

Noteworthy Decision Summary

Decision: WCAT-2004-02598 **Panel:** Teresa White **Decision Date:** May 18, 2004

WCAT's jurisdiction over a Review Division decision where the worker injures his thumb and one or more fingers, and pursuant to policy item #39.24 of the Rehabilitation Services and Claims Manual, the Workers' Compensation Board adds an "enhancement factor" which is normally equivalent to 100% of the lesser of the two disabilities – Because the amount of an enhancement factor is subject to discretion, it was not a "specified percentage" captured by section 239(2)(c) of the Workers Compensation Act – Since the worker suffered greater loss of range of motion to his thumb as compared to his finger, WCAT's jurisdiction was limited to the thumb only – "Initial adjudication" in Resolution #2002/11/19-04, which pertains to chronic pain, means initial adjudication with respect to entitlement for compensation for subjective, chronic pain

The worker injured his hand in 2002. His claim was accepted, and one of the issues he appealed was whether his permanent partial disability award was properly determined by the Review Division. In this respect, the issue of WCAT's jurisdiction pursuant to section 239(2)(c) of the *Workers Compensation Act* (Act) arose.

The worker's functional impairment was calculated with reference to very specific percentages set out in the Permanent Disability Evaluation Schedule for impairment of the digits. In particular, the worker had loss of range of motion of the left thumb at the interphalangeal (IP), metacarpal-phalangeal (MP), and carpal-metacarpal (CMC) joint. He also had loss of range of motion at the distal interphalangeal, proximal interphalangeal, and metacarpal phalangeal joint of his index finger. Policy #39.24 of the *Rehabilitation Services and Claims Manual* (RSCM) states that in cases where the thumb and one or more fingers are involved, an "enhancement factor" normally equivalent to 100% of the lesser of the two disabilities is added. However, this amount is subject to discretion, and on that basis the WCAT panel did not consider it to be an amount captured by section 239(2)(c) of the Act. It was not a "specified percentage". The panel concluded that WCAT has jurisdiction of the review officer's decision with respect to the worker's loss of range of motion of the thumb, including the MP and IP joints (upper limit is 12%) and the CMC joint (upper limit of the range is 10%) but did not have jurisdiction with respect to the loss of range of motion of his index finger, where the upper limit is 4%.

On the issue of chronic pain, the panel noted that although the worker was injured in 2002, his permanent disability award was decided by the Workers' Compensation Board in 2003, after changes to the RSCM respecting chronic pain became effective (January 1, 2003). Resolution #2002/11/19-04 states that the changes apply to new claims received and all active claims that are currently awaiting an initial adjudication. The panel adopted the reasoning in WCAT Decision #2004-01842, which found that the phrase "initial adjudication" in the Resolution means an initial adjudication with respect to entitlement for compensation for subjective, chronic pain. 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. The worker was entitled to an award of chronic pain at 2.5% as set out in policy.

WCAT Decision Number**WCAT-2004-02598****WCAT Decision Date:****May 18, 2004****Panel:****Teresa White, Vice Chair**

Introduction

The worker injured his left hand while using a power saw on April 17, 2002.

The worker's claim was accepted by the Workers' Compensation Board (Board) for injuries to his left thumb and index finger. He now appeals three decisions of the Board, two decisions made by the case manager, and one by the Review Division of the Board. All three appeals are addressed in this decision.

I note here that some of the documents originating the claim make reference to the worker's right hand. It is apparent that the compensable injury was to the worker's left hand.

The "A" appeal was originally filed with the former Workers' Compensation Review Board (Review Board) from a decision of the case manager communicated to the worker in a letter dated June 13, 2002. The case manager informed the worker that his wage rate after eight weeks of wage loss would be \$280.11 per week. This rate was based on total gross earnings information reported by the worker's employer of \$18,877.40 for the period January 1, 2002 to April 17, 2002. I note that the reference to January 1, 2002 appears to be a typographical error and should have stated January 1, 2001.

The "B" appeal was also originally filed with the Review Board. The case manager, in a letter dated August 15, 2002, revised the worker's wage rate based on total gross earnings of \$30,641.62 from January 1, 2001 to April 16, 2002. The new wage rate was 75% of \$454.43 per week (\$340.82 net).

The "C" appeal is from the August 22, 2003 decision of the Review Division. The review officer confirmed the Board's decision of March 20, 2003 respecting his permanent partial disability award, and the Board's use of the eight week/long term earnings rate set out in the August 13, 2002 letter in calculating his award.

Jurisdiction

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*.

The "A" and "B" appeals were 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).

The “C” appeal was filed with the WCAT under section 239(1) of the Act. The question of WCAT’s jurisdiction pursuant to section 239(2)(c) arises in respect of the worker’s permanent disability award, and is addressed below.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT panels are bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Policy relevant to this appeal is set out the *Rehabilitation Services and Claims Manual* (RSCM), Volume I which relates to the former (pre-Bill 49) provisions of the Act. 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.

Issue(s)

The first issue is the whether the worker’s eight-week/long-term wage rate was properly determined.

The second issue is whether the worker’s permanent partial disability award was properly determined. In that respect, the issue of WCAT’s jurisdiction pursuant to section 239(2)(c) of the Act arises.

Background and Evidence

Wage Rate

When he injured his hand on April 17, 2002 the worker had been employed by the employer since March 1, 2002. He also worked part time as a janitor.

In a note dated May 10, 2002 the entitlement officer recorded her initial wage rate determination. She noted that the worker had two employers, and worked a five-day week with the accident employer. He could “work any day of the week” with his second employer as a janitor. The entitlement officer used total gross earnings from both employers for the period March 1 to April 17, 2002, noting that she thought this was a good reflection of the worker’s loss.

Earnings from the accident employer were \$1,932.40 and as a janitor were \$2,453.33 to a total of \$4,385.73 for March 1 to April 17, 2002. This resulted in a gross weekly wage rate of \$639.60.

A memo from the case manager dated June 12, 2002 notes that the worker had submitted T4 information for 2001. The case manager “averaged” about \$23,085.02 for that year. He said that he was looking at using the period of January 1, 2001 to April 17, 2002 rather than one year. The total was \$24,277.902. He asked the disability awards officer whether she concurred with using a period other than one year for the long-term wage rate.

The disability officer made further inquiry and noted, also on June 12, 2002 that the total earnings from January 1, 2001 to April 17, 2002, 472 days, was \$280.00 per week or \$1,216.00 per month.

The next piece of earnings information resulted from a meeting with the worker and his wife on June 27, 2002. They are recorded to have shown the case manager a statement of professional activities for income in 2001. The worker was apparently attempting to be “a self-employed worker as well as an employer.” He had incorporated a company that provided janitorial services. The worker’s gross income in 2001 from this enterprise was \$6,140.00, with a net amount of \$4,631.40. According to the memo, the worker “closed the business” in 2002 and was working only with the accident employer. Pay stubs were reviewed and the following stated as income:

T4 employment income	\$16,945.02	2001
Business income after deductions	\$ 4,631.80	2001
Income from accident employer	\$ 1,192.00	2002
Income from other employers	\$ 7,556.80	2002

The disability awards officer agreed that using the period January 1, 2001 to April 16, 2002 would provide a fair reflection of the worker’s long-term loss, but noted that the case manager had included the worker’s earnings with the accident employer twice, once as accident employer income and once in income from other employers.

The result of this exchange was the decision letter of August 15, 2002 setting the gross weekly wage rate at \$454.43 gross and \$340.82 net.

The request for review, filed by counsel for the worker and received by the Review Division on March 31, 2003, states that the “pension is insufficient” and “wage rate is insufficient.”

There is extensive documentation in the file respecting the worker’s earnings. It includes a handwritten schedule with the worker’s first name as the title, cheque stubs, cancelled cheques from the worker’s janitorial employer, handwritten statements of

earnings, and taxation documents. I have reviewed all of it, which includes earnings information from as far back as 1997.

The documents indicate that in 2002 the worker had earnings from the accident employer and a janitorial company. For the months of March and April, this income totaled \$2,458.33 gross. In 2001 he had employment income from a baking company of \$16,945.02 gross. According to taxation documents, in 2000 the worker had employment income of \$1,507 and professional earnings of \$12,604.00 gross, \$9,254.00 net. In 1999 his income tax documentation shows total earnings of \$12,331.00, based on employment with a flooring company, and, it appears, work with at least two other enterprises. In 1998 the worker had a WCB claim and income reported from at least three other sources, for a total of \$18,385. In 1997 the worker had employment income from one source, the flooring company, of \$19,940.00.

Counsel for the worker submitted that in 2001 the worker was employed full time at the baking company, and earned \$16,945.02. The submission, which was dated May 28, 2003 further states that, "concurrently, the worker had a janitorial business going on a casual basis," and that his earnings for the whole year 2001 were \$6,140.00 gross, \$4,631.80 net. In February 2002 the worker left the baking company and started working with the accident employer. Further, in March 2002 the worker was employed as a "contractor" by a janitorial company and earned \$1,600 per month.

Counsel submitted that at the time of the injury the worker had a fixed change in his earning pattern, relying on policy item #67.20 in the RSCM, which notes that in some instances earnings from the three months prior to the injury may be used. Their use is generally limited to those situations where there is a relatively fixed change in the worker's earning pattern which is deemed likely to continue into the future.

Counsel submitted that in 2001 the worker had one full-time job and a second concurrent "casual" janitor job. In March 2002, he had one full-time job and a second concurrent "steady" janitorial job paying significantly more than the casual job. Counsel submitted this was a fixed change. He submitted that the initial rate set by the Board was a better reflection of the worker's loss. The fixed change occurred seven weeks before the injury.

The review officer, in the decision under appeal, noted policy item #67.20. She further noted that the worker had been employed with the accident employer and as a janitorial contractor for only seven weeks at the time of injury. She noted that counsel submitted that the worker was "still employed" by the company for which he worked as a janitorial contractor, and this indicated a fixed change.

The review officer was not satisfied that there had been a fixed change.

Permanent Partial Disability Award

As noted above, the restriction on WCAT's jurisdiction pursuant to section 239(2)(c) must be considered.

The worker's permanent disability award was the subject of the August 22, 2003 Review Division decision. WCAT's jurisdiction with respect to appeals from a review officer's decision respecting a permanent disability award is limited by section 239(2)(c) of the Act, which states that a decision made by a review officer respecting the application under section 23(1) of the Act of a rating schedule compiled under section 23(2) of the Act, where the specified percentage of impairment has no range or has a range that does not exceed 5%, may not be appealed to the appeal tribunal (WCAT).

The worker's permanent disability award was calculated in accordance with the *Permanent Disability Evaluation Schedule* (PDES), which is a schedule compiled under section 23(2) of the Act.

The worker's injury was to his left thumb and index finger. The injuries were severe, and required extensive hand surgery. It is apparent from a review of the medical information on file that the worker's left index finger was, and continues to be, at risk for amputation. The worker has continuing complaints of pain in his left thumb, index finger, web space and wrist. The nature of the injuries is particularly significant for the worker, whom, it appears from a review of the file, has been employed exclusively in work requiring manual labour.

The worker's functional impairment was calculated with reference to very specific percentages set out in the PDES for impairment of the digits. In particular, the worker has loss of range of motion of the left thumb at the interphalangeal (IP), metacarpal-phalangeal (MP) and carpal-metacarpal (CMC) joint. He had loss of range of motion at the distal interphalangeal (DIP), proximal interphalangeal (PIP), and metacarpal phalangeal (MP) joint of his index finger.

Published policy in the RSCM states:

#39.31 Finger Restrictions

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

When considering restriction of finger movement, the full range of flexion restriction is taken into consideration, but only 50% of the range of restricted extension. This is because extension is not considered as vital as flexion. The formula used to compute a percentage value for restriction of finger movement is:

Restriction Degrees x 3/4 x amputation value at the joint concerned
Normal Degrees

This formula is used as it is normally considered that a fused finger joint is equal to 3/4 of the value of an amputation at the same level.

Items #51, #52 and #53 of the Permanent Disability Evaluation Schedule allow a higher value to be applied if necessary (up to value of amputation). These are normally used when the fused finger is essentially useless and there would be no difference in the disability if the finger had been amputated.

When more than one finger is involved, the appropriate multiple finger chart from the Permanent Disability Evaluation Schedule is used to determine the amputation value at the joint concerned, thus building in any enhancement factor.

#39.32 Thumb Restrictions

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The basic principles set out in #39.31 also apply here. The formula used to compute a percentage value for restriction of thumb movement is:

Restriction Degrees x 1/2 x amputation value at the joint concerned
Normal Degrees

This formula is used in that it is normally considered that a fused thumb joint is equal to 1/2 of the value of an amputation at the same level.

Where a finger and thumb are affected, an enhancement factor is added in the manner set out in #39.24.

#39.24 Amputation of Thumb and One or More Fingers

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The percentage of disability of the thumb is determined and the percentage of disability for the finger or fingers is determined. Normally, an enhancement factor of 100% of the lesser of these two disabilities is then added. The Disability Awards Officer or Adjudicator in Disability Awards does have discretion, based on the severity of the injuries, to adjust the enhancement factor, but normally a 100% multiple of the lesser is used.

More serious disabilities of this type are awards listed in the *Permanent Disability Evaluation Schedule*, items 9 to 12.

The PDES value, in item #6, for total amputation of the thumb including the metacarpal, is 20%. The charts in the PDES provide values for amputation of the thumb based on 10% for the metacarpal, 6% for the first phalange and 4% for the second phalange (tip), which totals 20%, the value for total amputation. With regard to immobility (which I interpret to mean complete loss of range of motion), the PDES provides in item #49 that fusion of "both joints" of the thumb is valued at up to 3/5 of the value of amputation at the MP joint. Fusion of the MP or IP joint of the thumb is valued at a percentage of item #49.

The value for total amputation of the index finger at the MP joint is 4%, as stated in item #16. Item #51 in the PDES provides that the value for total immobility of a finger is "up to value of finger."

There is no amount specified for immobility of the thumb, including the CMC joint. There is a value, in item #45 for total immobility of the wrist, which is 12.5%. However, policy item #39.32 states that the formula is used "in that it is normally considered that a fused thumb joint is equal to 1/2 of the value of an amputation at the same level." For the CMC joint of the thumb, the value specified for amputation at that level is 20%. On that basis, fusion of the CMC joint of the thumb would have a possible upper limit percentage of 10%.

As noted in policy item #39.24, in cases where the thumb and one or more fingers are involved, an "enhancement factor" normally equivalent to 100% of the lesser of the two disabilities is added. However, this amount is subject to discretion, and on that basis I do not consider it to be an amount captured by section 239(2)(c). It is not a "specified percentage."

Based on the above analysis of the PDES provisions for impairment of the digits, I have concluded that WCAT has jurisdiction on an appeal from the review officer's decision with respect to the worker's loss of range of motion of the thumb, including the MP and IP joints (upper limit is 12%, which is 3/5 of 20%), and the CMC joint (upper limit of the range is 10%). WCAT does not have jurisdiction with respect to the loss of range of

motion of his index finger, where the upper limit is 4%. The decision of the Review Division is final.

However, WCAT does have jurisdiction with respect to the wage rate (which is addressed separately in this decision) the effective date, and other aspects of the disability award which are not based on the PDES. This includes whether the worker was entitled to consideration of an award based on loss of earnings.

The most recent medical report from the hand surgeon, Dr. Carr, is dated September 5, 2003. The worker was noted to be employed as a cleaner at an airport. The worker said he had "too much pain" in his index finger and to a lesser degree in his thumb. Dr. Carr said that the worker's options for further treatment were limited, and the most reasonable choice would be to consider ray amputation of the index finger through the index metacarpal. Dr. Carr was concerned that given the worker's "track record of having problems with pain he may still have pain in the hand despite amputation." The fact that the worker found his thumb so painful was considered to be a poor predictor for him doing well in Dr. Carr's mind.

Dr. Carr noted the worker's loss of range of motion of the index finger as "limited with 0/20 degrees of motion at the MCP joint and less than 10 degrees of passive motion at the PIP joint. He has 30/45 degrees of motion at the DIP joint." Dr. Carr said the thumb had reasonable range of motion.

Dr. Carr's range of motion finding at the MCP (MP) joint of the index finger is inconsistent with the range of motion findings at the permanent functional impairment examination, which noted 86 degrees of flexion on the injured left side and 70 degrees on the uninjured right side. Notably, the report of the PFI examination also states "the left side was measured with greater MP flexion than the right side." This inconsistency is found in Dr. Carr's March 2003 and May 2003 evaluations, which were soon after the PFI examination in February of 2003.

The disability awards officer noted that based on range of motion loss, the worker's impairment was 5.81%. An additional 2.09% was added for "restricted sensation and a multiple enhancement factor for the additional impairment relating to sensory loss." A loss of earnings amount was not considered applicable because the worker was considered fit to return to suitable employment with no long-term loss in earning capacity.

In his May 28, 2003 submission to the Review Division, counsel for the worker pointed to the worker's problems with pain in the index finger, thumb and left wrist, and to loss of sensation over the thumb and index finger. The worker also has cold intolerance. In April of 2002 the worker was prescribed Tylenol #3 and Neurotonin. Counsel submitted that 2.09% was not sufficient, and that the worker was entitled to 2% more.

The review officer concluded that the Board determined the worker's permanent partial disability award of 7.9% in a manner consistent with the facts, Board policy, and law. She denied the worker's request for review.

Reasons and Findings

Wage Rate

The worker's injury occurred on April 17, 2002, which was before the amendments to the Act resulting from Bill 49, which were effective June 30, 2002. Those amendments involved substantial changes to the wage rate provisions, but are not applicable to the worker because of the date of injury.

As was noted by the review officer, the applicable section 33(1) of the Act allows the Board to determine a worker's average earnings and earning capacity at the time of the injury to best represent the worker's actual loss of earnings by reason of the injury. Policy item #67.20 explained that normally earnings in the one year prior to the injury are used to reflect long-term wage loss and the permanent disability award rate. Earnings in the three-month period before the injury may be used, but their use is generally limited to situations where there is a relatively "fixed change."

I agree with the review officer that the evidence does not support a conclusion that there was a "fixed change" in the worker's earnings. The documentary evidence demonstrates that the worker's earnings pattern varied over the years from 1997 to 2002. At times he had employment income, at times business income and at times both. His earnings from each varied, but overall his income earning pattern was relatively stable. It is apparent from that documentary evidence that the worker had a pattern of undertaking both employment in the traditional sense and self-employment in the janitorial industry. I cannot conclude based on the change that occurred in the period immediately before the injury that there was a "fixed change" in the worker's earnings pattern.

The "A" appeal is essentially moot, because the worker's wage rate was amended, retroactively, by the decision that is the subject of the "B" appeal. Both appeals are denied and the worker's long-term wage rate, as determined in the August 15, 2002 decision letter and adopted by the disability awards officer in the March 20, 2003 decision letter is confirmed.

Permanent Disability Award

The first indication that the worker would likely have a permanent disability must be taken in this case to be the date of injury. Based on my review of the medical reports, and the severity of the injury, it was immediately apparent that the worker would have permanent impairment of his left index finger and thumb. Thus, the permanent disability

statutory and policy provisions applicable are those before June 30, 2002 and the amendments resulting from Bill 49.

The wage rate used for calculation of the worker's permanent partial disability award is confirmed as the wage rate determined in the August 14, 2002 decision letter, for the reasons set out above.

As also noted above, WCAT does not have jurisdiction with respect to the application of the rating schedule to the worker's award for his index finger. Dr. Carr reported in September 2003 that the worker had range of motion limited to 0/20 degrees at that joint. In March he said the worker had range of motion measuring 0/65 degrees. The PFI examination found 86 degrees of flexion and -7 degrees of extension. The injured left finger had more range than the right. Although this may well be possible, there appears to be a discrepancy between the measurements made by Dr. Carr and during the PFI examination. I cannot reconcile the measurements. However, WCAT does not have jurisdiction respecting the Review Division's determination respecting the application of the PDES with respect to the worker's index finger.

Noting that the Review Division decision on this point is final, the worker may also wish to consider asking the Review Division to reconsider its decision, which does not appear to have considered the discrepancies in measurement. Such a request must be made to the Review Division, and any decision in that respect would be subject to the Review Division's ability to reconsider a decision made final by section 239(2)(c).

With respect to the worker's thumb, I can find no reason to disturb the range of motion findings or the scheduled amounts applied. The worker, through his counsel, does not object to the manner in which the measurements were taken, or the scheduled amount determined on the basis of those measurements. The Board's conclusions in that respect are confirmed.

Counsel for the worker did not make any submissions respecting the effective date. Although I note Dr. Carr's suggestion that amputation of the index finger may be an option for the worker, I do not consider that possibility to mean that the worker's condition has not plateaued. Dr. Carr's suggestion was provided in the context of the worker's ongoing complaints of pain in the index finger, which have been consistent over time. If the worker elects to proceed with amputation, the Board may have to give consideration to revisiting the permanent disability award in accordance with law and policy.

With respect to the decision that the worker is not entitled to an award based on loss of earnings, I note that he informed the hand therapist on October 9, 2002 that he was working full time and did not have any major problem other than working in cold water. Dr. Carr's report of September 2003 also indicates that the worker is employed as a cleaner.

That leaves the issue of the additional 2.09% awarded by the disability awards officer for restricted sensation and a multiple enhancement factor. Counsel for the worker submits that this amount is insufficient and a further 2% should be added.

The worker's permanent disability award was decided by the Board in 2003. Changes to the RSCM respecting "chronic pain" were made effective January 1, 2003 (see resolution of the Panel of Administrators #2002/11/19-04). The resolution states that the changes apply to new claims received and all active claims that are currently awaiting an initial adjudication. The application statement in that resolution with respect to the meaning of "an initial adjudication" could be interpreted to mean an initial adjudication of the claim, or the "initial adjudication" of aspects of the worker's permanent disability award relating to chronic pain (or, as former policy item #39.02, which was deleted as a result of the resolution, "subjective complaints).

In that regard, I adopt the reasoning in *WCAT Decision #2004-01842*, in which 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 considered to be, and I agree, 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*.

Thus, the applicable policy is the new version of the policy which 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% of total disability will be granted.

There are indications in the worker's file that he is experiencing ongoing pain in his index finger, thumb, the web space between his thumb and index finger, and his wrist.

Policy item #39.02 states that an award is not made for chronic pain where a worker has chronic pain that is consistent with the associated compensable physical impairment. The policy states that chronic pain is considered to be consistent with the associated compensable physical impairment where the pain is "limited to the area of the impairment, **or** medical evidence indicates that the pain is an anticipated consequence of the physical or psychological impairment."

In the worker's case, the evidence supports a conclusion that the pain is in the general anatomic area of his injury, that is, it is not "generalized." This suggests that an award

for chronic pain would not be made under the policy in the worker's case, because one of two alternatives set out in the policy is satisfied.

However, the policy then states that pain is considered to be disproportionate where it is generalized rather than limited to the area of the impairment **or** the extent of the pain is greater than that expected from the impairment. Dr. Carr's reports, and in particular the report of September 5, 2003, suggest that the worker has "problems with pain," in conjunction with comments that the outcome of amputation may not be relief of pain because of the worker's experience of pain in his thumb. This statement suggests that the worker's pain is greater than expected from the impairment. Dr. Carr also said that the only other alternative he could suggest was a chronic pain specialty clinic.

It is difficult to reconcile the two statements in policy. Following the first direction would lead to a finding that the worker's chronic pain is consistent with his injury, because it is not generalized. I prefer in this case to apply the second statement, which states that pain is considered to be disproportionate to the injury if it is greater than expected from the impairment. I consider this approach to be most consistent with the remainder of the policy as it recognizes pain that is greater than expected based on functional impairment, even though it is generally in the anatomic area of the injury, and as such is "specific" chronic pain.

Policy item #39.02 states that the evidence that may be considered in a section 23(1) assessment for chronic pain includes the following:

- i) The findings of any multidisciplinary assessments.
- ii) Information provided by the worker's attending physician as well as any other relevant medical information on the claim.
- iii) The worker's own statements regarding the nature and extent of the pain.
- iv) The worker's conduct and activities and whether they are consistent with the pain complaints.

The worker sustained a severe injury to his hand. He continues to have significant pain complaints, which have been the subject of comment by Dr. Carr, who is a specialist in plastic, hand and aesthetic surgery. I consider that Dr. Carr's comments regarding the worker's problems with pain suggest that the worker has pain that is disproportionate to the injury. I consider that Dr. Carr's suggestion of a specialized pain clinic is strong evidence in that regard.

On that basis, I have concluded that the worker has specific chronic pain that is disproportionate to his injury. He is entitled to an award for his chronic pain. The policy leaves no discretion with respect to the quantum of the award. The worker is entitled to

an additional 2.5%. This is in addition to the 2.09% already awarded for restricted sensation and an enhancement factor for the additional impairment related to sensory loss.

Conclusion

On the "A" appeal, the worker's appeal of the Board's decision of June 13, 2002 respecting the worker's wage rate is moot because it was replaced by the Board's August 15, 2002 decision. As such, it is cancelled.

On the "B" appeal, the Board's decision of June 13, 2002 is confirmed. The worker's wage rate was properly determined.

On the "C" appeal, the Review Division decision is varied to the extent that the worker is entitled to an additional 2.5% in accordance with policy item #39.02, Chronic Pain.

Teresa White
Vice Chair

TW/hf/pme