

Noteworthy Decision Summary

Decision: WCAT-2005-00077 **Panel:** Sherryl Yeager **Decision Date:** January 10, 2005

WCAT Jurisdiction over Long Term Wage Rate (Average Earnings) for Transition Period Workers – Transition Provisions in Section 35.1 of the Workers Compensation Amendment Act, 2002 (Bill 49) – Policy Item #67.20 of the Rehabilitation Services and Claims Manual, Volume I (RSCM I) – Policy Item #1.03 of the RSCM I & II

In accordance with the principles of fairness underpinning transitional law, a permanent disability award decision made by the Workers' Compensation Board (Board) in relation to a worker who is injured prior to June 30, 2002 but whose disability first occurs after June 30, 2002 (transition period workers) includes a decision about the worker's permanent disability award wage rate. Therefore, WCAT has jurisdiction over the wage rate on appeals relating to permanent disability awards for transition period workers.

In this case, the worker injured his arm and the Board accepted the claim and provided him temporary disability benefits. After several months the Board terminated his wage loss benefits and later awarded him a permanent partial disability award on a loss of function basis. The worker's injury occurred on June 25, 2002, five days before the transition date for changes made to the *Workers Compensation Act* (Act) by the *Workers Compensation Amendment Act, 2002* (Bill 49) but his permanent disability "first occurred" after the transition date.

Pursuant to the transition provisions of the Act (section 5.1), the former provisions of the Act (those in place before the transition date) apply to the worker's entitlement to temporary disability benefits, as does *Volume I* of the *Rehabilitation Services and Claims Manual* (RSCM I). In relation to the worker's permanent disability award, the current provisions of the Act (those in place on or after the transition date) apply, generally speaking, as does *Volume II* of the RSCM. This is because section 35.1(4) of the Act provides that if a worker's permanent disability *first occurs* on or after the transition date, as a result of an injury that occurred before the transition date, the current provisions apply to the permanent disability. However, section 35.1(5) of the Act provides that while the current provisions apply, a worker is entitled to calculation of the quantum of the wage rate as it would have been determined under the former provisions.

In relation to when the wage rate is calculated, the RSCM I directs that a worker's wage rate is reviewed three times: once for the initial or short-term rate, again at the eight-week or long term rate, and finally, if the worker was left with a permanent disability, the wage rate for permanent disability award purposes. Even where the wage rate was not changed for permanent disability award purposes, the permanent disability award wage rate was considered to be a new and appealable decision. Thus, under the former provisions, the wage rate was always one of the appealable issues arising from a permanent disability award decision. By contrast, RSCM II appears to provide that the permanent disability award wage rate is the long-term rate (now calculated at ten weeks). Thus it would appear that WCAT, under the current provisions, does not have jurisdiction over the wage rate used for permanent disability award purposes (unless the worker had specifically appealed the ten-week wage rate decision).

In this case, the Board used the worker's eight-week wage rate as the permanent disability award wage rate. At the time the eight-week wage rate was determined the Board reconsidered the rate, at the request of the worker, but confirmed the decision. The worker was advised that the wage rate would not be altered but was not advised that the decision could be appealed. The worker ultimately requested a review of the permanent disability award decision, made months later, and it was confirmed by the Review Division. The worker appealed to WCAT.

On the preliminary issue of whether WCAT has jurisdiction over the worker's permanent disability wage rate on an appeal of a Board decision respecting only the worker's permanent disability award, the WCAT panel found that it had jurisdiction, for the following reasons:

- When the Legislature enacted transition provisions in Bill 49, it provided that the former provisions regarding wage rates would continue to apply for purposes of determining permanent disability awards for transition period workers. The Legislature could have established that all permanent disability awards after the transition date be administered in an identical manner, regardless of the date of injury.
- It is inconsistent and more importantly, unfair, to apply a portion of the former provisions of the Act to some aspects of the wage rate, namely the 75% method for calculating wage rates, while simultaneously applying the current policy provisions found in the RSCM II to other aspects of the wage rate where doing so removes the third level of scrutiny over wage rate decisions and forecloses an appeal of the wage rate at the time the permanent disability award is awarded (especially where, as here, the worker was not advised that his eight-week wage rate would be his permanent disability award wage rate, and furthermore, he was not advised of his rights to appeal the eight-week wage rate).
- The use of the phrase in policy item #1.03, "Except as noted ... the former provisions apply to an injury that occurred before June 30, 2002," means that the former provisions of both law and policy continue to apply to all claim decisions other than the identified exceptions. The relevant exception identified is that current provisions apply to the permanent disability award but the calculation of the wage rate is excluded, "putting it back into the general direction that 'the former provisions apply to an injury that occurred before June 30, 2002'." This reading harmonizes the policy, the Act as amended, and the principle of fairness which generally underpins transitional law.

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Introduction

The worker was 24 years old and employed as a mill worker when he sustained a crush injury to his left forearm on June 25, 2002. The Workers' Compensation Board (Board) provided temporary wage loss benefits until April 20, 2003, at which point the worker was considered fit to return to his pre-injury employment. The worker requested a review of this decision, communicated to him by letter dated April 11, 2003. *Review Division Decision #5471* dated December 8, 2003 confirmed the Board's decision.

The Board determined the worker had a permanent functional impairment as a result of his compensable injury, and awarded him a permanent partial disability pension on a functional basis on October 24, 2003. The Disability Awards officer (DAO) determined the worker's residual impairment equated to 4.47% of total disability. The worker requested a review of this decision. *Review Division Decision #10762* dated April 5, 2004 confirmed the Board's decision. The worker appeals from these reviews.

The employer was invited to participate in the appeal but did not respond.

Issue(s)

- 1) Did the worker continue to be temporarily disabled as a result of his compensable crush and avulsion injury to his left forearm after April 20, 2003?
- 2) Was the worker fit to return to his pre-injury employment as of April 20, 2003?
- 3) Was the worker's functional pension an accurate reflection of his impaired earning capacity resulting from the injury? In particular;
 - a) Was the wage rate used to compute the award appropriate?
 - b) Was the awarded percentage of disability appropriate?
 - c) Was the effective date of the pension correct?
 - d) Was the worker entitled to an award on a loss of earnings basis?

Jurisdiction

The worker's injury occurred on June 25, 2002, and therefore the former provisions of the *Workers Compensation Act* (Act) and the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) as they read immediately prior to June 30, 2002 apply to

the first decision under appeal, which involved the worker's temporary disability benefits and ability to return to work. These are referred to as the former provisions and RSCM I.

Regarding the appeal involving the worker's permanent partial disability award, as it was determined the worker had a compensable permanent functional impairment after the proclamation of the *Workers Compensation Amendment Act 2002*, the law as it applies to that appeal is contained in the provisions of the Act as it read after June 30, 2002, (current provisions) and the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. The Workers' Compensation Appeal Tribunal (WCAT) has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

This appeal was filed with WCAT under section 239(1) of the current Act.

This section permits appeals from Review Division decisions to WCAT, subject to the exceptions set out in subsection 239(2) of the Act. Paragraph 239(2)(c) of the Act provides that a review officer's decision may not be appealed to WCAT where the decision relates to pension appeals under subsection 23(1) of the Act, which are based on rating schedules compiled under subsection 23(2) of the Act (the permanent disability evaluation schedule), and the specified percentage of impairment has no range, or has a range that does not exceed 5%.

In considering section 239(2), WCAT panels have taken different approaches to the interpretation of that restriction on jurisdiction. I have reviewed a number of those decisions. I prefer, and agree with, the reasoning in *WCAT Decision #2004-02317*, which concluded that the range of impairment of the spine includes the global loss of range of motion of 24% rather than the amounts specified for each individual motion.

In this case, the schedule in use at the time of the worker's permanent functional impairment assessment indicated a range of zero to 12.5% for range of motion deficits in the entire wrist. As such, I have concluded that WCAT has jurisdiction in respect of the Board's decision regarding the application of the permanent disability evaluation schedule in this appeal.

A final issue of jurisdiction arises regarding the worker's wage rate for pension purposes.

At the time of the worker's injury, the former provisions of the Act and Board policy applied. The RSCM I directed that a worker's wage rate was reviewed three times; once for the initial or short-term rate, again at the eight-week or long-term rate, and finally, if the worker was left with a permanent partial disability, the wage rate for pension purposes.

Policy #67.20 of the RSCM I directs that generally the eight-week rate would be utilized for the pension, but an officer in Disability Awards could use a separate rate if the situation warranted. To ensure consistency an officer in Disability Awards would approve the long-term wage rate when it was apparent the worker would have a permanent functional impairment. Policy #68.00 of the RSCM I establishes that the pension is normally based on the earnings rate, but a different rate can be utilized if there are valid reasons. The policy goes on to advise that a provisional rate or class average may be applied in suitable cases.

The end result is that the wage rate was one of four appealable issues arising from a pension decision made under the former provisions, as an officer in Disability Awards made a new decision on the wage rate with every pension, even if the decision was to continue with the eight-week rate.

In the RSCM II there is no mention of an officer in Disability Awards approving the long-term rate, nor is there reference to the possibility of using a different rate than the long-term or ten-week rate.

Review Division Decision #15971 sets out the position that for pensions determined under the current provisions, as the long-term wage rate is used for pension purposes, no new decision is made regarding this aspect of a pension, as was the case under the former policy provisions. Workers are advised of the ten-week wage rate by letter at the time it is established, and if they disagree with that rate for pension purposes, they must appeal within the time limits. Therefore the DAO has no discretion to alter the wage rate, and this is not an appealable issue within the pension.

This worker's circumstances are unique, in that he was injured prior to the transition date of June 30, 2002, but the first medical opinion that a permanent disability would result was after this date. The transition legislation contained in Bill 49 addresses workers whose injuries or appeals fall in this time period. It is summarized in Chapter 1 of both versions of the RSCM.

Of relevance to my considerations, Policy #1.03 states:

1. Except as noted in rules 3, 4, and 5, the former provisions apply to an injury that occurred before June 30, 2002.

3. Subject to rule 4 respecting recurrences, if an injury occurred before June 30, 2002, but the first indication that it is permanently disabling occurs on or after June 30, 2002, the current provisions apply to the permanent disability award with two modifications:
 - (i) 75% of average earnings (former provisions) is used for calculating the award rather than 90% of average net earnings (current provisions); and

- (ii) no deduction is made for disability benefits under the Canada Pension Plan (former provisions).

Under this rule, for an injury that occurred before June 30, 2002, where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of permanent disability is on or after June 30, 2002, the award will be adjudicated under the current provisions, using the modified formula described in (i) and (ii) above.

The transition provisions contained in section 35.1 of the *Workers Compensation Amendment Act, 2002* read as follows:

(4) Subject to subsections (5) to (8), if a worker's permanent disability first occurs on or after the transition date, as a result of an injury that occurred before the transition date, this Act, as amended by the *Workers Compensation Amendment Act, 2002*, applies to the permanent disability.

(5) For the purposes of subsection (4), sections 22 (1) and 23 of this Act, as amended by the *Workers Compensation Amendment Act, 2002*, apply as if

(a) all references, other than references in section 23 (3) (d) (i),

(i) to 90% were read as 75%, and

(ii) to "average net earnings" were read as "average earnings determined under this Act immediately before the transition date," and

(b) section 23 (3) (d) (i) read as follows:

(i) the average earnings that the worker is earning after the injury, as determined under this Act immediately before the transition date.

The result is these injured transition period workers are subject to a "hybrid" application of new and old provisions of the Act, in which the current provisions of section 23(1) and 23(3) are applied to determine entitlement to the functional loss and earnings awards, but the quantum of the wage rate is governed by the former provisions. I note that the transition provision does not state that the calculation of the wage rate for such workers will be "75% of average earnings" *simpliciter* as recited in Policy item #1.03, but adds the phrase "determined under this Act before the transition date." This results in some ambiguity regarding whether an injured transition period worker is entitled to the whole process that was in place under Board policy before the transition date for determining wage rates, including a pension wage rate review and the right to appeal that rate.

If one interprets the transition provisions and policy #1.03 to mean that policy contained in the RSCM II applies to the process of determining the pension wage rate for injured transition period workers, then no further appeal is possible, as under the new provisions the DAO does not make a pension wage rate determination. The only new decisions made in the pension award are (1) the effective date, (2) percentage of disability, and (3) entitlement to a loss of earnings award. Consequently, the Board letter of October 24, 2003 could not be read as deciding the rate for pension purposes and WCAT would have no jurisdiction to entertain an appeal of the rate.

The application of the new policy provisions to the pension wage rate determination would result in a combined approach which may have an adverse affect on the injured worker. The worker's eight-week wage rate was determined under the former policy provisions while the subsequent application of the new policy provisions when a pension award is made would result in that determination automatically becoming, without notice to the worker, the pension rate. The impact of such an approach is to deprive the worker of the procedural safeguard of a final review for pension purposes and the right to appeal at that point in time.

The alternative interpretation of the transition provision is that the policy contained in the RSCM I continues to apply to all aspects of wage rate decisions. Workers whose wage loss benefits were adjudicated under the RSCM I provisions underwent three wage rate reviews. Workers were not advised that the eight-week review was also for the purpose of establishing the pension wage rate and thus, there was an expectation of one final review and the ability to appeal at that time.

The letters issued to the worker in this case confirm that he was not advised in writing that his eight-week rate would also be his wage rate for pension purposes, nor was he advised he could appeal a client services manager's decision of September 17, 2002 upholding the decision regarding his eight-week rate. Under the first approach set out above, this worker's ability to take issue with the rate would be foreclosed, despite the expectations that the process raised.

As the eight-week rate was not final for pension purposes, it could be argued that under the former policy provisions the worker remains entitled to that last level of scrutiny for pension purposes. This review and determination by the DAO would constitute a new decision, and would therefore be one of the appealable decisions contained within the pension award, in addition to the three listed above. Indeed, WCAT would have jurisdiction over this issue even if the worker did not raise it with the Review Division: item #14.30 of the *Manual of Rules of Practice and Procedure* (MRPP).

Which of the two approaches is the proper one to be applied raises an interesting question of the transitional operation of new legislation. According to Sullivan and Driedger, *On the Construction of Statutes*, 4th edition, (Butterworths, 2002), the resolution to such a question depends not on attaching labels, but on understanding the values being protected, particularly not taking people by surprise. As important "[i]n

assessing the temporal application of legislation, another major consideration is fairness”: p. 545.

I consider it significant that when the Legislature enacted transition provisions contained in the amending Act (Bill 49), the former provisions regarding wage rates were continued in the pension determination for transition period workers. The Legislature could have established that all permanent disability after the transition date be administered in an identical manner, regardless of the date of injury.

I find that it is inconsistent and more importantly, unfair to apply a portion of the former provisions of the Act, namely the 75% method for calculating wage rates, while simultaneously applying the current policy provisions found in the RSCM II to other decisions regarding the wage rate, such as removing the third level of scrutiny and thus foreclosing an appeal of the wage rate at the time the pension is awarded.

The use of the phrase in policy #1.03, “Except as noted ... the former provisions apply to an injury that occurred before June 30, 2002,” in my view, means that the former provisions of both law and policy continue to apply to all claim decisions other than the identified exceptions. The relevant exception identified is that current provisions apply to the permanent disability award but the calculation of the wage rate is itself excluded, putting it back into the general direction that “the former provisions apply to an injury that occurred before June 30, 2002.” In my view, this reading harmonizes the policy, the Act as amended, and the principle of fairness which generally underpins transitional law.

I therefore find it more administratively fair to continue to apply the policies found in RSCM I to the process of establishing wage rates for pension purposes of injured transition-period workers, than to use the current provisions regarding the wage rate only at the pension stage.

For the reasons set out above, I find that for a worker whose injury occurred prior to the June 30, 2002 transition date and who was considered to have a permanent functional impairment after that date, the former provisions of the Act and the RSCM I continue to apply for the determination of the wage rate used for pension purposes. I find that from this flows my jurisdiction to consider the wage rate on this hybrid pension, as this in effect becomes the third time the wage rate is considered and a new decision contained within the pension, and therefore an appealable issue. The current provisions of the Act apply to the remainder of the pension decision, as set out in Bill 49.

Background and Evidence

This appeal was determined by way of review of the file material and written submissions. The employer was invited to participate but did not reply.

The worker was employed as a labourer, renovating homes and shingling roofs, until he moved to B.C. and started work with the injury employer in February 2002. He had been with the accident employer for five months when he sustained a crush injury to his left wrist and forearm on June 25, 2002. On examination in the hospital, the specialist observed that the worker had loss of extension of the MCP joint of the long finger and second and third degree burns to the skin of the forearm. The radial and ulnar nerves were intact. The specialist diagnosed a soft tissue compression injury with loss of function of the extensor of the MCP of the long finger.

The worker's initial wage rate was based on his hourly earnings at the time of his injury, and equated to a weekly rate of \$540.80. When his long-term wage rate was calculated at the eight-week mark in the claim, the weekly rate was reduced to \$405.81. This was based on the worker's one-year pre-injury earnings of \$8,716.00 with other employers prorated over 223 days to create a rate of \$23.88 per day, in addition to earnings of \$11,183.75 with the injury employer, for a total of \$16,508.99. The worker was advised of this decision by letter dated August 26, 2002.

The worker disputed this decrease on the basis that he had been hired as a permanent, full-time employee and would not be subjected to layoffs. The employer confirmed the worker was a permanent, full-time employee in a letter dated August 16, 2002.

A client services manager reviewed the long-term wage rate, and determined the case manager did not err in law and policy. The manager noted that it could be argued the worker had a fixed change in his employment and therefore the three months prior earnings could be used to determine the wage rate. She concluded that this would not be an accurate representation of his longer term earning pattern, as the industry was subject to periodic layoffs from March to November. The worker was advised by decision dated September 17, 2002 that the wage rate would not be altered. The letter did not advise the worker that this decision could be appealed.

Hand surgeon Dr. Goetz assessed the worker on July 5, 2002. He believed the worker had a muscle injury, likely a tear in the extensor surface of his forearm resulting in injury to the extensor digitorum communis (EDC), and possibly the posterior interosseous nerve. The extensor pollicis longus and the first extensor compartment muscles and extensor digiti quinti were functioning well.

On September 5, 2002 Dr. Goetz again assessed the worker and recommended physiotherapy to strengthen and stretch his wrist and fingers. He believed the worker had a muscle injury that would continue to improve with time but would never completely resolve, and a possible posterior interosseous nerve palsy of the recurrent

branch of the interosseous nerve. He advised against surgery, as there was a considerable chance it would worsen rather than improve the worker's injuries. He believed the worker would attain a high functional level but would have persistent deficits. He believed the worker should be able to return to work within three months.

Neurologist Dr. Sadowski assessed the worker on September 6, 2002. He believed EMG testing indicated there was partial axonal injury to the posterior interosseous nerve, as there was some evidence of denervation in the extensor digitorum communis, although there was a fair degree of integrity of the nerve supply overall.

The Board referred the worker to a hand program for physiotherapy. The worker completed the program on September 12, 2002 and was discharged as not fit to return to work. The worker reported persistent finger drop of the long finger, decreased strength and tightness of the flexor musculature. He was given a night extension splint to reduce flexor tightening of the long and ring fingers. The worker had full passive range of motion of the hand and wrist, and active range of motion was within functional limits, with the exception of the long finger MCP, which had lag of approximately 40 degrees and the ring finger, which had lag of 25 to 30 degrees. The worker was considered unable to return to work due to physical limitations of finger drop, decreased strength condition and partial nerve damage to the radial nerve in the proximal forearm. He was discharged to a home therapy program due to his intention to relocate to Newfoundland.

Dr. Goetz reassessed the worker on September 25, 2002. He continued to suspect the worker had denervation of the EDC in isolation, in the recurrent branch of the posterior interosseous nerve, and muscle damage in and of itself. He believed the weakness in the EDC would be permanent but the worker would return to work.

The worker moved to Newfoundland and the Board contracted service providers in his community for further assessments.

A progress report completed by the worker's new physician, Dr. Van der Merwe, on November 15, 2002 indicated "my opinion is suitable recovery in time to resume normal work." He recommended the worker continue with physiotherapy until his hand was strong and functional. He observed normal flexion and extension of the wrist, but the worker's fingers were not extending despite lack of injury to the tendons. The worker's left hand grip was weak. Dr. Van der Merwe believed the worker would be disabled for two to three months, depending upon the results of the physiotherapy.

A report from the physiotherapist treating the worker on December 6, 2002 indicated the worker's grip strength was 120 kilograms on the right and 40 kilograms on the left. He believed the worker was capable of light duties. He noted the worker's left elbow extension was limited due to contracture.

A Board medical advisor provided an opinion on December 17, 2002 that the worker would likely have reached maximal medical recovery by the end of the year. He did not

anticipate the worker would be precluded from his pre-injury work by the permanent impairment.

The case manager spoke to the employer on January 14, 2003, who advised it was not possible to accommodate a graduated return to work or light duties for the worker.

On February 12, 2003 Dr. Van der Merwe observed the worker had good flexion and extension of the wrist, but was displaying moderate shortening of the forearm flexor tendons. He recommended referral to a specialist regarding this problem.

A functional capacity evaluation of the worker was prepared by an independent contractor on March 4, 2003. The worker participated in a 4.5 hour assessment to determine if he could return to his pre-injury position. The *National Occupational Classifications* (NOC) guidelines rated the worker's occupation as medium strength, handling loads between 10 to 20 kilograms. The worker described his job duties as standing to operate the machinery, and only lifting or carrying if the wood was crossways or jammed in the machine, when he would reposition the wood. This lumber was 6 by 6 inches and 8 to 13 foot lengths.

The evaluator observed the worker exerted full effort on all testing. He could not lift from waist to shoulder height with his left arm and had decreased fine motor dexterity and muscle fatigue in the left hand. He met all other functional requirements and did not require rest periods. The evaluator believed the worker would benefit from a six-week easeback program to his position as a stacker, to increase his left hand function and decrease muscle fatigue, increase his work tolerance, and increase his tolerance for unilateral lifting from waist to shoulder. The evaluator concluded the worker was able to work at light to medium strength, lifting and carrying 35 pounds on a minor basis. The job demands of a stacker were sedentary to light strength. The worker did not meet the left hand function and lifting requirements of his pre-injury employment. The evaluator believed the worker could tolerate an eight-hour workday as he demonstrated full effort and his subjective pain reports were considered reliable.

At the functional capacity evaluation, the worker's wrist extension on the left was observed to be 50 degrees in active motion, with the second, third and fourth fingers flexed approximately 20 degrees at the MCP. In passive movement he was capable of 70 degrees of extension, with pain. The worker's radial deviation in the left was 20 to 30 degrees less than normal. His ulnar deviation was 10 degrees less than normal.

This assessment and a copy of the worker's job duties were provided to an occupational therapist with a Back in Motion program in B.C. to prepare a job demands analysis. This report, dated March 10, 2003, observed the worker's duties required bilateral upper extremity downward pushing to keep the pieces of wood in position while he operated the foot pedal to move the aligned pieces onto the stack, approximately once every 20 seconds. The worker's hands would be positioned flat on the boards with his wrists in extension. He had to occasionally push to ensure pieces of wood were properly aligned

on the top of the stack, which placed his hands with the wrists in extension, at shoulder level.

The occupational therapist concluded that Dr. Goetz' September 2002 report, indicating the worker had loss of left long and ring finger extension particularly with his wrist in extension, meant the worker's barriers to returning to performing full duties were downward forceful pushing with his left hand flat on the board to stabilize it, and occasional left hand bilateral power gripping and vice gripping for handling and repositioning misaligned/fallen pieces of wood.

A team meeting was held at the Board on April 10, 2003 and the team determined the worker was fit to return to work at his pre-injury employment, although he may have a small permanent functional impairment. He had reached maximal medical recovery as more than six weeks had passed since the easeback program was recommended.

The case manager advised the worker by letter dated April 11, 2003 that his wage loss benefits would conclude on April 20, 2003. The case manager determined the worker's position as a stacker was sedentary to light strength in nature, and the worker was capable of work in this category. The case manager referenced the decision of the Board medical advisor that the worker could return to his pre-injury position after a six-week easeback program, and more than six weeks had passed since the evaluation. Therefore the worker's wage loss benefits would be concluded as of April 20, 2003.

The worker requested a review of this decision by the Board's Review Division. The decision was upheld by a review officer on December 8, 2003 in *Review Division Decision #5471*. The review officer determined he did not have authority to consider whether the worker should be retrained as his representative had requested.

Orthopedic surgeon Dr. Grover assessed the worker on June 10, 2003 and advised the Board that the worker was making satisfactory progress and was continuing physiotherapy. He believed the worker had no neurovascular problems and his EMG was normal. He believed the worker would be ready to return to work in another eight to ten weeks.

In a consultation report to the worker's physician prepared on the same date, Dr. Grover indicated the worker's grip strength was 60 kilograms on the right side and 32 kilograms on the left side. He otherwise had normal hand function. He had prescribed a pressure garment for the worker's contracture. He had strongly urged the worker to return to normal work as soon as possible.

The worker reportedly had EMG testing in May 2003 that found no evidence of mononeuropathy or other focal neuropathy in the left arm but these results were not contained on the Board file.

A contracted physician in Newfoundland conducted a permanent functional impairment evaluation of the worker on behalf of the Board in August 2003. In his report dated September 9, 2003, the physician concluded that there was no extension strength deficit or any restriction of movement of the worker's MP joints. The worker reported pain in the wrist and forearm on the left side, particularly in the radial aspect of the wrist. His pain was aggravated by lifting, pushing, shoving or carrying, and he also had difficulty opening things. The worker's extension and flexion of the left wrist was limited in the terminal 12 to 15 degrees of range. Pronation and supination were full. Left-sided grip strength was "definitely decreased when compared to the right." The left mid-forearm muscles were half an inch smaller than their counterparts on the right. There was diminished sensation over the mid-finger of the left hand, particularly on the dorsal side. The worker had full range of movement of his fingers and thumbs in flexion and extension, and there was no wasting of the thenar, hypothenar or interossei muscle of the left hand.

A Board disability awards medical advisor (DAMA) reviewed this report and provided an opinion in a memo dated October 7, 2003 that, as no mention was made of restricted radial or ulnar deviation, he assumed these movements were normal. He recommended using normal default values for right wrist flexion and extension and subtracting 12 to 15 degrees for these measurements on the left side. Although there was no measurement for the weakened left hand grip strength, the DAMA noted the worker had volar scarring in the distal forearm and may have sustained some muscular injury. He therefore assessed the residual weakness to equate to 2% of total disability. He did not think the diminished dorsal sensation in the left middle finger warranted an award.

The DAO assessed the worker's pension on October 22, 2003. She accepted the opinion of the DAMA regarding the lack of restriction in pronation or supination, and calculated the 12 to 15 degrees of limitation in extension and flexion to equal 1.51%. In addition, although not referenced in the memo entry, the DAO's worksheet indicated an additional 0.96% for ulnar deviation, for a total of 2.47%. Including the 2% for loss of grip strength recommended by the DAMA, the worker's functional award equated to 4.47%.

The wage rate was based on earnings of \$1,763.34 per month, and the pension was effective April 21, 2003.

The DAO determined a loss of earnings award was not applicable as the worker could return to his pre-injury earning capacity.

The worker was advised by letter dated October 24, 2003 that his pension was awarded on a loss of function basis, and he was paid a lump sum amount of \$14,394.15.

The worker requested a review of this decision. A review officer confirmed the decision of the Board on April 5, 2004 in *Review Division Decision #10762*.

Submissions

On January 7, 2004 the worker's representative submitted a letter in support of the worker's appeal of the termination of his wage loss benefits. She noted the worker had loss of grip strength, inability to lift with the left hand and poor coordination; extension of the left wrist was restricted and painful, and there was decreased extension of his elbow. His position as a stacker required the worker to push down on wood bilaterally once every 20 seconds. The worker advised that repositioning the wood could be quite frequent when the boards were large, not an occasional task as indicated in the job demands analysis. The worker's representative included a report from the worker's physiotherapist dated November 10, 2003. She noted the physiotherapist confirmed the worker's symptoms had not changed since May 2003. The worker's representative argued that it was not possible for the worker to return to work in his pre-injury position.

On June 8, 2004 the worker's representative submitted a letter from the worker's physiotherapist dated May 31, 2004. This letter was based on an examination on May 23, 2004. The physiotherapist observed considerable wasting (1 inch) of the forearm musculature. The range of motion at the worker's wrist showed 60 to 65 degrees of active and passive range of motion in extension, with the wrist within normal limits for flexion. He measured the worker's elbow as minus 10 degrees of full extension and flexion. The worker's grip strength was 54, 50 and 49 kilograms on the right and 22, 20 and 30 kilograms on the left. He believed the worker had objective limitation in his strength and motion that warranted further investigation and/or rehabilitation.

The worker's representative submitted a letter dated September 8, 2004 in support of the worker's permanent functional impairment appeal. She noted the restrictions in range of motion observed at the functional capacity evaluation. She drew attention to the significant differences between the reports of the permanent functional impairment evaluation, the functional capacity evaluation, and the physiotherapist.

Findings and Reasons

Regarding the first issue under appeal - the conclusion of the worker's wage loss benefits - the relevant policy is set out in item #34.50 of the RSCM I. The policy directs that in accordance with section 29(1) of the Act, wage loss benefits are payable so long as a worker is temporarily totally disabled. When the temporary disability becomes partial, disappears entirely or stabilizes, these benefits are no longer payable. The concept of medical plateau or stabilizing is set out at policy #34.54 of the RSCM I. In summary, the policy states that if the medical condition is likely to resolve relatively quickly (i.e. within one year) it is temporary and the worker remains on wage loss benefits. If there is no potential for significant change within 12 months, the condition is plateaued or permanent, and wage loss benefits are no longer payable. The worker is

then assessed for a pension based on the degree of disability, effective the date of plateau.

It is not uncommon for workers to equate the term medical plateau with full recovery, and dispute they have reached medical plateau when they continue to experience symptoms or permanent functional impairment. However, the policy is clear that the initial injury may become partial, stabilize, or disappear entirely.

I find that the medical evidence on file, from physicians in B.C. as well as Newfoundland, supports a conclusion that the worker was no longer temporarily disabled after April 20, 2003. When Dr. Grover assessed the worker in June 2003, his findings were not significantly different than those of Dr. Goetz in September 2002. Aside from the contracture that he prescribed a pressure garment for, Dr. Grover observed normal hand function and reduced grip strength, and encouraged the worker to return to work as soon as possible.

The review officer concluded that the issue of vocational rehabilitation or retraining was not before him to consider as it was not addressed in the decision letter under review. However, I find the initial question of whether the worker was fit to return to his pre-injury employment is an issue before me, as it was referenced by the case manager in the decision letter as part of the explanation for the termination of benefits.

I reach a different conclusion regarding the worker's ability to return to his pre-injury employment. The job demands analysis report indicated the worker's barriers to returning to work as a stacker related to the finger drop in his third and fourth fingers. In particular, these barriers were downward forceful pushing with his left hand flat on the board to stabilize it, which was performed once every 20 seconds, and occasional left hand bilateral power gripping and vice gripping for handling and repositioning misaligned/fallen pieces of wood. The employer indicated to the Board that no modified or light duties were available for the worker. The final report of the functional capacity evaluation did not address or refer to the barriers identified in the job demands analysis in any way. The report placed emphasis on the worker's ability to sit and stand for extended periods and the sedentary/light strength components of his position in determining he was fit to return to work. It did not provide analysis of how he could perform the lifting and pressing components of his job, which were repetitive and not insignificant, in my opinion. The report noted that the worker did not meet the left hand function and lifting requirements of his pre-injury employment, but did not explain how he could then continue to meet his job demands. I consider the barriers identified in the job demands analysis to be more significant in terms of the worker's ability to safely return to this particular position.

I find therefore that the worker was not fit to return to his pre-injury employment at the time his wage loss benefits were concluded. I allow the appeal, in part. The file is returned to the Board for determination of entitlement to any further benefits arising from this decision.

Regarding this worker's permanent partial disability award, I will first consider the pension wage rate. I refer to section 33(1) of the former provisions of the Act, which required the average earnings and earning capacity of a worker at the time of injury be calculated on the basis of prior earnings, "or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the Board best to represent the actual loss of earnings suffered by the worker by reason of the injury...."

Policy #67.20 of the RSCM I establishes that at the eight-week point in a claim, the Board officer determined what earnings rate best represented the long-term earnings loss suffered by the worker as a result of the injury. Normally the one-year average earnings prior to the date of injury were used. In some instances, the three-month average prior to the injury may be used, however this was limited to situations where there was a relatively fixed change in the worker's earning pattern that was deemed likely to continue. Generally the eight-week rate would be utilized for the pension, but an officer in Disability Awards could use a separate rate if the situation warranted.

Policy #68.00 of the RSCM I establishes that the pension is normally based on the earnings rate, but a different rate can be utilized if there are valid reasons. The policy goes on to advise that a provisional rate or class average may be applied in suitable cases.

The worker was previously employed in construction, in particular roofing, in the Maritimes. His low earnings during this period indicate significant periods of unemployment, although he also advised the Board that he could not obtain all of his earnings records for this period and it was unclear from the evidence whether the worker had additional earnings that were not reflected.

He relocated to B.C. in early 2002 and found a new occupation with the injury employer. The worker was only 24 years old when he sustained his injury. The employer confirmed in writing that the worker was hired as a permanent, full-time employee and had become a valuable member of the construction team.

I find, therefore, that the worker had experienced a fixed change in his employment pattern in the months before his injury. I also find the wage rate, based on his one-year pre-injury earnings, is not a fair reflection of his lost earning capacity, due to the short period of time he was with the employer. I find the worker's wage rate should be based on the class average for full-time millworkers in 2002. The Board is directed to recalculate the worker's wage rate for pension purposes based on this information.

Section 23(1) of the Act provides that where an injury results in an impairment in earning capacity, the worker is entitled to a pension based on either 75 or 90%, depending on the injury date, of the estimated loss of average earnings resulting, and this is payable for life. This is commonly referred to as the "functional award."

Regarding the percentage of total disability awarded, I note that a percentage of 0.96% was awarded for limited ulnar deviation of the worker's wrist, despite the DAMA's comment that this motion appeared to be normal. The functional capacity evaluation results showed normal flexion and extension, and abnormal radial and ulnar deviation. The DAO did not provide any explanation as to why the ulnar deviation was included in the calculations but not radial deviation, or what measurements the calculation was based on. I am led to conclude that this percentage may have been included in error.

The medical evidence on file is contradictory regarding the worker's limitations in range of motion. In particular, I note Dr. Goetz commented on long and ring finger lag that he expected would be permanent. However, at the permanent functional impairment evaluation in August 2003, the examining physician found the worker's fingers to have normal movement. This is not consistent with the functional capacity evaluation only a few months before, or the observations of the worker's physiotherapist. The assessment of the permanent functional impairment provider was not as detailed as those normally produced when a worker is assessed by or for the Board in B.C. In particular, no range of motion tests using a goniometer were documented, nor objective strength tests.

The functional capacity evaluation testing indicated the worker exerted maximum effort and the results of the testing were considered reliable. The worker has not been diagnosed with chronic pain syndrome, nor is there any documentation regarding exaggerated pain behaviours contained on file. I therefore consider the inconsistencies more a matter of documentation, or lack thereof, and varying testing and measurement styles than changes in the worker's performance. However, I also consider the medical information too disparate to make a final conclusion on the worker's permanent disability award.

I therefore vary the pension decision, to the extent of finding that the range of motion measurements utilized were not valid and need to be re-assessed by an independent provider. In particular, range of motion in both of the worker's wrist movements should be objectively measured in all planes. In addition, range of motion in the third and fourth fingers in the worker's left hand should be objectively measured. If the worker continues to have lag or tendon contracture in those fingers, an additional award may be warranted.

I prefer the findings of Dr. Sadowski that the worker had a partial axonal injury to the posterior interosseous nerve, although there was a fair degree of integrity in the nerve supply overall. This was consistent with the medical opinions on file regarding the worker's reported and observed symptoms. This information should be included as part of the second evaluation and in the consideration of any additional entitlement.

Finally, the DAO awarded an additional 2% for loss of grip strength in the worker's left hand. There are consistent comments on file that this is reduced for the worker and

results from damage to the muscle in the forearm. I find this award was therefore appropriate.

Regarding the effective date of the worker's permanent partial disability award, as I have found he was at a medical plateau and no longer temporarily disabled as of April 20, 2003, the appropriate date for the permanent partial disability award was the day following, April 21, 2003.

As I have found the worker was not able to return to his pre-injury position, and the functional award requires re-calculation, I make no finding regarding the worker's entitlement to a loss of earnings award as this will also now have to be considered again by the Board.

I allow the worker's appeal, in part.

Conclusion

I vary the decision of the Board set out in *Review Division Decision #5471* dated December 8, 2003. I find the worker was at a medical plateau as of April 20, 2003 and no longer entitled to temporary wage loss benefits. I also find that the worker was not fit to return to his pre-injury employment due to the identified barriers resulting from his injury.

I vary the decision of the Board set out in *Review Division Decision #10762* dated April 5, 2004. I find the worker's wage rate for pension purposes should be based on the class-average for full-time millworkers in 2002.

I also find the calculated award of 2.47% for objective findings was invalid for the reasons set out on pages 15 and 16 of this decision. I find that the measurements utilized for the functional award were unreliable and direct that the worker be re-examined, preferably with ARCON AIRS or a similar equipment and protocols if possible and the results of that testing be utilized for his assessment. The worker's functional award should be re-calculated based on the results of that examination.

I find the 2% award for loss of grip strength was appropriate.

As I have found the worker was not fit to return to his pre-injury employment, the decision regarding his entitlement to a loss of earnings award must also be reconsidered by the Board.

Finally, the worker's representative has requested decisions regarding the worker's entitlement to benefits for impairment in his left elbow. As this has not been considered in the first instance by the Board, this is not part of the issue before me. The worker may therefore wish to request the Board issue a decision on whether his elbow complaints are a compensable consequence of his initial injury.

The worker did not request any reimbursement for expenses related to participating in the appeal, and none are awarded.

Sherryl Yeager
Vice Chair

SY/jd/dw