

**Noteworthy Decision Summary**

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**Decision:** WCAT-2005-03239      **Panel:** Marguerite Mousseau      **Decision Date:** June 22, 2005

***Chronic Pain – Disproportionate Specific Chronic Pain – Pain Increased by Work – Pain Increased since Permanent Functional Impairment Assessment – Policy Item #39.02 of the Rehabilitation and Services Claims Manual, Volume II***

This decision is noteworthy as an example of the application of the chronic pain policy found at policy item #39.02 of the *Rehabilitation and Services Claims Manual, Volume II* (RSCM II) in cases involving workers with specific chronic pain. In particular, it addresses the issue of whether specific chronic pain which is aggravated by work is sufficiently disproportionate to the associated physical impairment so as to create entitlement to an award for chronic pain.

In this case, the worker injured his neck and shoulder. The Board awarded him a permanent disability award on a functional impairment basis, but did not grant a chronic pain award because some of the reduced range of motion on which the functional award was based was thought likely to be due to pain. The Review Division confirmed the Board decision and the worker appealed to WCAT on that issue, among others.

Considering the medical evidence on the whole, the WCAT panel found that the worker could expect some degree of pain even when not working and, if he works, he could expect anything from some pain to intolerable pain. The question was whether pain of this magnitude is “specific chronic pain that is disproportionate to the associated objective physical ... impairment” as required by the policy on chronic pain.

The levels of pain which were experienced by the worker at the time of the decision were considerably greater than his expressed levels of pain at his permanent functional impairment assessment. Those levels of pain were considered by the Board to be proportionate to his objective physical impairment. The pain experienced by the worker at the time of the decision was a result of the interaction between his objective physical impairment and work which aggravated the area of the injury. It had been decided that the worker was able to perform this work, but the effect of his performing this work was a greatly increased level of pain which he would not otherwise have. Although the Board medical advisor anticipated that the worker could develop “intolerable” levels of pain, this was not and could not be reflected in his permanent functional impairment assessment. In the panel’s view, the worker’s functional impairment award reflected the level of pain that is proportionate to his physical impairment but it did not reflect, nor did it compensate for, the level of pain that the worker had as a result of attempting to work.

In the result, the WCAT panel determined that the worker was entitled to an award for chronic pain under item #39.02. His permanent disability award was increased by 2.5%. The panel found that the worker’s specific chronic pain was disproportionate to his objective physical impairment.

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## Introduction

The worker appeals decisions of a review officer of the Workers' Compensation Board (Board) set out in *Review Reference #19712*, dated November 18, 2004. The review officer confirmed the Board decisions regarding the worker's permanent partial disability award.

The worker is self-employed. He is unrepresented on this appeal although he was represented by legal counsel on his request for review by the Review Division. In his notice of appeal to the Workers' Compensation Appeal Tribunal (WCAT), the worker requested that his appeal proceed by "fast track - read and review". He later contacted the WCAT registry to find out when he would have his oral hearing.

Item 8.90 of the *Manual of Rules of Practice and Procedure* provides that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based, and credibility is not an issue. I have reviewed the issues, evidence and submissions on the worker's file in light of these criteria and have concluded that this appeal may be determined without an oral hearing. I also note that there is a comprehensive submission from the lawyer who represented the worker on the Review Division request, which I have considered in addressing the worker's appeal as well as the worker's letter to WCAT, dated June 15, 2005.

WCAT has jurisdiction to consider this appeal under section 239(1) of the *Workers Compensation Act* (Act) as an appeal from a final decision made by a review officer under section 96.2 of the Act.

## Issue(s)

The issue on this appeal is whether the worker's permanent disability award is consistent with the evidence, law and policy: whether the percentage of permanent functional impairment, reflects the worker's level of impairment including the worker's impairment due to pain; and, whether the worker is entitled to an assessment for a loss of earnings pension.

The worker also disputes the wage rate upon which his permanent disability award is based. WCAT does not have jurisdiction over this wage rate for the same reason that the Review Division does not have jurisdiction. This wage rate was set as of the 10<sup>th</sup> week that the worker was in receipt of wage loss benefits as required by section 33.1(1) and (2). It was not appealed at that time and there is no authority for

reviewing or appealing that wage rate at a later time, when it becomes apparent that the worker is left with a permanent disability.

## **Background**

The worker was a self-employed heavy equipment operator. On January 10, 2003 he fell backwards off of his backhoe, a distance of about 6 feet to the ground, injuring his left neck and shoulder. He was 61 years old at the time. He returned to work on May 3, 2003 but had to stop working again as of June 25, 2003 because of increasing pain.

A series of investigations followed including consultations with specialists and an x-ray on January 10, 2003, a CT scan on June 12, 2003, and an MRI on June 17, 2003. Dr. Gittens, neurosurgeon, examined the worker and reviewed the various imaging results on July 24, 2004. He thought that the worker had likely suffered a fracture subluxation of his cervical spine and a rotator injury from a blow to the back, left side of the head. This had caused both the fracture and the facet joint subluxation. A follow-up x-ray was taken on July 28, 2003 and Dr. Fisher, orthopaedic surgeon, saw the worker on October 29, 2004. He requested a follow-up CT scan which was taken on October 29, 2003 and Dr. Fisher saw the worker again on November 24, 2003 after reviewing all of the imaging results.

A Board medical advisor (BMA) had asked Dr. Fisher for an opinion as to whether there was evidence of instability in the worker's spine that would place him at risk of further displacement if he returned to work at a job that involved constant neck rotation, flexion and extension and which exposed the worker to continuous jarring and vibration.

In his report of November 24, 2003 Dr. Fisher said that the worker had a C6-7 fracture subluxation which appeared to have healed. On the left side the facet joint had fused in the subluxed position and there may also have been a fracture on the right side which also appeared to be healed. Dr. Fisher did not recommend surgery since the likelihood of improvement was low and there was a greater risk of injury to the spinal cord than if things were left alone.

He advised the worker to gradually return to normal activities. He would get some stiffness and soreness from time to time since he had suffered a very significant injury and his energy requirements and likelihood of pain doing his pre-injury activities would be higher. He said the worker would have to work at a slower pace and not take on quite as much in a day. Dr. Fisher thought the worker would improve as he became reconditioned but he would continue to be susceptible to neck discomfort.

On December 2, 2003 the worker's physician submitted a progress report saying that the worker had pain at the extremes of flexion and extension and lateral rotation. He also said that the worker's jobs involved a fair amount of bouncing around and a lot of physical exertion and that the worker could not do a graduated return to work; he could

either take on a job and do it or pass on the contract. He thought the worker should be off work for another three months of home exercise.

A team meeting was held on December 4, 2003 and the case manager reported the BMA as having provided opinions that the worker had reached his maximum medical recovery, he had a permanent condition and there was no medical restriction to returning to his pre-injury employment. The BMA had also stated though that the worker had limitations, in keeping with his injury, which would not improve with time; the worker would have pain with frequent head movement and with bouncing and jarring.

The case manager issued a decision to the worker dated December 5, 2003 in which she informed the worker that he had a permanent condition. As a result, he was no longer entitled to wage loss benefits but he would be referred to the Disability Awards Department for a permanent functional impairment assessment.

Of greater significance for his pension decision though, the case manager also communicated her decision that the worker had no physical restrictions precluding him from returning to his pre-injury employment and, as a result, he would not be referred to the Vocational Rehabilitation Department. The worker did not request a review of this decision.

After this decision was issued the BMA corrected/clarified the statement attributed to him by the case manager. He said that stating there were no medical "restrictions" to the worker returning to work meant only that "there is no absolute medical contraindication to return to his employment." The BMA went on to say, "Given the significant pathology in his cervical spine however it is quite conceivable that he will develop intolerable pain if he returns to work requiring frequent head rotation, and which subjects him to vibration, bouncing and jarring."

The worker was referred to Functional Abilities & Impairment Rating Assessment Centres Inc. (FAIR) for a functional impairment assessment, which was conducted on February 26, 2004. I note that the referral memo to FAIR requests that the worker be assessed for neck and left shoulder impairment. The FAIR report notes this request and states that the worker has informed the clinician that he experienced symptoms only on the right side. The FAIR report addresses the worker's impairment due to a loss of range of motion in the cervical spine. There was no assessment conducted of either of the worker's shoulders.

With regard to his cervical spine, the worker had a reduced range of motion in all planes except flexion. The impairment due to the reduced range of motion was calculated at 9.10% of a totally disabled person based on the application of the Permanent Disability Evaluation Schedule (PDES) which has been in effect since August 1, 2003.

In a decision letter dated April 20, 2004 the disability awards officer (DAO) informed the worker that he was entitled to a permanent disability award based on a permanent

functional impairment of 9.10% plus 1.55% for age adaptability. The worker would receive \$106.50 per month. This award was considered appropriate compensation for the estimated impairment of earning capacity, which means that the worker was not entitled to an assessment of whether he had sustained a loss of earnings.

The final medical report on the worker's file is a report from his physician, dated May 5, 2004. The physician states that the worker is having ongoing problems with his cervical spine. He can work about an hour without having to take a break. The worker has a lot of pain, especially on the right side, opposite C4-7 and pain and spasms in his trapezius muscles. The worker has had to significantly cut back on his work and he has trouble running any machine that vibrates.

The worker requested a review of the decision regarding his permanent disability award. The decision was confirmed by the Review Division and the worker now appeals the Review Division decision to WCAT.

### **Applicable Law and Policy**

The date of injury is January 10, 2003. As such, the worker's entitlement to a permanent disability award is adjudicated based on the provisions of the Act after the amendments made by the *Workers Compensation Amendment Act, 2002* (Bill 49), which were effective June 30, 2002. Applicable published policy is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

The worker's permanent disability award was based on the application of the PDES, which is a rating schedule compiled under section 23(2) of the Act. Section 239(2)(c) of the Act provides that WCAT has no jurisdiction to address a decision respecting the application of rating schedules compiled under section 23(2) "where the specified range of impairment has not range or has a range that does not exceed 5%."

In considering this section, WCAT panels have taken different approaches to the interpretation of that restriction on jurisdiction with respect to impairment of the spine. I have reviewed 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. As such, I have concluded that WCAT has jurisdiction in respect of the Board's decision respecting the application of the PDES in this case.

### **Reasons and Decision**

In his notice of appeal to WCAT the worker states that he feels his pension is inadequate. He cannot cut his lawn “in one go”, sit upright in a chair or do any heavy lifting and he cannot live on \$106.00 per month.

There are a number of factors which affect the amount of money awarded to the worker as a permanent disability award. One of the more significant factors is the decision that he was able to return to his regular employment as a heavy equipment operator. This decision, which is dated December 5, 2003, has not been appealed. Since it has been decided that the worker is able to return to his pre-injury work, there is no basis for a loss of earnings assessment.

In addition, the wage rate used for calculating the worker’s pension amount was decided once he had received wage loss benefits for a ten week period. It does not appear that a decision letter was sent to the worker informing him of this new, long-term wage rate and his right to appeal that. However, the Act and the policies do not provide the authority for using a different wage rate for his permanent disability award. Accordingly, WCAT does not have the jurisdiction to address the worker’s wage rate.

Another decision which affects the worker’s permanent disability award is the percentage of impairment caused by the compensable injury. The question is whether the percentage of permanent functional impairment reflects the worker’s impairment of earning capacity due to his permanent impairment.

On this point, as I have noted above, there has been no assessment of the impairment of the worker’s right shoulder. The medical evidence does not appear to reveal any impairment of range of motion of the right shoulder; however, this matter requires investigation and adjudication.

Turning to the percentage impairment of 9.10% for the reduced range of motion of the cervical spine, I have found no error in the calculations and there is no conflicting medical evidence to the effect that the objective impairment is greater than was measured by FAIR. Accordingly, there is no basis for altering this percentage.

With regard to the effects of the worker’s pain, the DAO referred to policy at item #39.10 of the RSCM II which states that “additional factors” may be considered when deciding the degree of functional impairment where the award is based on the PDES. It appears though, from her subsequent comments, that she was applying policy at item #39.02 of the RSCM II which deals with chronic pain.

The DAO did not consider the worker entitled to an additional amount for subjective symptoms because some of the reduced range of motion would likely be due to pain. I also note that the Additional Factors Outline does not include factors related to impairment of the cervical spine. Accordingly, I agree that there is no basis for increasing the worker’s permanent functional award under policy item #39.10.

I have also considered whether the worker is entitled to an award for chronic pain, which was addressed by the Review Division. I accept that the worker develops significant pain when he tries to operate heavy equipment but this is not, in itself, sufficient for an award for chronic pain. An award for chronic pain is only granted where the pain is of such a nature that it satisfies the requirements under policy item #39.02.

The worker's pain complaints fall into the category of "specific chronic pain," which is pain with clear medical causation or reason, such as pain that is associated with a permanent partial or total physical disability.

Policy item #39.02 states that a worker with specific chronic pain that is consistent with the impairment is not entitled to an additional award for chronic pain. Pain is considered to be consistent with the associated compensable impairment where the pain is limited to the area of the impairment, or medical evidence indicates that the pain is an anticipated consequence of the physical or psychological impairment. In these cases, an additional award for the specific chronic pain will not be provided, as it would result in the worker being compensated twice for the impact of the pain.

According to the policy, pain is considered to be disproportionate where it is generalized rather than limited to the area of the impairment or the extent of the pain is greater than that expected from the impairment.

In this case, the worker would be entitled to an award for chronic pain only if his pain "is disproportionate to the associated objective physical ... impairment".

In determining whether the worker's level of pain was disproportionate, I have reviewed the medical evidence at the time of his functional impairment assessment and subsequent to that.

It is unclear how much work the worker was undertaking at the time of his permanent functional impairment evaluation on February 26, 2004. According to his physician, he was attempting to work but was limited in the amount of work he could perform. The FAIR report states that the worker reported significant symptoms with most activities. He reported aching in the cervical spine which occurred while he was sitting and aching in the right shoulder which was intermittent. The permanent functional impairment physician reported that the worker's range of motion was consistent with the provided diagnosis. Generally, it is recognized that an injury which results in permanent objective impairment will be associated with some degree of pain. The percentage of impairment calculated by using the PDES is intended to reflect that and, as I've previously indicated, it appears that at the time the worker was assessed his level of pain was consistent with his level of objective impairment. Accordingly, his level of pain was appropriately compensated by the 9.10% award.

However, it was also anticipated at that time that if the worker returned to fairly regular employment as a heavy equipment operator, his level of pain would increase. The

medical opinion evidence differed as to how much pain would be associated with returning to work. According to Dr. Fisher, the worker had an increased likelihood of having neck pain but he should be able to work if he worked at a slower pace and did not take on quite as much in a day.

The BMA, on the other hand, opined that, based on the “significant pathology” in the worker’s cervical spine, the worker could conceivably develop intolerable pain if he returned to work that required frequent head rotation and involved exposure to vibration, bouncing and jarring.

The more recent progress report submitted by the worker’s physician indicates that the worker’s level of pain after returning to work is at significant levels and accompanied by muscle spasm. The level of pain appears more consistent with the BMA’s predictions.

The question is whether pain of this magnitude is “specific chronic pain that is disproportionate to the associated objective physical ... impairment” as required by the policy on chronic pain. Considering the medical evidence on the whole, it appears that the worker can expect some degree of pain even when not working and, if he works, he can expect anything from some pain (according to Dr. Fisher) to intolerable pain (according to the BMA).

The levels of pain which are now experienced by the worker are considerably greater than his expressed levels of pain at his permanent functional impairment assessment. Those levels of pain were considered to be proportionate to his objective physical impairment. The pain now experienced by the worker is a result of the interaction between his objective physical impairment and work which aggravates his area of injury. It has been decided that the worker is able to perform this work, but the effect of his performing this work is a greatly increased level of pain which he would not otherwise have. Although the BMA anticipated that the worker could develop “intolerable” levels of pain, this was not and could not be reflected in his permanent functional impairment assessment. In my view, the 9.10% impairment reflects the level of pain that is proportionate to his physical impairment but it does not reflect, nor does it compensate for, the level of pain that the worker now has as a result of attempting to work. I consider that the worker’s specific chronic pain is disproportionate to his objective physical impairment and he is entitled to an additional 2.5% for chronic pain under policy item #39.02.

## Conclusion

I vary *Review Reference #19712*, dated November 18, 2004. The worker is entitled to an assessment to determine whether he has a permanent impairment of the right shoulder. The worker is entitled to an award for chronic pain under policy item #39.02. His permanent disability award is increased by 2.5%.





Marguerite Mousseau  
Vice Chair

MM/gw