This decision was subject of a reconsideration application. See WCAT Decision #2006-03224, dated August 18, 2006.

WCAT Decision Number: WCAT-2004-00105-AD
WCAT Decision Date: **January 13, 2004**
Panel: David Van Blarcom, Vice Chair

Introduction

The worker's left index finger was crushed and partly amputated in 1978, while she was operating a punch press. She was 29 years old and eight months pregnant with her second child. She had a grade 5 education in her native country, and had been in Canada for about ten years. Her English was not strong. She has not worked for any significant length of time since the injury.

She was initially awarded a permanent partial disability pension effective February 27, 1979 based on a permanent functional impairment of 2.4 percent. The worker appealed that decision to the Boards of Review, saying she could not work and the functional award did not replace her loss of earnings. A Board of Review denied her appeal on October 9, 1979, finding there was no anatomical reason for the worker's complaints of pain.

The worker had surgery to have the stump revised in 1984, and her permanent partial disability was reviewed. In a decision letter dated January 9, 1985, the disability awards officer noted the worker's subjective complaints but did not consider them a consequence of the compensable injury and said they were expected to resolve. However, the disability awards officer increased the worker's pension for objective disability, based on an assessment of permanent functional impairment of 3.2 percent, as of the original effective date. The disability awards officer noted the worker had not returned to the work force, but considered she was capable of employment, and declined to award the pension on a loss of earnings basis.

The worker also appealed that decision to the Boards of Review, saying she was unable to work, but a Board of Review upheld the decision on February 20, 1986.

A Workers' Compensation Board (Board) psychologist assessed a 5.0 percent impairment for mild depression symptoms that were more intense and severe with exacerbations of pain. A decision letter dated October 1, 1987 informed the worker of her increased pension for depression, effective March 2, 1981. The worker did not appeal that decision.

The worker had surgery to remove neuromas on November 22, 1995. A further review of her medical and psychological condition resulted in a decision letter dated October 2,

1996 advising that there had been no significant change in her physical or psychological condition. The workers' adviser then asked the Board to consider an award for chronic pain syndrome, on the basis that the 1985 decision had expected the subjective complaints to resolve, but they had not.

The disability awards officer replied in a decision letter dated January 27, 1997 that the 1985 decision had declined to make an award for subjective complaints because they did not arise from the amputated finger and, despite those considerable subjective complaints, the worker was able to return to her pre-injury employment. She declined to arrange a functional capacity evaluation.

The worker appealed that decision to the Workers' Compensation Review Board (Review Board), which issued findings on May 5, 1998. The Review Board said it was apparent from the evidence that the worker's continuing pain since 1978 had been well-documented and found she should be awarded 2.0 percent for subjective complaints of pain. The panel did not specify an effective date. The panel said there was insufficient psychological or physical change to warrant an increase in those awards.

The disability awards claims adjudicator advised the worker of the implementation of those findings in a letter dated October 23, 1998. A functional capacity evaluation and employability assessment had been obtained, and the disability awards claims adjudicator determined the worker still did not have a loss of earnings. The worker's pension award was increased on a functional basis, based an additional permanent functional impairment of 2.0 percent, effective January 4, 1996, when therapy for the most recent surgery had ended.

The worker appealed to the Review Board, submitting that the award for subjective complaints should have been effective as of February 1979 and that her pension should be awarded on a loss of earnings basis. In findings dated March 6, 2002, the Review Board denied the appeal. The panel found a 1979 implementation date would require disregarding the Board of Review findings of 1979 and 1986. The panel accepted evidence from the functional capacity evaluation that the worker had not made a full effort, and accepted that the worker's compensable conditions did not keep her from working.

Issue(s)

What is the proper effective date of the 2.0 percent award for subjective complaints?

Should the worker's pension be awarded on a projected loss of earnings basis?

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Jurisdiction

The worker appealed the Review Board findings of March 6, 2002 to the Appeal Division. 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 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.)

According to the transition provisions and the recent amendments to the *Workers Compensation Act* (Act), I must make this decision based on the merits and justice of the case, but in so doing I must apply a policy of the board of directors that is applicable in this case. This compensable injury occurred before June 30, 2002. I therefore find the applicable policy is found in volume I of the *Rehabilitation Services and Claims Manual* (RSCM).

The worker's lawyer has made vigorous submissions that an oral hearing should be held in this appeal. In particular, he submits the Review Board findings are void, so that the evidence of the oral hearing should not be relied on. The vice chair and one member of the Review Board panel who presided at the oral hearing had left the Review Board, and the worker was given the option of having a new oral hearing before a single new vice chair, or have a single new vice chair decide the appeal based on the evidence from the oral hearing already held, plus a review of the evidence on file. The worker chose the latter, and the findings now under appeal resulted.

The worker's lawyer submits the process was flawed, because of the administrative principle that "he who hears must decide". The worker's lawyer did not submit that the Review Board findings should be set aside as void *ab initio*, so that a new Review Board finding should be issued. In any case, that would no longer be possible, as the Review Board no longer exists, but has been merged with the Appeal Division to create the present tribunal, WCAT. I do not find I must determine if there were defective proceedings at the Review Board, as I find the current proceeding effectively mends any such procedural defects.

I do not find those proceedings at the Review Board require me to hold an oral hearing. I am not obliged to hold an oral hearing in a WCAT proceeding in any case, but may decide a matter on the basis of a review of evidence on file. I do not find this case requires that I hear oral evidence from the worker. She is ably represented, and her concerns are well-documented. Whatever its status as a quasi-judicial hearing, the audio record of the Review Board hearing provides useful evidence for me in deciding this appeal, and I find I may refer to both the hearing record and the findings.

The worker's lawyer also submits an oral hearing must be held so that the occupational therapist who prepared the functional capacity evaluation can be subpoenaed and cross-examined. Criticism of the functional capacity evaluation is important to the

worker's case. However, the worker's lawyer has only referred to a general principle of the desirability of cross-examination in court proceedings and has not persuaded me that cross-examination of the occupational therapist would advance her case in this proceeding. She has had an opportunity to criticize the factual basis of that report and to provide contrary expert opinion, and has provided an opinion from her general physician addressing the occupational therapist's opinion.

Effective Date of the Award for Subjective Complaints

Background

The Review Board findings of May 5, 1998 reviewed medical reports on file, especially those describing pain from May 1983 through June 1996. In addition to the pain at the stump of the amputation, the reports discuss pain the worker felt in her entire left arm, up to her shoulder. The workers' adviser referred in her June 9, 1997 submission to medical reports after the 1995 surgery. The Review Board said it was apparent that the worker did not suffer any left arm complaints before the 1978 injury, but that her pain since had been well-documented and noted by doctors as related to the index finger injury. The panel referred to memo #82, dated November 16, 1984, which noted the pain in the left arm had been thought to be the result of scar tissue encroaching on the digital nerve. The memo said that, as corrective surgery had been performed, the discomfort was the result of non-compensable causes.

The 1998 panel then said the 1984 memo was the basis of the January 27, 1997 decision that denied acceptance of chronic pain. That is incorrect, as the 1984 memo was the basis of the decision letter of January 9, 1985, which was upheld in the Board of Review findings dated February 20, 1986. The 1998 findings do not mention or provide a basis for distinguishing the 1986 findings. Instead the panel went on to say: "The panel . . . finds that the continuing pain symptoms in the upper left extremity are the result of the 1978 injury to the index finger and should be compensated. We therefore find that an additional 2% should be added to the award." The panel did not specify an effective date.

In her memo of July 30, 1998 (#126), the disability awards claims adjudicator understood the Review Board had granted 2.0 percent for an increase in subjective complaints, and presumed the increase had come at the time of the surgery for the neuromas. She noted that, subsequent to that surgery, the worker was discharged from the Board's hand clinic on January 3, 1996, and therefore directed the increase be as of January 4, 1996.

In the March 2002 appeal to the Review Board, the worker's representative submitted that the increase for subjective complaints should have been as of February 1979, but the 2002 Review Board panel noted the effect of the 1979 and 1986 findings, and therefore upheld the January 4, 1996 effective date.

Reasons and Decision

There is ambiguity as to the effective date intended by the 1998 Review Board panel. The 1998 Review Board may have intended the award for subjective complaints to have been effective from sometime between 1979 and 1984, but that would effectively ignore the specific 1985 decision, upheld by the Board of Review in 1986, not to make an award for subjective complaints. I note that the worker had attempted to appeal the 1979 and 1985 findings to the Commissioners, but both appeals were rejected as being out of time. An effective date before 1984 would essentially be a further appeal against the 1985 decision, which I cannot undertake, given the length of time since the decision, and the decision of the Commissioners. I agree with the 1998 Review Board panel that the 1986 findings must stand.

In denying the right to appeal the 1986 Board of Review findings, the Commissioners nevertheless directed the Board to adjudicate the worker's psychological impairment, which resulted in the October 1, 1987 decision to increase the worker's pension to recognize disability from depression. That decision was not appealed to claim an additional award for subjective complaints, although such an appeal may have been difficult, given the recent decisions by the Board of Review and the Commissioners.

The worker says she has had ongoing problems with her left arm, but there is a gap in the medical reports on file between July 30, 1987 and November 29, 1994 when a hand surgeon diagnosed the ganglia. I note a letter dated June 8, 1987 from another hand surgeon saying that the numbness in her left arm had improved and that nerve conduction studies had not shown any abnormality. The ganglia were also noted then, but the worker was not then requesting further surgery.

From the November 29, 1994 diagnosis, there is continuity of treatment of the neuromas until the January 3, 1996 hand unit discharge report noted by the disability awards claims adjudicator. The hand clinic and discharge reports discuss the worker's complaints in the hand, but does not specifically mention additional left arm and shoulder complaints.

In the discharge report from the hand unit, the worker is described as saying she was back to functioning with her left hand, and that her surgeon had said she was fit to return to work. The report from her surgeon on February 16, 1996 said she was making good progress and should resume normal hand function. Conduction studies of the digital nerves were normal, although she did not respond to pinprick.

The clinic staff said the worker had attended "occasionally". She said she was still unable to open a can with a can opener. She also needed help from her husband or son to lift heavy dishes from the oven. She continued to have a sore palm, as well as cramps in her left hand muscles. Her fingers felt sleepy, but her thumb felt okay. The worker did not think she could do manual work, but might be able to do office work.

Objectively, the hand unit physician found the left hand looked normal, and she had good strength of her thumb and the opposing fingers (except for the index finger, I assume). When her left hand grip was tested simultaneously with the right hand, she showed very adequate power in the left hand, but less power when it was tested on its own. She was discharged from the clinic with the advice that she remain active and functional with her left hand.

The January 3, 1996 report does note persistence of subjective complaints. While wishing to give some effect to the 1998 Review Board findings, in the context of this very complex and lengthy claims history, I agree that the January 4, 1996 date is the most reasonable effective date for the increase of 2.0 percent for subjective complaints for the left upper extremity directed by the 1998 Review Board panel. The worker's appeal on this issue is therefore denied.

Loss of Earnings Award

Background

The 1998 Review Board panel agreed with the submission of the worker's representative that her pain symptoms might affect her functioning and employability, and so directed the Board to undertake functional and employability assessments.

An occupational therapist provided a functional capacity evaluation dated August 26, 1998. She noted the worker was still reporting pain in her left forearm, left upper arm, left shoulder, and left upper side of her head. She also reported numbness on the ulnar side of her left hand, as well as pain in her hand and hypersensitivity in the left index finger stump. I note that the worker had previously been diagnosed with left carpal tunnel syndrome and had surgery for it at the same time the neuromas were removed, but it was not accepted as due to her compensable injuries. The worker also had mild low back pain.

The worker felt she was naturally left-handed, but had been forced to use her right hand in school. In her punch press work, she had pushed the material through with her right hand. She said she was too scared to go back to that kind of work, and she felt she would have too much pain in her left arm. She noted the Board had arranged for an alternate job copying blueprints, but the worker said there was too much arm pain. The worker said the Board had refused to retrain her into work that did not require her left arm, and she now felt she was too old to go back to school, and her English too limited.

In testing, the occupational therapist did not think the worker had put out a full effort. She said the functional limitation associated with the left index finger amputation was relatively minor, although handling abilities with both hands was non-competitive. The occupational therapist noted that, although left-handed, the worker had learned to use her right hand as a child and had reportedly used her right hand primarily since the injury. She therefore expected the right hand dexterity should have been significantly

better than the left, if the worker had the left arm limitations claimed. She felt the worker's pain ratings were out of proportion. The worker had non-organic pain responses to tests of her left arm. Forearm girth was greater on the right, consistent with dominant use of that hand.

The worker's general physician provided a letter in this appeal, dated July 18, 2003, that was critical of the occupational therapist's report. The occupational therapist had noted that the worker's pain levels had returned to their baseline the morning after testing, which she said indicated a good tolerance of work activity. However, the general physician said the worker had taken an anti-inflammatory the night before, which would have artificially masked the worker's pain response. He therefore rejected the occupational therapist's conclusion that the worker is able to work at sedentary occupations. The occupational therapist was aware that the worker occasionally used an anti-inflammatory suppository for pain, as well as other pain relievers and a muscle relaxant.

A vocational rehabilitation consultant provided an employability assessment dated September 29, 1998, in which he reviewed the functional capacity evaluation. He concluded, based on the opinion that the worker did not provide a full effort, that the worker had Light to Medium, rather than Sedentary, functional capacity, at least as far as strength.

The vocational rehabilitation consultant noted an earlier employability assessment dated June 3, 1987 (memo #102). That vocational rehabilitation consultant had noted that, shortly after the injury, the worker had tried operating a sewing machine, working in a delicatessen, and photocopying blueprints, but her hand and arm pain and general sickness had caused her to quit. That earlier vocational rehabilitation consultant felt the worker could have done those jobs, or returned to her pre-injury employment or many similar light industrial jobs and avoided a loss of earnings.

Nevertheless, the earlier vocational rehabilitation consultant offered to support the worker in upgrading her English skills and to arrange a referral to Canada Employment. According to memo #103, dated June 23, 1987, the worker declined the offer of English language training – she indicated her eyesight was poor, and such training could cause her to "lose money" in the long run.

The decision letter of October 1, 1987 accepted that the worker could not return to her pre-injury employment, but also accepted there were many other jobs she could do, and therefore did not award the pension on a loss of earnings basis.

In addition to the positions identified in 1987, the vocational rehabilitation consultant said in his 1998 assessment that a number of other positions were suitable for her, including cashier, waitress, maid, dry cleaner presser, and sewing machine operator. He noted her experience as a homemaker.

The 1998 employability assessment was sent to the worker for comment, and she replied on October 7, 1998 that it has taken her a great deal of time to become comfortable performing day-to-day activities without her finger. Simple tasks had become annoying and more of an effort to perform. She said that her lack of English would be a barrier to many of the jobs proposed and said that, missing a finger, she would not be hired to operate a sewing machine.

In the decision letter of October 23, 1998, the disability awards claims adjudicator noted that the worker had been offered English training by the Board. She said the worker could have obtained work if motivated to do so.

The Review Board found in the 2002 findings that the worker had left the workforce in 1979 for reasons unrelated to her injury, and had shown no commitment to returning. The panel accepted the functional capacity evaluation that the worker had not given a full effort, and said that was a thread that had run through the reports over the years. She again noted that she could not go behind a prior Review Board or Board of Review decision.

Reasons and Decision

I accept the October 1, 1987 decision that the worker at that time did not have a projected loss of earnings. That decision was not appealed, and it would be inappropriate for this appeal to function as an appeal of that decision.

The degree of permanent functional impairment as of October 1, 1987 has not been found to have increased, except by the 2.0 percent as of January 4, 1996 for subjective complaints in the left arm/upper extremity.

While I have considered the evidence of the worker and her general physician, I accept the evidence of the occupational therapist that the worker did not give a full effort to indicate her functional capacity. I find that evidence is significantly corroborated by the 1995 and 1996 evidence of the hand unit physician and the worker's own hand surgeon in 1996, who found good strength in her hand and an ability to remain active and functional with her left hand.

I accept that the worker's evidence that she could not return to the punch press work because of fear, and that the jobs of waitressing, cashiering, and sewing machine operation required more strength and dexterity than she had in her left hand.

However, I find she could return to the other light industrial positions identified by the earlier vocational rehabilitation consultant and to the housekeeping and presser jobs identified. The worker relied heavily on the interpreter at the Review Board hearing, but I do not find that barrier to employment is compensable – she had been offered, but refused further English training.

The pain in the worker's left arm has been recognized as compensable but I note the evidence of the hand surgeons that nerve conduction studies do not indicate a physical basis for it. The worker's own doctor does not suggest a physical basis for it, but refers to additional psychological components of post-traumatic stress disorder and chronic pain syndrome. I do not find that acceptance of those conditions is within the jurisdiction of this appeal.

I do not find the addition 2.0 percent recognized for pain in January 1996 significantly alters the worker's employability from before that date, noting especially the reports of the hand surgeons.

Although I have found it appropriate to deal with the merits of the worker's employability, I also note law and policy in that regard.

Section 32(3) of the *Workers Compensation Act* says:

> Where more than 3 years after an injury a permanent disability or an increased degree of permanent disability occurs, the compensation payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.

The Board provided policy to guide the interpretation of the Act in item #70.20, part 3 as follows:

> . . . The section directs that the pension is payable for life and appears to rest on an assumption that over the many years ahead some loss will on average be experienced. It follows that, just because a person is unemployed and does not now foreseeably have an actual loss of earnings, it does not mean that the person should not receive an award under section 23(1). However, the situation is different for projected loss of earnings awards under section 23(3). Since that assessment aims to predict the worker's actual loss of earnings over the future, no award can be made when the worker is unemployed for reasons unrelated to the injury and it is determined that there will not be a potential loss of earnings.

The disability awards claims adjudicator had considered that policy in her consideration of the worker's claim for a loss of earnings award, and I find it is applicable in this case. The Board had previously found the worker was not disabled from working by her permanent functional impairment, and at the time of the reopening of her claim for the increase in permanent functional impairment for subjective complaints, I find the worker was not unemployed for reasons related to her compensable injury; as such, there is not a potential loss of earnings. The worker's appeal is therefore denied on this issue as well.

Conclusion

Among other reasons, previous appellate and unappealed Board decisions restrict the remedies available in this appeal. The worker has provided an invoice from her general physician in the sum of $175.00 for the opinion he has provided. Although that opinion was not clearly focused on the issues in this appeal, it did provide some useful information and was reasonable to obtain.

The worker will be reimbursed the $175.00 cost of her general physician's letter dated July 18, 2003 obtained for the purposes of this appeal.

The decision of the Review Board is affirmed.

David Van Blarcom
Vice Chair

DVB/hba

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