Noteworthy Decision Summary

Decision: WCAT-2004-04324-RB **Panel**: Ernie MacAulay **Decision Date:** August 18, 2004

WCAT Jurisdiction over Chronic Pain Awards – Section 239(2)(c) of the Workers Compensation Act (Act) – Whether Chronic Pain is a Scheduled Award - Permanent Disability Evaluation Schedule - Section 23(2) of the Act – Policy Item #39.01 of the Rehabilitation Services and Claims Manual, Volume I – Section 99(3) of the Act

A chronic pain award is not a "scheduled" award provided pursuant to the Permanent Disability Evaluation Schedule (PDES) contemplated by section 23(2) of the *Workers Compensation Act* (Act). Therefore, WCAT has jurisdiction to hear appeals of chronic pain decisions.

Section 23(2) of the Act provides that the Workers' Compensation Board (Board) may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases. The Board has compiled such a schedule, the PDES, and it is found in Appendix 4 of the Rehabilitation Services and Claims Manual (RSCM), Volumes I and II.

Section 239(2)(c) of the Act provides that a decision involving a scheduled award may not be appealed to WCAT if the specified percentage of impairment the scheduled award is based upon (as set out in the schedule) has no range or has a range that does not exceed 5%. The chronic pain policy, policy item #39.01 in RSCM I (and #39.02 in RSCM II), provides that an impairment percentage of exactly 2.5% will be added to a worker's permanent disability award if the criteria set out in that policy are met. As the specified percentage for chronic pain is less than 5%, the WCAT panel noted that WCAT has no jurisdiction to consider the appeal if a chronic pain award is a "scheduled award".

Although the WCAT panel found that the absence of chronic pain from the PDES was not a conclusive determination of whether or not it is a scheduled award, it concluded that a chronic pain award is not a "scheduled award".

The panel noted that section 239(2)(c) of the Act removes a formerly available appeal right, namely a right to appeal regardless of the value of the percentage of impairment set out in the schedule, and emphasized the nature of compensation legislation as entitlement legislation with a statutory provision requiring the Board to, where issues are evenly balanced, resolve matters in favour of the claimant (section 99(3) of the Act). For these reason, the panel concluded that the removal or diminishment of such a right would require a clear and unambiguous statement to that effect. The panel was satisfied that there was no clear and unambiguous language that categorizes chronic pain awards as being scheduled awards.

The panel also noted that the Board could have easily added chronic pain to the PDES but did not. The panel found this to be indicative of an intention to not have chronic pain awards regarded as scheduled awards.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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Panel: Ernest C. MacAulay, Vice Chair

Introduction

The worker appealed a decision by the Review Division dated January 13, 2004 that confirmed a decision, dated July 10, 2003, in which a Board officer informed the worker that she had been granted a permanent partial disability award amounting to 3.83% of a totally disabled person, computed using monthly earnings of $2,021.00, effective December 20, 1999, paid on a loss of function basis, and paid in a single sum of $16,584.21.

Issue(s)

What are the worker's entitlements with respect to a permanent partial disability award including;

- the percentage of total disability the award is based upon,
- the monthly earnings used to compute the award,
- the effective date of the award,
- the payment of the award on a loss of function basis, and
- the payment of the award in a single sum?

Jurisdiction

This is an appeal of a Review Division decision pursuant to subsection 239(1) of the *Workers Compensation Act* (Act) as enacted by the *Workers Compensation Amendment Act (No. 2), 2002*.

Under section 250 of the Act (as enacted by the *Workers Compensation Amendment Act (No. 2), 2002*), the Workers' Compensation Appeal Tribunal (WCAT) may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decisions on the merits and justice of the case, but in so doing, it must apply a policy of the Workers' Compensation Board (Board) board of directors that is applicable in the case. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear and determine all those matters of fact and law arising or required to be determined in an appeal before it.

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.

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Background and Evidence

On April 15, 1999 the worker, a customer service employee of an insurance firm, felt a sensation of heat and pain in her ear and neck while lifting a file box down from the top shelf in a storage area. The Board eventually accepted her claim for a cervical disc herniation and an anterior cervical discectomy and fusion on August 19, 1999. The worker returned to her pre-injury employment with the accident employer on December 20, 1999.

The worker provided testimony under solemn affirmation on July 14, 2004. She described her ongoing symptoms and stated that she still feels pain in her neck and upper chest with pain radiating down her right arm to her thumb, index, and middle fingers. She also has numbness on the right that follows the same pattern as her pain and is now moving to her left side. She also has pain in both of her shoulders and the back of her neck. She stated the pain appears to be aggravated by typing and keeps her awake at night. She has a choking feeling at the front of her neck and a crunching feeling at the back of her neck. She rated her neck pain at six (on a scale of zero to ten) and stated that it is constant but worse on some days. She described the pain that radiates down her right arm as stabbing pain and stated that it is aggravated by activity or sudden movement. She lost a significant amount of hand grip strength (with more loss in her dominant right hand) and now cannot open jars. She sleeps two to four hours at a time then has to rise and she never gets a full night of sleep.

The worker stated that she was formerly an avid golfer but is now restricted to nine holes on par-3 courses. She has reduced her camping and all upper body physical activities.

The worker still works for the accident employer and takes three 375 mg. Naprosyn® per day to control the pain and swelling associated with her condition.

The employer was a franchisee for a national insurance company but is no longer in business and there is no successor. WCAT invited the appropriate industry group to participate in this appeal but an employers' adviser informed WCAT that the industry group had declined to participate in this appeal.

Reasons and Findings

The worker's entitlement in this case is adjudicated under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). 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 in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), which relates to the former (pre-Bill 49) provisions of the Act.

A Board contractor conducted a permanent functional impairment evaluation of the worker using a standardised testing platform and protocol on March 14, 2003.

The worker did not complete all the static strength tests due to reported severe neck pain. The static strength tests actually completed revealed poor forces and an unacceptable increase in heart rate during testing. The strength graphs are variable and tentative and grip strength test results are not indicative of maximal effort. The clinicians observed objective signs of effort during all completed tests and did not observe overt guarding of cervical spine movement during the formal testing. Despite the noted indications of unreliability, the supervising physician found the range of motion measurements to be consistent with the available medical information.

A disability awards claims adjudicator (DACA) accepted the range of motion findings from the permanent functional impairment evaluation and, using the appropriate software, compared the identified cervical spine deficits against Reference 109 of the Permanent Disability Evaluation Schedule. The results were: flexion deficit – 2.1%; right rotation deficit – 0.53%; and left rotation deficit – 1.2% for a total scheduled award of 3.83% of a totally disabled person. The DACA also noted that the worker has a fusion of the C5 and C6 vertebrae and Reference 108c of the Permanent Disability Evaluation Schedule provides for a 3% of a totally disabled person for such a fusion. When such an anatomic or surgical impairment is present with loss(es) in range of motion, the claimant is entitled to the higher of the two awards so the DACA recommended a scheduled award of 3.83% (as the total ranges of motion deficits exceeded 3%). The DACA noted the worker's subjective complaints (as documented in the permanent functional impairment evaluation and an associated questionnaire) and found them to be consistent with the objective findings and not worthy of an additional award.

The worker's counsel agreed with the objective findings but submitted that the worker is entitled to an additional award for chronic pain.

The worker appealed a Review Division decision with respect to her permanent partial disability award pursuant to subsection 239(1) of the Act. Paragraph 239(1)(c) of the Act provides that WCAT does not have jurisdiction over appeals of permanent partial disability awards from the Review Division where the specified percentage of impairment has no range or where the range does not exceed 5%. Reference 109 of the Permanent Disability Evaluation Schedule provides for a range from 0 to 6% for cervical spine flexion deficit but a range of from 0 to 4% for cervical spine right and left rotation deficits. Since it would be impractical (if not impossible) to separate the flexion and the right/left rotation deficits and, since the panel has jurisdiction over the flexion deficit (by virtue of a range exceeding 5%), the panel finds it has jurisdiction over all of the percentage of total disability component of the permanent partial disability award decision.

Although the worker testified that she made her best efforts during the permanent functional impairment evaluation, the test results are not supportive of this claim and are only marginally acceptable. The panel accepts the supervising physician's opinion that the range of motion findings are consistent with the medical information and the DACA's judgment that the findings are acceptable given the nature of the injury. The panel finds the worker is entitled to a scheduled award of 3.83% of a totally disabled person for her objective symptoms.

The panel's jurisdiction over the worker's potential entitlement to an award for subjective symptoms depends upon whether or not the revised chronic pain policy [which was effective January 1, 2003 and applies to new claims after that date and prior claims that are awaiting adjudication of initial entitlement to permanent partial disability awards which the panel interprets to include adjudication by the appellate body] was made pursuant to subsection 23(2) of the Act. If the answer is affirmative, WCAT has no jurisdiction over such awards on appeals from the Review Division because of paragraph 239(2)(c) of the Act. If chronic pain awards are not 'scheduled awards' (that is, not provided pursuant to subsection 23(2) of the Act) then WCAT has jurisdiction to consider such awards on appeals from the Review Division.

Most of the scheduled awards are found in the Permanent Disability Evaluation Schedule (at Appendix 4 of the RSCM I) but the absence of chronic pain from Appendix 4 is not a conclusive determination of whether or not it is a scheduled award. Its defined amount, a universal 2.5% of a totally disabled person, makes it very similar to awards contained in the Permanent Disability Evaluation Schedule making it intuitively appealing to regard chronic pain as a scheduled award even though it cannot be found in the actual schedule.

The organisation of Chapter 6 of the RSCM I is of no real assistance in determining whether or not chronic pain is a scheduled award as item #39.01 appears prior to item #39.10 which contains a discussion of scheduled awards and item #39.50 which discusses non-scheduled awards. As well, the overall structure of RSCM I does not accord with conventional statutory drafting and the panel would not place much reliance on the placement of a provision within a chapter as a useful means of interpreting its meaning.

Resolution 2002/11/19-04 outlines that the need to revise the Board's policies on chronic pain arose from legislative changes, the *Government's Core Review*, incongruence with current scientific and clinical information, and stakeholders having "… raised concerns regarding the lack of clarity with respect to the provision of section 23(1) awards for chronic pain." The Panel of Administrators' reference to subsection 23(1) may be of significance (in that it could be interpreted as having stated the authority for the revised policies is solely rooted in subsection 23(1) of the Act with no reference to rating schedules compiled under subsection 23(2) of the Act) but more likely is simply a reference to the overall authority to grant permanent partial disability awards with the absence of a reference to subsection 23(2) not being determinative of

anything. Similarly, the last paragraph of item #39.01 of the RSCM I also describes chronic pain awards as being granted pursuant to subsection 23(1) of the Act but, again, this may not be persuasive for the same reason.

Paragraph 239(2)(c) of the Act removes a formerly available appeal right and, given the nature of compensation legislation as entitlement legislation with a statutory provision [subsection 99(3) of the Act] requiring the Board to, where issues are evenly balanced, resolve matters in favour of the claimant, the panel is of the view that the removal or diminishment of such a right would require a clear and unambiguous statement to that effect. As well, the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8 requires every enactment be construed as being remedial and must be given fair, large, and liberal construction and interpretation as best ensures the attainment of the enactment's objectives. This theme is further reinforced in *Caputo v. WCB (BC)* (1987), 13 B.C.L.R (2d) 145, 38 D.L.R. (4th) 458, where the British Columbia Court of Appeal stated the Board should administer the Act in accordance with practical, equitable, and non-technical principles according to the justice and merits of each case. The panel is satisfied that there is no clear and unambiguous language that categorises chronic pain awards as being scheduled awards pursuant to subsection 23(2) of the Act.

The panel notes that the Board could have easily added chronic pain to the Permanent Disability Evaluation Schedule following the resolution of the Panel of Administrators but did not. The panel finds this to be indicative of an intention to not have chronic pain awards being regarded as scheduled awards.

The panel finds that chronic pain awards, pursuant to item #39.01 of the RSCM I are not scheduled awards, therefore, paragraph 239(2)(c) of the Act does not deprive WCAT of jurisdiction to hear appeals from Review Board decisions on such matters.

The worker's condition meets the definition of chronic pain (in item #39.01 of the RSCM I) in that it has persisted more than six months after her injury and beyond the usual recovery time for such an injury and is specific chronic pain because it has clear medical causation. Item #39.01.4(a) of the RSCM I provides that specific chronic pain is consistent with the associated impairment where the pain is limited to the area of the impairment or medical evidence indicates the pain is an anticipated consequence of the physical impairment. In such cases, an additional award is not granted as to do so would amount to double compensation. Item #39.01.4(b) provides that specific chronic pain that is disproportionate to the associated objective physical impairment is compensable. Pain is considered to be disproportionate where it is generalised rather than being confined to the area of the impairment or the degree of pain is greater than would normally be expected from the injury.

During informal observations during the permanent functional impairment evaluation the clinicians observed the worker moving her head freely and spontaneously through a functional range of motion demonstrating fluid and controlled movements of her cervical spine. Her reports of constant pain and aching are generally confined to areas affected

by her cervical spine such as her neck, upper torso, and upper extremities. The panel is satisfied that the evidence supports the worker's subjective symptoms to be limited to the area of her impairment and of a degree consistent with her impairment. The evidence supports a finding that the worker's subjective symptoms are consistent with her impairment, as contemplated by item #39.01.4.(a) and, therefore, do not entitle her to an additional award for chronic pain.

The panel finds the worker is entitled to a permanent partial disability award amounting to 3.83% of a totally disabled person.

Subsection 33(1) of the Act provides the Board with several options to compute the amount that best represents claimants' losses due to their injuries. Item #67.20 of the RSCM I provides that, normally, the claimant's earnings during the year prior to his/her injury is the best representation of the loss occasioned by the injury. In this case, the Board used the worker's earnings of $24,257.83 during the year prior to her injury to generate a pension wage rate of $465.22 gross weekly or $2,021.00 gross monthly. Noting the regularity of the procedure and concurrence by the worker's counsel, the panel finds the worker is entitled to have her permanent partial disability award computed using gross monthly earnings of $2,021.00.

Pursuant to item #41.10 of the RSCM I, the general rule is that a permanent partial disability award commences when the claimant's temporary disability ceases and his/her condition stabilises or is first considered to be permanent. Based upon medical evidence of the worker's condition having stabilised, the Board terminated the worker's temporary total disability benefits on December 19, 1999. Noting the regularity of the process and the concurrence of the worker's counsel, the panel finds the worker is entitled to her permanent partial disability award effective December 20, 1999.

Subsection 23(3) of the Act provides that, where it is more equitable to do so, the Board may award compensation based upon 75% of the difference between what a claimant earned prior to his/her injury and the amount he/she can earn following the injury. As well, item #40.00 of the RSCM I requires the Board to compute permanent partial disability awards using both a loss of function and a loss of earnings method and award the higher result. In this case, the worker has returned to her pre-injury occupation without any loss of earnings making an award on a loss of function basis the higher of the two calculations. Noting concurrence by the worker's counsel, the panel finds the worker is entitled to her award on a loss of function basis.

Subsection 35(1) of the Act provides that compensation is paid periodically but paragraph 35(2)(a) of the Act provides the Board with the discretion to commute all or part of the periodic payments that are due or payable to a single sum. Item #45.10 of the RSCM I categorises permanent partial disability awards based upon the percentage of total disability, the monthly payments generated, and their commuted value. The award in this case is less than 10 percent of total disability, generates less than $100.00 per month, and has a commuted value of less than $40,000.00 and is, therefore, a

Category A award. Category A awards are always paid in single sums. The panel finds the worker is entitled to her award in a single sum.

Conclusions

The panel confirms the Review Division's January 13, 2004 decision.

The worker did not seek reimbursement of any expenses associated with this appeal and the panel does not make any award for reimbursement of such expenses.

Ernest C. MacAulay
Vice Chair

ECM/lc

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