

Noteworthy Decision Summary

Decision: WCAT-2004-02912-RB **Panel:** Jane MacFadgen **Decision Date:** May 31, 2004

Apportionment when the work injury's contribution to the worker's total disability was not de minimus - The Workers' Compensation Board (Board) cannot apportion under section 5(1) of the Workers Compensation Act where the Medical Review Panel certified that other non-work causes of the disability, which arose after the claim injury, did not independently produce a portion of the worker's disability but rather acted together with the claim injury to produce the worker's current disability - Interest on retroactive payments denied because no blatant Board error – Since the Board had no information regarding the worker's back condition between 1959 and 1997, it did not make a blatant error in 1997 when it decided that the claim ought not to be reopened

The worker sustained a compensable back injury in 1958. An Medical Review Panel (MRP) certified that four identified causes (a 1958 claim injury, a 1969 MVA, a 1976 slip and fall on stairs, and natural degeneration of the spine) all acted together to produce the current disability, and that each contributed equally to the disability. The Workers' Compensation Board (Board) limited his pension entitlement to 25% of his assessed total disability on the basis of the MRP certificate, and its decision was upheld by the Review Division. The worker appealed.

The panel found that the Board could not apportion its responsibility under section 5(1) of the Workers Compensation Act where the MRP certified that the other non-work causes of disability, which post-dated the claim injury, did not independently produce the worker's current disability. Given the medical findings of the MRP, the panel concluded that the claim injury was a material or significant contributing cause of the worker's permanent disability. The panel found that work injury's contribution to the worker's total disability (16%) could not be characterized as negligible or de minimus as discussed in Appeal Division Decisions #2002-0146/0147, such that the claim injury should not be considered to have had causative significance in the production of his disability. The Board erred in apportioning its responsibility to 25% of his total assessed disability of 16%. The worker's full disability was compensable.

The worker submitted that he should receive interest on the retroactive payments of wage loss and pension benefits. Policy item #50.00 of the *Rehabilitation Services and Claims Manual* gives the Board the discretion to pay interest on retroactive lump sum payments wage loss or pension benefits if there was a blatant Board error. The evidence did not support that there was a blatant Board error that necessitated the payment of interest. The Board received no medical or other information related to the worker's back between 1959, when his physicians reported he could return to work, and 1997 when the worker contacted the Board about reopening his claim. It was only then that the Board learned about the worker's ongoing back problems since 1959 and his surgeries in 1964 and 1976. It was only a 2002 MRP decision which resulted in the reopening of the worker's claim and the payment of retroactive benefits. Given the available evidence regarding his back condition between 1959 and 1997, the panel did not consider that the Board made a blatant error in 1997 when it decided that the worker's claim should not be reopened for further benefits.

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Panel: Jane MacFadgen, Vice Chair

Introduction

The worker sustained a compensable back injury in 1958. A January 2002 Medical Review Panel (MRP) certificate concluded that the worker's back surgery in 1964 was causally related to his 1958 injury, and that his claim injury was one of four causes which acted together to produce his current back disability. The six decisions under appeal relate to the implementation of the MRP certificate by the Workers' Compensation Board (Board).

The June 10, 2002 decision paid the worker 26 weeks of wage loss benefits dating from his 1964 surgery, based on his original long-term wage rate under the claim. The February 4, 2003 decision reimbursed him for medical costs incurred for his 1964 surgery, but did not pay interest on this amount.

The four pension decisions under appeal (October 28 and December 17, 2002; January 10 and February 17, 2003) established and revised the worker's pension entitlement. The net result of the four decisions was that the worker was awarded a 2% permanent partial disability pension effective May 4, 1959, based on the original long-term wage rate; and a further 2% award effective December 8, 1976, based on the statutory maximum wage rate in effect in 1976. These awards reflected the Board's decision to accept responsibility for only 25% of the worker's total assessed back impairment.

The worker requested a review of the January 10, February 4 and 17, 2003 decisions by the Review Division. The August 7, 2003 Review Division decision confirmed all three decisions.

The worker now appeals the June 10, October 28 and December 17, 2002 decisions of the Board and the August 7, 2003 Review Division decision. An oral hearing of these appeals was held on March 29, 2004 in Richmond. The employers' adviser did not attend the oral hearing but provided written submissions on behalf of the accident employer, which was no longer registered with the Board. The worker provided a further written submission subsequent to the oral hearing.

Issue(s)

Whether the Board appropriately determined the worker's entitlement to wage loss and health care benefits and his pension entitlement under the 1958 claim, arising out of the 2002 MRP certificate. This includes consideration of whether the Board appropriately

limited the worker's pension entitlement to 25% of his total permanent functional impairment.

Jurisdiction

The appeals of the June 10, October 28 and December 17, 2002 decisions 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 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 worker's appeal of the August 7, 2003 Review Division decision was made directly to WCAT under section 239(1) of the *Workers Compensation Act (Act)*.

Because the scheduled portion of the worker's functional impairment was established in the initial October 28, 2002 pension decision appealed to the Review Board, I have jurisdiction to address the scheduled portion of the award as part of my determination of that appeal, which was transferred to WCAT.

Section 250 of the Act provides that WCAT must make its decision based on the merits and justice of the case but, in so doing, must apply relevant policies of the board of directors of the Board. Section 254 gives WCAT exclusive jurisdiction to inquire into and determine all matters of fact and law arising or required to be determined in an appeal before it. This is therefore a rehearing by WCAT.

Background and Evidence

The worker was 31 years old when he sustained a compensable back injury on December 2, 1958. He was working as a faller and fell about 10 feet, landing on his back on a log. A lumbosacral sprain and disc injury/protrusion in the lower lumbar spine were diagnosed. The worker was hospitalized for three weeks.

The worker received temporary disability benefits until May 3, 1959 when the Board concluded he was fit to return to work. His long-term wage rate for the claim was set at \$40 a week. The worker did not respond to the Board's invitation to provide further earnings information to support a different wage rate.

The orthopaedic specialist's April 20, 1959 report noted that the worker's symptoms had improved, and he should be able to resume some type of work in about two weeks, wearing a lumbar support. The attending physician's May 5, 1959 report stated that the worker's back had responded well to treatment; his current disability was due to a right arm problem. His May 11, 1959 letter to the Board noted the worker still had some residual disability in his back, although his final report/account confirmed the worker was able to work as of May 3, 1959.

The Board received no further medical or other information related to the worker's back until he contacted the Board in June 1997 about reopening his claim. The worker advised the Board officer that he had been unable to return to heavy work and instead had worked in sales, particularly vacuum sales, over the years. He had had surgery in Alberta, was hospitalized in Manitoba for about eight weeks in the 1960s, and had a surgical fusion of his back in the United States in the mid-1970s.

The Board obtained the following medical information related to the intervening years. Some records were no longer available due to the passage of time.

The worker was hospitalized in Alberta from May 24 to June 8, 1964 for a right-sided L5-S1 disc protrusion. A right L5-S1 discectomy was performed on May 28. The hospital recorded that he had had a back injury six years earlier, but had been well until six weeks prior to his hospital admission. Since then he had had low back and sciatic pain radiating down his right leg.

The worker was hospitalized in Manitoba from May 23 to June 9, 1969 for a recurrence of a disc problem, diagnosed as sciatic syndrome. The hospital recorded that he had had prior back surgery, and had injured his neck and low back in a car accident about three months earlier. He had an exacerbation of left sciatic pain, such that he could not bear weight on his left leg.

The next medical information relates to his hospitalization in the U.S. from December 2 to 20, 1976 with severe low back and right leg pain. On December 8, 1976 he had a lumbosacral fusion and laminectomy at L4-5 on the right and L5-S1 bilaterally. The records noted his history of low back pain since his 1964 back surgery. He had done quite well until he fell on stairs in May or June 1976, after which he had an exacerbation of back pain.

The Board concluded that the worker's subsequent back problems and disability were not related to his 1958 injury, and denied a reopening of the claim in a November 13, 1997 decision.

Both the Review Board and Appeal Division denied the worker's appeal of this decision. A Medical Review Panel examined the worker to determine whether his back problems and surgeries after May 3, 1959 were causally related to his December 2, 1958 compensable injury. The January 30, 2002 MRP certificate certified as follows:

- the worker currently had a moderate back disability involving pain in his back and legs with bending, walking, lifting, or prolonged sitting. His disability limited his capacity to walk, lift, or sit for prolonged periods;
- he did not have a pre-existing condition or disability;

- the cause of his disability was degenerative disc disease and perineural fibrosis, and the December 2, 1958 work incident was of causative significance in producing the disability;
- the May 28, 1964 discectomy was causally related to the work injury, and an additional period of temporary total disability resulted from the claim injury, for about six months after the 1964 discectomy;
- the worker's disability related to the 1958 claim injury diminished, to one of only mild degree, but was exacerbated by the motor vehicle accident of 1969, the fall on stairs in May/June 1976, and the natural degenerative process in the spine, such that his disability was currently of moderate degree;
- his subsequent back problems and moderate partial disability were equally causally related to the claim injury, the 1969 motor vehicle accident, the May/June 1976 slip and fall, as well as diffuse degenerative disc disease and osteoarthritis of the thoracic and lumbar spine;
- these four causes all acted together to produce his current disability, and were all of equal significance in producing this disability;
- the December 1958 work injury was 25% responsible for the current disability; and,
- the worker had been disabled from doing heavy work (i.e. his previous logging and mining work) after the December 2, 1958 claim injury, but he was able to do lighter work thereafter.

The Board's implementation of the MRP certificate led to the six decisions under appeal. The worker's permanent disability award was revised several times, as a result of changes in the pension effective dates and wage rates. The decisions under appeal are outlined below.

The case manager's May 31, 2002 memo concluded that proportionate entitlement under section 5(5) of the Act did not apply as the MRP found that the worker did not suffer from a pre-existing disability or condition, and the other causes of disability outlined in the certificate post-dated the compensable injury.

The June 10, 2002 decision accepted the L5-S1 discectomy and fusion under the 1958 claim and paid the worker retroactive wage loss benefits totalling \$1040 for the 26-week period after his May 28, 1964 surgery. These benefits were calculated using his original gross weekly claim rate of \$40 a week, which the case manager found to be in line with the class average earnings for door-to-door sales people in 1964. The case manager determined that increases in the consumer price index (CPI) did not apply to earnings prior to 1964.

The worker's file was referred to a disability awards adjudicator to determine his pension entitlement. The June 2002 permanent functional impairment (PFI) review memo noted the claim had been accepted for an L5-S1 discectomy (May 28, 1964) and an L5-S1 fusion (December 8, 1976).

Based on the available medical information and the history which the worker gave the MRP, the adjudicator concluded that the worker had recovered quite well after his 1964 discectomy. Using the current spinal schedule as a guideline, the adjudicator rated his back disability after this surgery at 2% of a totally disabled person. This portion of the award was effective November 29, 1964, the date after temporary disability benefits concluded post-surgery. The adjudicator accepted 100% of this impairment under the claim as this surgery preceded any of the other causes of disability. The pension wage rate was set at \$174 a month, based on the original \$40 a week claim rate. The adjudicator determined that the worker was not entitled to a loss of earnings award as the pension effective date pre-dated the dual pension system.

The adjudicator made the second portion of the pension award effective December 8, 1976, the date of his second back surgery. He rated the worker's total lumbar impairment at 14.6%, based on the MRP findings regarding his range of lumbar motion. Section 5(5) of the Act did not apply as there was no evidence of any pre-existing disease, condition or disability. However, as the MRP had found that only 25% of this disability was causally related to the claim injury, the adjudicator determined that, under section 5(1) of the Act, the worker's compensable entitlement was limited to 3.65% of total disability. The adjudicator rounded this up to 4% of total disability. This represented a further award of 2%, after factoring in the prior award of 2%.

The worker was unable to provide documentation corroborating his annual earnings between 1969 and 1977, which the worker recalled were in the \$15,000 to \$17,000 range. The adjudicator decided to use the 1976 statutory minimum rate of \$537 a month rather than the original claim rate with CPI adjustments. Noting that the worker was successfully re-employed in sales work from 1960 to 1983, and as a shift supervisor prior to his retirement in 1992, the adjudicator determined he was not entitled to a loss of earnings pension. The adjudicator concluded that interest was not payable on either award.

The October 28, 2002 pension decision accordingly awarded the worker a pension in two stages: a 2% permanent partial disability award effective November 29, 1964, based on a monthly pension wage rate of \$174; and a further 2% permanent partial disability award effective December 8, 1976, based on a monthly pension wage rate of \$537. No loss of earnings pension was awarded. The pensions were commuted into a \$2128 lump sum payment.

In response to additional earnings information supplied by the worker's representative related to the 1969 to 1977 period, the December 17, 2002 pension decision readjudicated and increased the pension wage rate for the portion of the pension that took effect December 8, 1976 to the statutory maximum then in effect of \$1,133 a month. The additional award resulting from this new wage rate totalled \$1,655.

The January 10, 2003 pension decision advised the worker that his retroactive pension awards had been erroneously calculated. The recalculations included both the cumulative retroactive amount as well as the current cash value for future benefits, resulting in an additional pension award totalling approximately \$18,308.

The February 4, 2003 decision reimbursed the worker for \$375 in medical costs which he had incurred for his 1964 surgery. This amount did not include interest.

The February 17, 2003 pension decision revised the effective date for the first portion of the pension award to May 4, 1959, the day after temporary disability benefits concluded, which resulted in an additional pension amount of \$264. No interest was paid on this award as the Board manager found no evidence of a blatant Board error.

The worker appealed the June 10, October 28 and December 17, 2002 decisions to the Review Board. As noted at the outset, these are now WCAT appeals.

The worker requested a review of the January 10, February 4 and 17, 2003 decisions by the Review Division of the Board. He submitted that there were errors in the pension wage rate, functional award and loss of earnings award, and that he was entitled to interest on his retroactive wage loss, pension and health care benefits.

The August 7, 2003 Review Division decision confirmed the Board's decisions. The review officer concluded that the Board had correctly determined the revised pension awards, including the appropriate CPI adjustments beginning in 1966. He decided the Board did not have the authority to pay interest on retroactive health care benefits, and that it had not made a blatant error that required the payment of interest on the retroactive benefits.

The worker now appeals the August 7, 2003 Review Division decision as well as the June 10, October 28 and December 17, 2002 decisions of the Board.

Prior to the oral hearing I sent the parties a memo inviting submissions on the Board's approach to apportioning its responsibility for the worker's permanent functional impairment, referencing several prior decisions of the Appeal Division. Both parties provided written submissions on this issue.

The worker testified that in the year before his claim injury he did various contract logging work, operated heavy equipment, and was unemployed for about 6 months. He had done contract logging work for this particular company for about 4 to 6 weeks prior to his injury. He disputed the company's report to the Board that he was earning \$100 a week at the time of injury. Although he had no documentation of his earnings, he was sure they were quite high as the contract logging rate was \$17 per thousand feet 'all in'. Further, the company did not pay him for all the trees that he had cut, but not yet loaded, when he was injured. As he was hospitalized, he had no way of proving what

the company owed him for the logs on the ground. He described his dire financial situation after the injury, when he was forced to sell a lot of his equipment and assets.

The worker stated that he was still disabled by his back when the Board terminated his benefits in May 1959. Thereafter he had constant back pain and could not bend forward. He had to shift to lighter work because he was physically unable to do falling or heavy equipment operation, even with the waist to shoulder back belt provided by the Board. From 1959 to 1964 he did sales work, initially of vacuum cleaners, first in B.C. and then in Alberta. Around 1960 he became a sales manager for a vacuum company and trained sales people. In 1966 he obtained the vacuum cleaner franchise for Manitoba, and also bought a 50% interest in a vacuum repair business which was housed in a building which he owned. He had very good earnings of at least \$500 to \$600 a week. He estimated that his annual net taxable income (after deducting car and other business expenses) was around \$5,000 to \$6,000 in the year before his 1964 surgery. He moved to the U.S. around 1970 as most of his company's business was there; he continued to be paid by his own company in Manitoba.

After his back surgery in 1964 he no longer had pain. It took him about six months to recover, after which he returned to work. He still had back problems and restrictions from 1966 to 1976, but he was alright if he only did light work and avoided reaching and heavy lifting. If he exceeded those restrictions he would end up in bed for two to three weeks. The worker noted that the car accident referred to in the medical records was a minor rear-ender, with no associated disability. Also, there was no fall down a flight of steps; he stumbled going down a single stair into his garage, but he did not fall down. There was not much change in his back condition associated with this incident. His back again became as bad as it had been before, which led to his 1976 disc surgery and fusion. He was hospitalized for about three weeks, and had a long recovery. After this surgery his back was the best condition it had ever been since his injury, although he still could not have resumed heavy physical work. He later sold the building and company which he owned, and went into an irrigation business.

I will address the submissions in the context of my reasons and findings below.

Reasons and Findings

The former provisions of the Act apply to the adjudication of the worker's wage loss and pension entitlement.

Interest on retroactive wage loss, pension and health care payments

The worker submits that he should receive interest on the retroactive payments of wage loss, pension and health care benefits in the decisions under appeal. His representative argued that the Board's policy #50.00 in *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) restricting the provision of interest to situations of

blatant Board error, and capping it at 20 years, was unjust and discriminatory. It meant that injured workers who had been denied compensation benefits due to decisional errors by the Board were not compensated for the loss of access to those benefits, in the worker's case for over 30 years.

The employer's adviser submitted that the Board properly declined to pay interest on the retroactive awards, consistent with RSCM I policies #50.00 and #50.10.

As noted at the outset, WCAT is required to apply relevant policies of the board of directors of the Board. The revised RSCM I policy #50.00 addresses the payment of interest on lump sum payments of retroactive wage loss or pension benefits in decisions made after November 1, 2001 (see *Resolution 2001/10/15-03* of the former panel of administrators of the Board).

Policy #50.00 gives the Board the discretion to pay interest in situations other than those expressly provided under sections 19 and 92 of the Act. One of the conditions for the exercise of the Board's discretion to pay interest on retroactive lump sum payments wage loss or pension benefits is that it must be determined that there was a blatant Board error that necessitated the retroactive payment. For an error to be "blatant" it must be an obvious, glaring error that no reasonable person should make; it does not include an understandable error based on misjudgement. There is no provision in the policy for the payment of interest on retroactive health care benefits.

I find that the evidence on file does not support that there was a blatant Board error that necessitated the retroactive payments in question. The Board received no medical or other information related to the worker's back between mid-1959, when his physicians reported he could return to work, and June 1997 when the worker contacted the Board about reopening his claim. It was only then that the Board learned about the worker's ongoing back problems since May 1959 and his surgeries in 1964 and 1976.

Given the available evidence regarding the condition of the worker's back between 1959 and 1997, I do not consider that the Board made a blatant error in 1997 when it decided that the worker's claim should not be reopened for further benefits. The Board's decision was upheld on appeal to the Review Board and Appeal Division; both tribunals came to the same conclusion after weighing the available evidence. It was only the January 2002 MRP decision which resulted in the reopening of the worker's claim and the payment of the retroactive benefits at issue in this appeal.

Accordingly, I confirm the Board's decisions to deny interest on the retroactive lump sum wage loss, pension and health care benefits in the decisions under appeal. As the worker paid for the surgery in 1964 at the then prevailing rates, I do not see a basis for reimbursing him on the basis of the current rates for such surgery. I therefore deny his appeal related to the February 4, 2003 decision regarding reimbursement for health care expenditures incurred in 1964.

Wage loss benefits after 1964 surgery (June 10, 2002 decision)

The worker's representative submits that the wage rate for the reopening of the claim for temporary disability benefits after the May 28, 1964 surgery should have been based on the statutory maximum, rather than his initial claim rate.

He stated that the original claim rate was arbitrarily set at the minimum rate due to incomplete earnings data. The worker had good earnings in road construction and falling prior to his injury, although earnings records no longer existed to prove this. Because the worker could not return to those occupations, he re-established himself in sales and management work, and by the time of his 1964 surgery his earnings were above the then statutory maximum rate. He submitted that the November 2002 statutory declaration by the lawyer for the worker's company, regarding the worker's annual earnings from the company between 1969 and 1977 (i.e. \$14,000 to \$17,000), should also be accepted as representative of his earnings in 1964, as he was in the same business. He referred to RSCM I policy #70.20 with respect to the wage rate on a claim reopening.

The employer's adviser submitted that the Board properly based the worker's wage loss benefits after his 1964 surgery on the \$40 gross weekly wage rate being paid at the time benefits were terminated in 1959. The worker had never appealed the original rate, and there were no policies in effect in 1964 related to the reopening of claims over three years post-injury.

Section 32 of the Act, in effect at the time the Board adjudicated the worker's entitlement related to this reopening of the claim, addresses the recurrence of temporary disability or the occurrence of (or increase in) permanent disability more than three years after the original injury. It gives the Board the discretion to base the compensation rate on the worker's average earnings at the date of the reopening of the claim if, by doing so, the compensation payable to the worker better reflects his actual loss of earnings suffered by reason of the recurrence of or increase in disability.

RSCM I policy #70.20 outlines the Board's current policies with respect to the calculation of a worker's average earnings when a claim is reopened over three years after the original injury.

The adjudication of this issue has been made very difficult by the absence of earnings records or other documentation regarding the worker's earnings level for the time period in question. The statutory declaration provided by the lawyer for the worker's company relates only to the period beginning in 1969, when the company in question was formed as the manufacture agent in an import/export business. I do not consider this to be reliable evidence of the worker's likely earnings level at the time of the May 1964 reopening of the claim. I also find that, in the absence of other corroboration, the worker's testimony regarding his recollection of his earnings' level almost 40 years

earlier is not a sufficient basis to support a finding regarding his average earnings at the time of the reopening.

I find that, in the circumstances, the Board appropriately based the worker's wage rate for the reopening of the claim in May 1964 on his original claim rate. RSCM I policy #51.11 states that where a claim is reopened on the basis of a worker's original date of injury earnings, the worker will receive the benefit of any CPI adjustments occurring between the injury and the reopening date. As there was no provision for CPI adjustments for the time frame in question (see *Order in Council No. 3031, B.C. Reg.198/65*), I find no error in the Board's calculation of the worker's reopening wage rate.

I find, however, that the Board should have reopened the claim for temporary disability benefits as of May 24 rather than May 28, 1964, and I vary the June 10, 2002 decision to that extent. Although the worker had his back surgery on May 28, the medical records show that he had been hospitalized since May 24, 1964.

Pension entitlement (October 28 and December 17, 2002, and January 10 and February 17, 2003 decisions)

As the four pension decisions modified and recalculated various aspects of the worker's pension entitlement related to his 1958 injury, I will address them together. The worker was ultimately awarded a 2% permanent partial disability pension effective May 4, 1959, based on the original long-term wage rate; and a further 2% award effective December 8, 1976, based on the statutory maximum wage rate in effect in 1976. The second award reflected the Board's decision to accept responsibility for only 25% of the worker's total assessed back impairment.

I find no error in the two final pension effective dates (May 4, 1959 and December 8, 1976), which were established in accordance with the MRP findings and RSCM I policy #41.10.

The worker submits that the pension wage rate for the first part of the pension (effective May 1959) should be based on the statutory maximum rate then in effect. The worker's and employer's arguments on this issue are similar to those advanced with respect to the wage rate used for temporary disability benefits after the 1964 surgery. I find that the pension wage rate for the first portion of the pension was correctly determined, based on the original long term wage rate used for temporary disability benefits in 1958 to 1959. As outlined above, the worker has not provided persuasive evidence to support the use of a different wage rate for that portion of the award.

Neither the worker nor the employer's representative disputes the pension wage rate used for the second portion of the pension, effective December 1976. I see no error in the Board's decision to use the then statutory maximum rate for that portion of the

award, based on the additional earnings information submitted by the worker. I therefore confirm that aspect of the pension award.

The calculation sheets on file indicate that in its final calculations of the retroactive awards the Board factored in the relevant CPI adjustments to the earnings figures, commencing January 1, 1966. The worker's representative has not identified any error in the Board's calculation of the CPI changes to the rates, and I see no basis for disturbing that aspect of the pension award.

I now turn to the assessment of the worker's permanent functional impairment (PFI). The Board rated the worker's lumbar impairment for the first portion of the pension effective May 1959 at 2% of total, based on the limited evidence on file with respect to the worker's back condition before and after his 1964 surgery. The full amount of this 2% impairment was assessed as the Board's responsibility, as it pre-dated any of the other causes of disability noted in the MRP certificate.

Given the very limited medical and other evidence on file with respect to the worker's back condition prior to 1990, I find no error in the Board officer's exercise of judgment in assessing the worker's back impairment at 2% of a totally disabled person as of the 1959 effective date. I am satisfied that this appropriately compensated the worker for his lumbar impairment due to both objective as well as subjective factors at that time.

For the second portion of the pension effective December 1976, the disability awards officer considered the MRP examination findings and other medical evidence regarding the worker's back condition since his 1976 surgery. Based on this evidence he rated the worker's total lumbar impairment at 14.6% of a totally disabled person. He concluded that only 25% of this disability was causally related to the claim injury, as the MRP had certified that the claim injury was 25% responsible for the worker's current disability. He therefore adjusted the worker's compensable entitlement, with reference to section 5(1) of the Act, to 3.65% (i.e. 25% of 14.6%), and rounded it up to 4% (i.e. added a further 0.35%). I concur with the review officer's analysis that the additional 0.35% must reflect a similarly pro-rated amount for factors other than range of motion, including subjective symptoms, equal to 1.4% of total disability.

Although the worker's representative submitted that he should be examined by a disability awards medical advisor or ARCON service provider, I am satisfied that the specialists on the MRP conducted a thorough examination which provides a reliable basis for assessing the worker's PFI. Based on the objective measurements in that examination, I conclude that the Board appropriately assessed the worker's PFI at 14.6%, reflecting his loss of range of lumbar motion, plus an additional amount of 1.4% for other factors including his subjective symptoms as detailed in the MRP report. Together, this reflects a PFI of 16% of total disability as of the 1976 pension effective date. Recognizing the limitations of the available medical evidence, I find that the 16%

figure is a reasonable and fair assessment of the worker's total lumbar PFI due to both objective and subjective factors, as of the 1976 pension effective date.

I now turn to the apportionment issue. The adjudicator correctly concluded that proportionate entitlement under section 5(5) of the Act did not apply as the MRP found that the worker did not suffer from a pre-existing disability or condition, and the other causes of disability outlined in the certificate post-dated the compensable injury. RSCM I policy #44.30 states that section 5(5) is only concerned with pre-existing problems, and has no relevance to conditions which arise after the injury. It is the Board's practice, however, to apportion its responsibility in respect of a disability attributable to causes other than the work injury arising after the injury.

The pension decisions at issue in this appeal reflect the disability awards adjudicator's determination that, because the MRP had found that only 25% of the worker's total disability was causally related to the claim injury, his compensable entitlement under section 5(1) of the Act was limited to 25% percent of his total assessed disability (resulting in a total permanent partial disability award under the claim of 4%).

I invited the parties to make submissions on the Board's approach to limiting the worker's pension entitlement to 25% of his assessed total disability on the basis of the MRP certificate, in light of the discussions in *Appeal Division Decisions #96-1721* (13 *Workers' Compensation Reporter* 353¹), #98-1865 (both parties were given a copy of this unpublished decision, with identifiers deleted) and #2002-0146/147 (18 *WCR* 113).

The first two Appeal Division decisions cited the now repealed version of RSCM I policy #103.54 concerning MRP certificates and "cause of the disability." The 2002 decision provided further analysis regarding MRP certificates, causative significance, and the *de minimis* principle.

The worker's representative submitted that the *de minimis* principle did not apply in this case. The worker's total PFI should not be apportioned based on the relative contribution of work-related and other contributing factors because the MRP found that his 1964 surgery was wholly attributable to the 1958 claim injury; the 1976 fusion took place at the same level as the 1964 surgery; the claim injury and the 1964 surgery may well have activated or accelerated the degenerative processes identified as one of the contributing factors; and the MRP concluded that the four identified causes all acted together and were of equal significance in producing the worker's current disability. As a result, the claim injury was a significant contributing factor to his back disability, such that all of his disability should be compensable.

The employer's adviser submitted that the Board correctly apportioned its responsibility for the worker's total PFI at 25%, and that the work injury's contribution to his total disability should be considered *de minimis*. Unlike the fact situations in the Appeal

¹ found at http://www.worksafebc.com/publications/wc_reporter on the Board's website

Division decisions cited above, the non-work contributing factors to the worker's disability did not pre-exist the claim injury, but rather occurred subsequent to the work injury. The worker would clearly be suffering from his disability in the absence of the work event, as the disability was due mainly to the post-injury motor vehicle accident, the fall on stairs, and the natural degenerative process in the spine. The work-related disability had diminished to one of a mild degree until the non-work related factors operated to render the disability of moderate degree.

RSCM I policy #103.84 provides that a MRP certificate only determines "cause" as a matter of etiology with respect to medical science, not as a matter of law or non-medical fact. In analyzing the issue of apportionment arising from an MRP certificate, the panel in *Appeal Division Decision #96-1721* stated as follows (13 WCR 353 at pp. 362-363):

If one can determine with certainty that a disability has been caused by the independent progression of a non-work related condition or disease, it would seem evident that this would not be compensable. It would not matter whether or not there was any pre-existing disability, so long as it was established that this independent progression to a disability was not causally related to the work injury. There may, therefore, be situations where a worker's disability might be found to be non-compensable, based upon a medical review panel certification as to the existence of a disability due to a prior non-work cause notwithstanding the absence of a pre-existing disability. Just as disability resulting from a subsequent non-work cause is not compensable, and will be excluded from the assessment of the worker's compensable disability, so too might disability resulting from a prior non-work cause be non-compensable.

While disability resulting independently from subsequent non-work causes would not be compensable (see, for example, RSCM I policy #22.20), that is not the situation in the worker's case. The MRP was specifically asked whether each of the identified causes of the worker's back disability independently resulted in a disability (and, if so, what proportion of the disability was attributable to each cause), or whether one or more of the causes acted together to produce the disability. In response to that question, the MRP certified that the four identified causes (the 1958 claim injury, the 1969 MVA, the 1976 slip and fall, and the degeneration) all acted together to produce the current disability, and each contributed equally to the disability. The MRP also certified that the cause of the worker's disability was degenerative disc disease and perineural fibrosis, and that the 1958 claim injury had causative significance in producing his disability.

I find that the Board cannot apportion its responsibility under section 5(1) of the Act where, as here, the MRP certified that the other non-work causes of disability, which post-dated the claim injury, did not independently produce a portion of the worker's disability, but rather acted together with the claim injury to produce the worker's current disability.

Given the medical findings of the MRP, I conclude as a matter of fact and law that the claim injury was a material or significant contributing cause of the worker's permanent disability. I find that the work injury's contribution to the worker's total disability (which I found above to be 16% of total) cannot be characterized as negligible or *de minimis* as discussed in *Appeal Division Decisions #2002-0146/0147*, such that the claim injury should not be considered to have had causative significance in the production of his disability. I therefore conclude that the Board erred in apportioning its responsibility for the worker's total disability of 16% as of the December 1976 pension effective date. There is no rational support in law or policy for apportionment of the worker's disability. I find that the worker's full disability is compensable.

The worker's representative did not submit in this appeal that the worker was entitled to a loss of earnings pension under the claim. I do not find persuasive evidence that the worker sustained a loss of earnings over the long term as a result of the effects of the 1958 claim injury. I therefore confirm the Board's decision that he was not entitled to a loss of earnings pension.

Conclusion

I confirm the Board's decisions to deny interest on the retroactive lump sum wage loss, pension and health care benefits in the decisions under appeal.

I vary the June 10, 2002 decision to the limited extent that I find that the claim should have been reopened for temporary disability benefits as of May 24 rather than May 28, 1964.

I deny the worker's appeal related to the February 4, 2003 decision regarding reimbursement for health care expenditures incurred in 1964.

I allow the worker's appeal regarding his pension entitlement (as set out in the October 28 and December 17, 2002 and January 10 and February 17, 2003 decisions) to the extent that I find that the Board erred in limiting the worker's pension entitlement to 25% of his total assessed disability of 16% as of the December 1976 pension effective date. I find that the worker's total assessed disability should be accepted under the 1958 claim. Factoring in the worker's first award of 2% which took effect in May 1959, I find that the worker is entitled to an additional award of 14% as of December 8, 1976, and I vary the pension decisions accordingly. I confirm the other aspects of the pension awards.

Jane MacFadgen
Vice Chair

JM/lco