Noteworthy Decision Summary

Decision: WCAT 2004-01842 **Panel:** Ning Alcuitas-Imperial **Decision Date:** April 14, 2004

Effective date of new chronic pain policy, Item #39.01 of the Rehabilitation Services and Claims Manual, formerly entitled "subjective complaints" - Definition of "initial adjudication" with regard to the effective date of chronic pain pensions - The phrase "initial adjudication" in the Panel of Administrators Resolution 2002/11/19-04, which amended the policy, means an initial adjudication with respect to entitlement for compensation for subjective, chronic pain, not initial adjudication of the claim

The Workers' Compensation Board (Board) issued a pension decision on January 22, 2003 on a worker's bilateral elbow claim, and, inter alia, awarded the worker a small percentage of total disability to recognize his subjective complaints. The worker sought a review and then an appeal of that decision, and the appeal was allowed in part.

On the issue of subjective complaints, an issue arose as to which version of policy #39.01 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) applied. The Board officer applied this previous version of the policy in reaching the decision under appeal. However, this policy was amended by the Board's panel of administrators by *Resolution 2002/11/19-04*. The new version of the policy is entitled "Chronic Pain" and sets out guidelines for assessment of section 23(1) of the *Worker' Compensation Act* awards for "workers who experience disproportionate disabling chronic pain as a compensable consequence of a physical or psychological work injury." If the worker was found to have chronic pain that is disproportionate to the permanent impairment, an award of 2.5 percent of total disability will be granted. Point #3 of the resolution, which deals with the effective date of the policy change, states that: "This resolution applies to new claims received and all active claims that are currently awaiting an initial adjudication". Point #4 of the resolution states that it is effective on January 1, 2003. The term "initial adjudication" in the resolution is ambiguous and could be interpreted to mean the initial adjudication of the claim itself (i.e. whether there is a compensable condition), or the initial adjudication of the question of subjective, chronic pain as a compensable consequence (which may arise while the worker is still temporarily disabled or when the worker is undergoing assessment for a section 23(1) award). Although the Board has issued a practice directive (Practice Directive #61 on "Pain and Chronic Pain") on the new version of the policy, there was no further interpretative guidance on the effective date of the new policy. The question of which version of the policy applied in this case arose because the Board's pension decision of January 22, 2003 was issued after the effective date of the new policy.

The panel found that the phrase "initial adjudication" in the panel of administrators resolution means an initial adjudication with respect to entitlement for compensation for subjective, chronic pain. This means that all active claims awaiting an initial adjudication on subjective, chronic pain (whether the worker's condition is still temporary or has become permanent) on and after January 1, 2003 should be considered in light of the new version of the policy. This was the most reasonable approach in light of the stated purposes behind the policy amendment to bring clarity to the consideration of the question of subjective, chronic pain in light of current scientific and medical knowledge. A similar conclusion was reached in WCAT Decision #2004-00820.

The Board officer first dealt with the worker's entitlement to compensation for subjective, chronic pain in the April 23, 2002 memo, but it wasn't until January 2003 that he issued a decision letter

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formally awarding the pension award under appeal. What should be considered the initial adjudication of the worker's entitlement to compensation for subjective, chronic pain in this case: the April 2002 memo or the January 2003 decision letter? The panel found that the initial adjudication of the worker's entitlement to compensation for subjective, chronic pain occurred in January 2003. Although for purposes of registering appeals, WCAT may take jurisdiction over memos or other forms of correspondence on a worker's claim file, it interpreted the phrase "initial adjudication" to mean the formal communication of a decision to the worker. In reaching its conclusion, the panel noted item #99.20. Since the initial adjudication of the worker's entitlement to compensation for subjective, chronic pain took place after January 1, 2003, the new version of the policy at item #39.01 of the RSCM I applied. On review of the evidence, the panel concluded that the worker was entitled to an additional award under section 23(1) for specific chronic pain that was disproportionate to his impairment.

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WCAT Decision Number: WCAT-2004-01842
WCAT Decision Date: April 14, 2004
Panel: Luningning Alcuitas-Imperial, Vice Chair

Introduction

The worker appeals a July 30, 2003 decision of the Review Division of the Workers' Compensation Board (Board). This decision concerned the worker's pension award under a 1998 bilateral elbow claim. In upholding the original decision of the Board, the review officer confirmed the 0.25 percentage of permanent functional impairment of the right elbow. She also confirmed that there was no measurable impairment of the worker's left elbow. Finally, she confirmed that no award should be granted on a projected loss of earnings basis, as the worker was fit to perform his regular duties as a storesman. She did not address the effective date of the pension or the average earnings used to calculate the award.

The worker argues that he is entitled to a pension award for his left elbow. He also disagrees that he is fit to perform his regular duties, as he says that he can only work four days per week.

Issue(s)

The worker did not dispute the pension's effective date or the average earnings used to calculate the award. Therefore, the issues arising from this appeal are:

1. What is the percentage of the worker's permanent functional impairment due to the condition of his left and right elbows?

2. Is the worker entitled to an assessment of his permanent partial disability award on a projected loss of earnings basis?

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act).

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 board of directors of the Board 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.

The worker's compensable injury and permanent disability occurred before June 30, 2002. Therefore changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49) do not apply to the adjudication of this appeal. I have therefore adjudicated it under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual*, *Volume I* (RSCMI), which relates to the former (pre-Bill 49) provisions of the Act.

As well, I note the provisions of section 239(2)(c) concerning WCAT's jurisdiction over appeals involving the scheduled portion of the pension award. Having referred to the rating schedule compiled under section 23(2), which is the *Permanent Disability Evaluation Schedule* (published as Appendix 4 of the RSCMI), the specified ranges of impairment for the elbow exceed 5.0 percent. Therefore, I have jurisdiction over the scheduled portion of the pension award under appeal.

Background and Evidence

I reviewed the worker's claim file, as well as evidence presented by the worker and the employer at the oral hearing. Only the relevant information is outlined here.

The worker, a storesman, injured both his elbows on September 9, 1998 when lifting heavy items. He was diagnosed with bilateral extensor tendinitis. The Board accepted his claim for compensation. He received wage loss benefits from September 10, 1998 to March 12, 2000.

During the course of this claim, the worker underwent two surgeries for his right elbow (June 1999) and for his left elbow (October 1999). Dr. Favero, orthopaedic surgeon, performed both operations.

On Dr. Favero's recommendation, the worker returned to work on a part-time basis in January 2000. He did modified duties (avoiding lifting and gripping with the left hand) with no overtime hours. His treating physicians continued to monitor his progress after he returned to work. In July 2000, Dr. Favero noted the worker's left elbow pain when gripping and twisting. He thought the worker needed to be accommodated indefinitely for this left elbow pain.

On the basis of a medical advisor's opinion, the Board accepted in August 2000 that the worker's condition was permanent. His file was sent for assessment at the Disability Awards Department.

In September 2001, the employer contacted the Board to advise that the worker was working a nine day fortnight, but only working four days per week on the alternate weeks. The worker later confirmed this information, explaining that he needed the day off due to his ongoing symptoms.

The worker was then examined by Dr. Parhar of CORE Medical Centre on November 28, 2001. The worker expressed concerns about switching to afternoon or evening shifts and about his ability to resume his pre-injury duties. The worker wanted to continue working four day shifts per week.

Dr. Parhar concluded that:

> In my opinion, [the worker's] anxiety about attempting shift work and resuming pre-injury duties is the biggest obstacle in his making a complete recovery.
>
> Given the nature of his condition any type of activity involving a forearm could conceivably cause an aggravation of his symptoms. Given his anxiety and resistance at working afternoons and evenings 4 – 5 days per week, it is unlikely that a durable and sustainable return to work is going to be possible at this time.
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> [reproduced as written]

In April 2002, the pension assessment process began. Dr. Bland conducted a permanent functional impairment examination of the worker on April 15, 2002 at an external facility. In his report, Dr. Bland recorded the worker's reported functional tolerances. He reported limitations with carrying, climbing, fingering, handling, lifting and reaching with weight involved. The worker also reported that both elbows were fatigued after a day's work. Both elbows ached after any prolonged activity.

Dr. Bland then reported the results of the series of tests conducted. These included grip strength and pinch strength tests which were done on both hands and elbows. The following results were also taken from extremity range of motion tests done on both elbows:

- Left elbow flexion = 143 degrees
- Right elbow flexion = 142 degrees
- Left elbow extension = 4 degrees

- Right elbow extension = 4 degrees
- Left elbow supination = 84 degrees
- Right elbow supination = 85 degrees
- Left elbow pronation = 70 degrees
- Right elbow pronation = 65 degrees

These results were placed into the ARCON Automated Impairment Rating Software (AIRS) system. A slight abnormal pronation of the right elbow was calculated to 0.25 percent of total disability. This percentage was calculated with reference to items #46 to #48 of the *Permanent Disability Evaluation Schedule*, published as appendix 4 of the RSCMI.

Prior to implementing the pension award, a Board officer in the Disability Awards Department reviewed the worker's claim file. In an April 23, 2002 memo, the officer first reviewed the ARCON results. The results of 0.25 percent for the right elbow and 0.0 percent for the left elbow were confirmed. The officer added 0.13 percent for the worker's subjective complaints, stating that:

> I have considered the worker's subjective complaints in determining his entitlement and find that these complaints are somewhat more significant than what would be considered consistent with the objective findings. Therefore, an additional award in recognition of same equal to half of what the objective degree of assessment was, would be appropriate, at 0.13%.
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> [reproduced as written]

The effective date of the award (March 13, 2000), as well as the wage rate, were also confirmed. Finally, the Board officer asked for further information from the Vocational Rehabilitation Services Department about the worker's long-term employability.

The worker spoke to the Board in August 2002. He explained that he was still having pain, but was concerned about moving to an afternoon shift. He preferred the morning shift, as he was able to rotate duties with co-workers during that shift. A Board vocational rehabilitation consultant then contacted the employer in October 2002, who maintained that assistance would be available to the worker on the afternoon shift.

To further investigate this question, the Board conducted a worksite visit on October 31, 2002. Those present included a Board vocational rehabilitation consultant, a Board nurse advisor, the worker and the employer's representative. After a demonstration of the work duties, the vocational rehabilitation consultant analyzed the breakdown of those duties as follows:

- 40 percent making kits, which involves assembling and counting small pieces from shelves
- 25 to 30 percent putting light parts away on seven foot shelves
- 10 to 15 percent computer data entry
- 10 to 20 percent retrieving parts and bringing to the counter for co-workers

Six workers were in the stores on the day shift, while there were only two on the afternoon shift. The second worker on the afternoon shift was located at least 100 feet away from the worker.

At the job site visit, the worker expressed his concerns that his arms hurt with activity. The vocational rehabilitation consultant recorded that the worker did not have difficulty with his work duties, but that "home life combined with work proves to be too much."

At the end of the work site visit, the Board nurse advisor concluded that the worker should have a second person working on the afternoon shift to assist him if necessary.

The Board then contacted the employer to discuss implementation of the nurse advisor's recommendation. The employer's representative advised that a second worker was available to assist the worker on the afternoon shift, unless that second worker called in sick. In any event, the employer indicated that they were undergoing a work reorganization which would result in "extra" people available on the afternoon shift.

On January 2, 2003, the Board vocational rehabilitation consultant issued a letter advising the worker that he was not suffering any long-term loss of earnings because of his compensable injuries. The rehabilitation consultant considered the employer's information that assistance would be available. The rehabilitation consultant also characterized the nurse advisor's opinion as meaning that the worker's current position was physically suitable for the worker to complete on a full-time basis and that it was medically reasonable for the worker to work on afternoon shifts. An employability assessment outlining the same information, but with less detail, is also on file.

The worker reacted to the rehabilitation consultant's letter on January 7, 2003. He expressed to the Board that the question of a co-worker to assist him was not his main concern. He characterized his main concern as his ability to complete five day shifts.

The Board then issued the pension decision on January 22, 2003. The pension award was based on 0.41 percent of total disability, including a small percentage for age adaptability. No loss of earnings award was granted as the worker was considered capable of performing suitable employment over the long term.

In early 2003, Dr. Favero and Dr. Morrell (family physician) both filed reports with the Board. They stated that the worker should only work four days per week. In particular, Dr. Favero noted the worker's complaints in a January 7, 2003 letter. The worker reported a 75 percent improvement on the right side, but only a 50 percent improvement on the left. Dr. Favero thought the worker's scars well healed. He found tenderness on the lateral epicondyle of both elbows, with a full range of motion but pain on the extremes. Dr. Favero concluded that the worker had significant residual problems and needed to continue working four days per week. He noted that from his clinical experience, significant improvement from chronic tennis elbow might take five to eight years.

The worker requested a review of the January 22, 2003 pension decision. In confirming the Board decision, the review officer first examined the issue of the worker's permanent functional impairment. She noted that the tests conducted by Dr. Bland reflected the Board's practice to compare restrictions for bilateral injuries against population norms. On the issue of the worker's ability to perform his job duties, the review officer preferred the conclusions of the vocational rehabilitation consultant to that of the worker on the issue of his ability to perform his job duties.

Oral Hearing Evidence and Submissions

At the oral hearing, the worker gave an update about the work reorganization and the shifts he worked. He confirmed that he has worked four shifts per week since returning to work after his September 1998 compensable injury. The only exception was three months he spent on the weekend shift in 2003. The weekend shift involves working Friday, Saturday and Sunday for 12 hours. He confirmed that he can perform all the physical duties of his job, but he requires every second Friday off so he can rest for three days in a row. He has covered these missed shifts through his vacation entitlement.

The worker said he finds repetitive motions have the most impact on his endurance level. His symptoms are aggravated by activity, beginning with shooting pains and progressing to a dull ache in both elbows. He also briefly described the impact of his disability on his activities of daily living. He can no longer cook or golf.

In terms of a submission, the worker made oral comments to the panel. He submitted that he does not have the physical endurance to work full time. He argued that this fact is well documented in the medical evidence of his treating physicians and the employer's doctor. He submitted that this medical evidence should be preferred to that of the nurse advisor. He thought the Board missed this central question in adjudicating his loss of earnings pension. He also submitted that he still experiences residual symptoms in his left elbow and that these should be addressed in his pension. He asked for an increase in his functional award and an assessment for a loss of earnings award.

At the oral hearing, the employer's representative argued that the Review Division decision should be upheld. In support of her position, she submitted a March 8, 2002 letter from Dr. Morrell outlining the worker's restrictions with repetitive grasping and gripping. Dr. Morrell also stated that "[The worker] feels that his ability to work Monday, Tuesday, Thursday, Friday allows him one day off in the middle of the week as a recovery day and will allow him to work on a regular basis with this in mind. This program would be permanent."

The employer's representative also submitted a posting for positions in the "lean support group" created after the workplace reorganization.

In terms of a submission, the employer's representative made oral and written comments to the panel. She argued that Dr. Favero's January 2003 opinion was only based on the worker's subjective complaints. She also argued that there was no new medical evidence submitted to justify a change in the Review Division decision. She asked the panel to confirm the Review Division decision.

Following the oral hearing, I obtained further information from Dr. Morrell. This consisted largely of his chart notes. This material was disclosed to the worker and the employer's representative. They did not comment further on the material.

Reasons and Findings

Pension award under section 23(1) for objective impairment

Section 23(1) of the *Workers Compensation Act* (Act) provides in part that "Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury."

This is the "loss of function/physical impairment" method of assessing permanent partial disabilities. This is opposed to the "projected loss of earnings" method under section 23(3) of the Act. These are the Board's two basic methods of assessing permanent partial disabilities under the so-called dual system.

I will first deal with the percentage of the worker's functional award concerning his objective impairment. Item #39.30 of the RSCMI deals with restrictions of movement in the arms and legs. It provides in part that:

> Restrictions of movement in the joints of the body are measured and documented during the permanent functional impairment evaluation. The Disability Awards Officer or Adjudicator in Disability Awards then applies the measurement to the appropriate item in the Permanent Disability Evaluation Schedule.

Taking the results of Dr. Bland's examination, the Board entered the range of motion findings into the ARCON system. Normally, the ranges of motion for one limb are compared to the findings for the unaffected limb. Given that the worker has a bilateral condition, the ARCON system has built in standards based on population norms. Those normal ranges of motion are now contained in the new version of the *Permanent Disability Evaluation Schedule*, published as appendix 4 of *Rehabilitation Services and Claims Manual*, *Volume II* (RSCMII).

Examining those population norms against the results of Dr. Bland's examination, I find that the award for 0.25 percent for loss of right elbow pronation is correct. The normal range of motion for pronation of the forearm is 71 degrees, whereas Dr. Bland recorded a right elbow pronation of 65 degrees. Dr. Bland recorded a left elbow pronation of 70 degrees, which is only slightly less than the normal range of motion.

I have also examined the worker's range of motion findings for flexion and extension in both elbows. These findings are slightly below the normal range of 146 degrees. However, I note that the correct figures were entered into the ARCON system. Applying item #97.40 of the RSCMI, I give weight to the findings of Dr. Bland. Item #97.40 of the RSCMI provides that the report of a disability awards medical advisor or external service provider takes the form of expert evidence which, in the absence of other expert evidence to the contrary, should not be disregarded. The worker has not provided any other medical evidence challenging the range of motion findings of Dr. Bland. While the worker states that he has symptoms in his left elbow, these do not appear to significantly interfere with his range of motion. Thus, I accept the Board's decision that the worker had no measurable objective impairment in his left elbow.

In summary, I confirm the worker's pension award for objective impairment in the right elbow at 0.25 percent of total disability. I deny the worker's appeal on this issue and confirm that portion of the July 30, 2003 decision of the Review Division.

Pension award under section 23(1) for subjective, chronic pain

I will now examine the subjective complaints component of the worker's pension award. In this case, the Board awarded a small percentage of total disability to recognize the worker's subjective complaints. It is not clear from the Board file whether the additional percentage for subjective complaints addressed the symptoms in both elbows.

An issue arises as to which version of item #39.01 of the RSCMI applies in this case.

The previous version of the policy dealt with "subjective complaints" and outlined that both objective physical findings and the subjective complaints of pain were considered in a section 23(1) determination. I imply from the evidence that the Board officer applied this previous version of the policy in reaching the decision under appeal.

However, this policy item was amended by the Board's Panel of Administrators by *Resolution 2002/11/19-04*. The new version of the policy is entitled "Chronic Pain" and sets out guidelines for assessment of section 23(1) awards for "workers who experience disproportionate disabling chronic pain as a compensable consequence of a physical or psychological work injury." If the worker is found to have chronic pain that is disproportionate to the permanent impairment, an award of 2.5 percent of total disability will be granted. The preamble to the panel resolution provides reasons for the policy change, including the need to reflect current scientific and clinical information regarding chronic pain and the need to provide clarity for stakeholders about pension awards for chronic pain.

The body of the resolution of the Panel of Administrators also deals with the effective date of the policy change. Point #3 of the resolution states that:

> This resolution applies to new claims received and all active claims that are currently awaiting an initial adjudication.

Point #4 in the Panel of Administrators resolution states that it is effective on January 1, 2003.

There is ambiguity in the language of the Panel of Administrators resolution referring to an "initial adjudication." There are a number of possible interpretations of that phrase, including initial adjudication of the claim itself (i.e. whether there is a compensable condition); or initial adjudication of the question of subjective, chronic pain as a compensable consequence (which may arise while the worker is still temporarily disabled or when the worker is undergoing assessment for a section 23(1) award).

Although the Board has issued a practice directive (Practice Directive #61 on "Pain and Chronic Pain" publicly available on the Board website at www.worksafebc.com) on the new version of the policy, there is no further interpretative guidance on the effective date of the new policy.

The question of which version of the policy to apply in this case arises because the Board's pension decision of January 22, 2003 was issued after the effective date of the new policy.

I find that the phrase "initial adjudication" in the Panel of Administrators resolution means an initial adjudication with respect to entitlement for compensation for subjective, chronic pain. This means that all active claims awaiting an initial adjudication on subjective, chronic pain (whether the worker's condition is still temporary or has become permanent) on and after January 1, 2003 should be considered in light of the new version of the policy. This is the most reasonable approach in light of the stated purposes behind the policy amendment to bring clarity to the consideration of the question of subjective, chronic pain in light of current scientific and medical knowledge.

In reaching this conclusion, I note a similar conclusion reached by the panel in *WCAT Decision #2004-00820* (publicly available on the WCAT website at www.wcat.bc.ca). It is also open to the Board to issue further directions to the workers' compensation system on the effective date of this new policy.

Unfortunately, this does not entirely resolve the question arising in this particular appeal. The Board officer first dealt with the worker's entitlement to compensation for subjective, chronic pain in the April 23, 2002 memo. It took a further eight months before the worker was formally awarded his pension award in the decision letter under appeal. This time period was spent gathering further information on the worker's long-term employability.

What should be considered the initial adjudication of the worker's entitlement to compensation for subjective, chronic pain in this case: the April 2002 memo or the January 2003 decision letter?

I find that the initial adjudication of the worker's entitlement to compensation for subjective, chronic pain occurred in January 2003. Although for purposes of registering appeals, WCAT may take jurisdiction over memos or other forms of correspondence on a worker's claim file, I interpret the phrase "initial adjudication" to mean the formal communication of a decision to the worker. Although there were telephone communications between the worker and Board officers subsequent to the April 2002 memo, the subject matter of these communications concerned the worker's long-term employability, rather than his specific entitlement to compensation for subjective, chronic pain. The worker was only informed in January 2003 of that entitlement. The January 2003 decision can be characterized as a decision adverse to the worker's interest, therefore requiring notification of the reasons supporting the decision and the worker's right to appeal such a decision. In reaching this conclusion, I note the provisions of item #99.20 of the RSCMI.

Therefore, since the initial adjudication of the worker's entitlement to compensation for subjective, chronic pain took place after January 1, 2003, the new version of the policy at item #39.01 of the RSCMI applies to this appeal.

The new policy clearly defines chronic pain as "pain that persists six months after the injury and beyond the usual recovery time of a comparable injury." Two types of chronic pain are distinguished: specific chronic pain (pain that exists with clear medical causation or reason) and non-specific chronic pain (pain that exists without such clear medical causation or reason). In evaluating a worker's entitlement to a section 23(1) award for chronic pain, the policy contemplates consideration of numerous types of evidence, including a multidisciplinary assessment, other medical information and the worker's own statement, conduct and activities. However, central to the question of entitlement to a section 23(1) award for chronic pain is the determination of whether the worker's chronic pain is consistent with the impairment or disproportionate to the impairment. In this way, the new version of the policy appears to adopt at least a

portion of the reasoning expressed in *Appeal Division Decision #2001-0916* (publicly available on the Board website at www.worksafebc.com).

I find that the worker is entitled to an additional award under section 23(1) for specific chronic pain that is disproportionate to his impairment. In reaching this conclusion, I have considered the following:

- The Board officer's conclusion that the worker's subjective complaints were "more significant" than what would be consistent with the objective findings.

- The medical evidence from Dr. Parhar, Dr. Bland and Dr. Favero consistently documenting pain and fatigue in **both** elbows, particularly after activity. I note that the worker's treating specialist, Dr. Favero, stated in July 2000 that the worker's left elbow pain would need indefinite accommodation. Although there is minimal objective impairment in the worker's left elbow, he continues to have consistent pain complaints in the left elbow. In combination with his objective right elbow impairment, the left elbow chronic pain has affected the worker's ability to function. I find that this meets the criteria outlined in item #39.01 of the RSCMI regarding disproportionate pain, where the extent of the pain is greater than what would be expected from the impairment.

- The worker's consistent and credible evidence of chronic pain. There is no suggestion in the evidence that the worker's pain complaints are the result of exaggerated pain behaviours or malingering. His conduct, particularly in requesting accommodation at the workplace, is also consistent with his pain complaints.

I allow the worker's appeal on this issue and vary that portion of the July 30, 2003 decision of the Review Division to the following extent. I note that the policy no longer gives discretion regarding the quantum of a section 23(1) award for chronic pain. Therefore, aside from the 0.25 percent award for objective impairment, the worker is entitled to a further 2.5 percent award for subjective, chronic pain.

Projected loss of earnings award

Section 23(3) provides in part that:

> Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury…and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.

As noted above, Board policy in the RSCMI describes this method of assessing permanent partial disabilities as the projected loss of earnings method.

In this case, the Board declined to assess the worker for a loss of earnings award because the worker was fit to perform his full-time duties as a storesman. However, the worker submits that while he can perform his work duties, he does not have the physical endurance to work full-time hours in this position.

In considering this issue, I have referred to item #40.12 of the RSCMI which provides guidelines on assessing what are suitable and available occupations for the claimant in the long-term. In particular, item #40.12 provides that:

> In advising on the suitability of the claimant for reasonably available jobs, the Rehabilitation Consultant must have regard to the limitations imposed by the residual compensable disabilities of the claimant and assess the claimant's earnings potential in light of all possible rehabilitation measures that might be of assistance, including the possibility of retraining or other measures that may be appropriate to the particular worker.

Having carefully examined the evidence, I give weight to the opinion of the vocational rehabilitation consultant that the worker's position with the employer was physically suitable. Although the opinion of the rehabilitation consultant mischaracterizes the conclusions of the nurse advisor (who limited her opinion to the question of whether the worker needed assistance from a co-worker), I am still comfortable in relying on it because the rehabilitation consultant actually visited the worksite and analyzed the worker's work duties. Although the medical evidence from the worker's treating physicians is that he should be working a reduced workweek, I find that these opinions are largely based on the worker's self-report and not on a detailed analysis of the worker's work duties. I further note that the worker consistently admits that he has no difficulty performing his work duties, but also states that his endurance to work full-time is affected by his activities of daily living. I also note that the worker was able to complete approximately three months of three 12-hour shifts per week in 2003.

Therefore, I deny the worker's appeal on this issue and confirm that portion of the July 30, 2003 decision of the Review Division.

Conclusion

In summary, I partially allow the worker's appeal and vary the July 30, 2003 decision of the Review Division to the following extent:

- I confirm the portion of the worker's section 23(1) award for right elbow objective impairment at 0.25 percent. I find that the worker is not entitled to an additional percentage of total disability for objective, left elbow impairment.

- However, the worker is entitled to an additional 2.5 percent under section 23(1) for subjective, chronic pain in both elbows. I apply the new version of policy item #39.01 of the RSCMI to this appeal.

- I confirm that the worker is not entitled to an assessment for a section 23(3) award for projected loss of earnings, as he is fit to perform his regular, full-time duties as a storesman.

When asked at the oral hearing, the worker said there were no expenses incurred in mounting this appeal. Thus, I make no order for reimbursement of expenses under section 7 of the *Workers Compensation Act Appeal Regulation*.

Luningning Alcuitas-Imperial
Vice Chair

LA/cmm