WCAT Decision Number: WCAT-2004-00124-RB
WCAT Decision Date: **January 13, 2004**
Panel: Larry J. Campbell, Vice Chair

Introduction

The worker, a then 44-year-old plater, was injured on February 17, 1998 when a co-worker dropped one end of a frame, which caused the other end to pull the worker's shoulder and hit his right knee. The worker's claim was accepted, and he had surgery to the left shoulder. The worker was ultimately assessed for a permanent partial disability award. In a letter dated March 29, 2001 the Workers' Compensation Board (Board) granted an award of 23.97 percent of total disability for the left shoulder. No award was granted for the right knee, on the basis that the referring Board officer recorded that the worker's right knee had not been accepted as part of the claim.

The employer appeals the granting of the award for the left shoulder (Appeal C). The worker appeals the lack of award for the right knee (Appeal D).

Issue(s)

The pension award raises several issues: the pension wage rate; the percentage of functional award; the effective date; the Board's conclusion about the worker's long-term earning capacity. The parties raised specific issues:

Appeal C

Was the functional impairment of the worker's left shoulder determined in accordance with the medical evidence?

Appeal D

Had the worker's right knee been accepted as part of the claim?

Jurisdiction

These appeals were filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As these appeals had not been considered by a Review Board panel before that date, they have been decided as WCAT appeals. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

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Background and Evidence

The information about the worker's claim is contained in the Board file, and will not be repeated in detail.

The initial file information clearly set out that the worker injured both his left shoulder and right knee. Both injuries were noted at the medical rehabilitation program on July 14, 1998, with the shoulder worse than the knee.

The worker had MRI's of the shoulder and knee on July 23 and 24, 1998, respectively. The knee MRI showed evidence of patellar bone contusion and edema in the Hoffa's fat pad. The worker had surgery to the left shoulder on September 10, 1998.

The worker had pre-existing problems in both the left shoulder and right knee. He had undergone surgery in 1993 for the shoulder. He had old Osgood-Schlatter disease and bilateral patellofemoral chondromalacia in the knees. The Board determined that while these were pre-existing conditions, they were not disabilities.

The worker had numerous left shoulder examinations by treatment programs and specialists (Note: medial is the same as internal, and lateral is the same as external rotation). Examples of the examination findings (in degrees) include:

July 14, 1998 – Occupational Therapist Notes:

Flexion:	Active 40 Passive 90
Abduction:	55
Adduction:	Not Recorded (NR)
Internal Rotation:	55
External Rotation:	35

November 25, 1998 – Medical Rehabilitation Program (MRP) Assessment:

Flexion:	90
Abduction:	80
Adduction:	NR
Internal Rotation:	20 (passive 35)
External Rotation:	40 (passive 55)

November 30, 1998 – Rehabilitation Centre Treatment Notes:

Flexion:	140-143
Abduction:	110
Adduction:	NR
Internal Rotation:	70

External Rotation: 50

December 15, 1998 - Rehabilitation Centre Treatment Notes:

Flexion: 135
Abduction: 85
Adduction: NR
Internal Rotation: 80
External Rotation: 30

December 17, 1998 – MRP Discharge:

Flexion: Over 90
Abduction: Over 90
Adduction: NR
Internal Rotation: NR
External Rotation: NR

January 6, 1999 – Dr. R:

Flexion: 135-140
Abduction: 90
Adduction: NR – no weakness with shoulder adducted at side
Internal Rotation: NR
External Rotation: NR

January 11, 1999 – Occupational Therapy Intake Assessment:

Flexion: 120
Abduction: 80
Adduction: NR
Internal Rotation: NR
External Rotation: NR

January 14, 1999 – Occupational Rehabilitation Program (ORP) Assessment:

Flexion: 90
Abduction: 90
Adduction: Full, but painful at extremes
Internal Rotation: Restricted
External Rotation: Restricted

February 15, 1999 – Rehabilitation Centre Treatment Notes:

Flexion:	Active 90	Passive 130
Abduction:	90	
Adduction:	NR	
Internal Rotation:	NR	
External Rotation:	NR	

March 19, 2001 – PFI Examination

Flexion:	63 Extension 14
Abduction:	48
Adduction:	4
Internal Rotation:	24
External Rotation:	31

The PFI examiner, Dr M, noted that he was unable to conclude that the range of motion tests results were reliable. He found that the actual range of motion measurements were not in keeping with the diagnosis provided.

In the form 24, dated March 27, 2001, the Board officer noted a conversation with an unnamed senior medical advisor. The officer reported that the medical advisor felt the impairment was reliable, after review of the medical information and noting the worker's lack of pain behaviour. The Board officer concluded the worker did not have a loss of earnings, and that the effective date of the award was December 20, 1999. The pension rate was set at 75 percent of $3,263.00 per month. Section 5(5) was not applied. The employer was relieved of 75 percent of the cost of the award under section 39(1)(e) of the Act.

In a log entry dated May 11, 1999, a Board medical advisor noted that there was no medical evidence that the worker was disabled by his right knee.

The referral form to Disability Awards, dated November 12, 1999, noted that the right knee was not accepted under the claim. In a log entry dated December 20, 1999, a Board medical advisor noted it was less than 50 percent likely that the worker's history of prior left shoulder surgery caused his present disability, although it was an underlying condition.

In the form 22, dated March 6, 2001, the officer in Disability Awards noted it could not be said, with greater than 50 percent likelihood, that the Osgood-Schlatter disease was contributing to the worker's ongoing knee pain. However, the worker's underlying chondromalacia might be the reason why the contusion resulted in ongoing knee symptoms.

At the oral hearing, the worker described his injury. He said that the right knee was immediately painful and never resolved. He said the specialist told him that there was nothing that could be done for the knee. The worker said he had no problems in the right knee prior to the work injury. The worker said he has no problems with his left knee. The worker said that, before the injury, he was active in soccer, swimming, and other activities.

The worker said that the knee now bothers him all the time. Long walks, bending, and prolonged standing all give him problems. He cannot run or jog at all. He can, however, do all of his work duties.

With respect to his left shoulder, the worker said that the surgery helped a bit, but did not return it to normal. The worker said that, in his opinion, his shoulder was better in 2001 than it was in 1999. The worker felt that his shoulder was now worse than it was in 2001. The worker could not explain why the findings at the PFI examination were worse than those in 1999. The worker said the movement tests for his shoulder were the same at the PFI exam as when he saw specialists in the past. The worker stated that he did not know the PFI exam was for pension purposes. He said he thought it was for lighter duties or maybe for retraining, but not that it was for a pension.

Appeal C

The employer's representative provided written and oral submissions. In essence, he argued that the opinion of the PFI medical advisor should be given greater weight than that of the unnamed senior medical advisor. Further, the worker had suffered no earnings loss, and should not receive a pension award. If an award was granted, then section 5(5) of the Act should have been applied. The employer felt the work injury was not a significant one, and would not have resulted in a permanent impairment.

The worker's representative submitted that the worker's award, under section 23(1) of the Act, was not contingent upon a loss of earnings, which would be considered under section 23(3) of the Act. The senior medical advisor felt the award was appropriate and that opinion should be given greater weight. The representative considered there was no medical evidence that the PFI percentage was inappropriate.

The employer's representative rebutted that the PFI medical advisor considered the examination results were unreliable, and that all of the medical evidence should be reviewed. The representative noted that, if, as the worker stated, he was better in 2001 than in 1999, why was there a greater range of motion in 1999.

Appeal D

The worker's representative provided both written and oral submissions. In essence, he argued that the evidence on the Board file supported that the worker's right knee had

been accepted as part of the claim. That being the case, the worker was entitled to a pension award for the right knee of 2.0 percent of total disability.

The employer's representative submitted that the Board had considered and decided not to grant an award for the right knee, and this should be upheld. The employer felt the work injury was not significant, and any right knee problems were more likely related to pre-existing conditions.

Findings and Reasons

Appeal C

The worker was granted an award based upon the measurements at the PFI examination. The PFI medical advisor concluded that the measurements were unreliable. A senior medical advisor reportedly considered that they were. The Board officer gave greater weight to the opinion of the senior medical advisor. The employer appealed the result.

I find that the opinion of the PFI medical advisor should be given greater weight, because it is in accordance with the weight of the other medical evidence in the claim. During the pre- and post-surgical period, while the worker was receiving active treatment, his shoulder range of motion was routinely recorded. All of these examinations, including the pre-surgical one of July 14, 1998, showed greater ranges of motion, in many cases significantly greater, than those at the PFI examination.

I find that such differences cannot be reasonably explained by the lapse of time between the end of active treatment and the PFI examination. It is unlikely that the worker suffered such a drastic deterioration in range of motion, yet was able to fully return to his pre-injury job and, on his own evidence, was better in 2001 than he was in 1999. I find that the PFI results were out of proportion to the medical condition and the other medical evidence on the file, and prefer the opinion of the PFI medical advisor.

I allow the employer's appeal in part. I set aside the existing award, and direct the Board to conduct a new PFI examination to reliably determine the extent of the worker's PFI, taking into account the other medical evidence on the claim.

With respect to the employer's argument regarding the application of section 5(5) of the Act, I find that the evidence does not support a conclusion that the worker had a pre-existing disability. I deny the employer's appeal in this regard.

Appeal D

The Board officer who referred the worker's claim to Disability Awards recorded that the worker's right knee was not accepted under the claim. I find that the evidence clearly

supports that the worker sustained a right knee injury under the claim. This was accepted according to the file documentation. The worker received ongoing medical attention, including specialist referrals. The worker's attending physician has documented ongoing problems, and this is in accordance with the worker's evidence.

I find that the worker was entitled to a PFI examination with respect to his accepted right knee injury to determine the nature and extent, if any, of permanent impairment in the right knee. The worker's appeal is allowed in part.

While not raised as disputed issues by the parties, I have reviewed the effective date of the pension award, the pension wage rate, and the Board's conclusion with respect to the worker's long-term earning capacity and find that these were determined in accordance with Board policy and I confirm them.

Conclusion

I vary the decision of the Board of March 29, 2001 to the extent noted above. The Board is directed to undertake a new PFI examination and pension assessment to include both the worker's left shoulder and right knee. No costs were requested and none are awarded.

Larry J. Campbell
Vice Chair

LJC/hba/jyo

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