication intake, addressed the percentage of disability that the Board had awarded, I respectfully disagree with that conclusion. It is the worker's position that the award for permanent disability does not adequately take into consideration the extent of his pain complaints, and Dr. Richardson's letter specifically addresses that matter. I find that Dr. Richardson's November 20, 2002 letter provides further support that the worker's award for subjective complaints does not adequately recognize the extent of the worker's pain complaints. In reaching this conclusion I have considered that the Board has recognized that the worker copes with his ongoing pain complaints through medication intake. As stated by Dr. Richardson, the worker is on the maximum dosage allowable for Tylenol #3 and also takes two other medications to cope with his pain complaints, which Dr. Richardson describes as "chronic pain."

I have concluded that an award of 1.5 percent will more accurately recognize the extent of the worker's subjective symptoms. When combined with the assessed functional limitations of 7.69 percent, the worker's award under section 23(1) of the *Workers Compensation Act* (Act) is now equal to 9.19 percent of total.

Although the worker requested a decision concerning replacement of his glasses, that issue does not arise from any of the decisions the worker appealed to the Review Board. The worker received a September 17, 2003 decision denying the prescription eyeglasses. As outlined in that decision the worker had the right to request a review by the Review Division within 90 days from the date of that decision.

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Conclusion

The worker's appeal is allowed. I vary the decision concerning the quantum of the award, in finding that the subjective complaints are equal to 1.5 percent, bringing the worker's total award to 9.19 percent of total.

As noted by the Review Board panel, the Board's conclusion that there would be no loss of earnings is premature. The issue of loss of earnings should be reviewed in light of the vocational rehabilitation activities that are taking place. An employability assessment will be required to assess the worker's residual employability and earning capacity.

Michael Carleton
Vice Chair

MC/lco/mak

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