Noteworthy Decision Summary

Decision: WCAT-2005-05460 **Panel**: Elaine Murray **Decision Date:** October 17, 2005

Permanent disability award – Loss of earnings – Worker's ability to continue in occupation or similar occupation – Medical restrictions – National Occupational Categories – Section 23(3) of the Workers Compensation Act – Item #40.00[1] of the Rehabilitation Services and Claims Manual, Volume II – Practice Directive #46

This decision is noteworthy for its discussion of the evidentiary foundation required to determine whether a worker is eligible for a loss of earnings assessment under section 23(3) of the *Workers Compensation Act* (Act).

The worker, a truck driver/delivery person, injured his back. The Workers Compensation Board (Board) accepted his claim for an L5-S1 disc herniation and awarded him a permanent disability award (PDA) of 3.52%. However, the Board declined to assess the worker for a loss of earnings PDA under section 23(3) of the Act. The worker requested a review by the Review Division of the Workers Compensation Board, which confirmed the decision. The worker appealed to WCAT.

The panel noted that item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* creates a two-tiered process by which the Board first determines whether a worker meets the criteria to be assessed under section 23(3), followed by the actual assessment. Item #40.00 further states that the worker must no longer be able to perform the essential skills needed to continue in the previous employment. The panel also noted that Board Practice Directive #46, which elaborates on the criteria under item #40.00, provides that skills are not to be confused with physical demands.

The panel noted the worker's restrictions included bending, twisting, and exposure to vibration. The worker was also advised to avoid static, prolonged positions of standing or sitting. The panel further noted that after the Board decides a worker cannot return to his or her pre-injury job, it generally convenes a "section 23(3) meeting" to address the criteria in item #40.00 and Practice Directive #46. In this case, the disability awards officer had concluded the worker could return to his pre-injury job. However, the vocational rehabilitation consultant did not consider the worker capable of returning to his job. The panel concluded the worker was unable to return to his pre-injury job as it required him to perform heavy lifting and required prolonged sitting.

The panel noted that Practice Directive #46 suggests that where a worker is unable to return to his or her pre-injury job, the Board should determine whether the worker is able to work in a "similar occupation". This is defined as an occupation in which the first three digits of the National Occupational Categories (NOC) code are the same as those of the worker's pre-injury occupational code. In this case, as a section 23(3) meeting did not occur, the Board had not

[1] This decision is noteworthy for the points discussed in this summary but should be viewed with some caution as policy item #40.00 was significantly amended on April 26, 2012. Click here for more information.

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considered what NOC code captured the worker's occupation at the time of the injury, what essential skills were required, and what modifications, if any, might be necessary.

The panel allowed the worker's appeal. The panel directed the Board to conduct further investigation and render a new decision on the worker's eligibility for a section 23(3) assessment.

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Panel: Elaine Murray, Vice Chair

Introduction

On October 18, 2002, the then 46-year-old worker injured his low back while in the course of his duties as a truck driver/delivery person. The Workers' Compensation Board (Board) initially accepted the worker's claim for a low back strain, but later accepted it for an L5-S1 disc herniation and resulting surgery.

The Board paid the worker temporary disability benefits until April 11, 2004, followed by payment of wage loss equivalent vocational rehabilitation benefits until June 6, 2004. The Board also referred the worker's claim to the Disability Awards Department to assess any entitlement to a permanent partial disability (PPD) award that he might have.

By decision dated July 26, 2004, a disability awards officer (DAO) informed the worker that he was entitled to a PPD award of 3.52% of total disability (3.45% for loss of range of lumbar motion, along with an age adaptability factor of 0.07%), effective April 12, 2004. The DAO also concluded that the worker was not eligible for assessment of his PPD award on a loss of earnings basis.

The worker submitted a request for review of the July 26, 2004 decision to the Review Division. By decision dated March 2, 2005, a review officer confirmed the Board's decision. The worker now appeals the March 2, 2005 decision to the Workers' Compensation Appeal Tribunal (WCAT).

The employer filed a notice of participation, but did not appear at the oral hearing, which was held on August 18, 2005. The worker and his representative, Mr. Jarmson, attended the hearing.

Mr. Jarmson seeks an increase in the worker's PPD award to recognize his chronic pain. He is also pursuing payment of the worker's PPD award on a loss of earnings basis.

Preliminary Matters

In her May 14, 2004 referral (form 22) to the Disability Awards Department, the case manager noted that the worker's claim was accepted for the following permanent conditions:

> Low back strain, temporary aggravation of pre-existing DDD (degenerative disc disease), L5-S1 disc herniation, and left leg symptoms.

The case manager also noted that the worker's claim was not accepted for pre-existing DDD. She did not address the worker's pain complaints.

During the hearing, Mr. Jarmson and I discussed WCAT's jurisdiction concerning a PPD award for the worker's pain, and the nature of the aggravation of the pre-existing degenerative changes in the worker's lumbar spine.

Chronic pain

One of the worker's main complaints since he was injured is his low back and left leg pain. The case manager never adjudicated whether or not the worker has chronic pain and, if so, whether it should be assessed as a permanent condition.

Although the case manager did not indicate in the referral form to the DAO whether or not chronic pain was a permanent condition, the DAO addressed it in the form 24 (which forms part of the July 26, 2004 decision). The DAO concluded that the worker had subjective complaints of pain, but considered that they were not disproportionate to the associated objective findings. He decided that the worker was not entitled to an additional award for his pain.

The review officer concluded that he did not have jurisdiction to address any entitlement that the worker may have to an award for chronic pain, since the case manager had neither accepted nor rejected that condition under the worker's claim, as required by Board policy items #96.20 and #96.30 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). These policies were amended as of July 2, 2004 and apply to all decisions on or after that date, including appellate decisions. The review officer informed the worker that he could pursue an award for chronic pain directly with the Board and, if found to be a permanent condition, a further referral to the Disability Awards Department would be made.

During the hearing, I advised Mr. Jarmson that the decision under appeal might not provide me with jurisdiction over any potential award for chronic pain, since the DAO did not follow RSCM II policy item #96.30. It reads, in part, as follows:

> Where the Board officer has accepted an actual or potential permanent disability, Board officers in Disability Awards then decide the extent of the disability and calculate the worker's permanent disability award entitlement. Board officers in Disability Awards must accept the final decision of the Board officer as to what conditions are accepted under the claim. The Board officer is required to outline the decision in a memo when referring the claim to the Disability Awards Department.

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I recognize, however, that it was the Board's practice at the time of the referral to Disability Awards (in May 2004) that the officers in Disability Awards would address a worker's pain without the necessity of the Board officer accepting it as permanent condition. Nevertheless, the policy in RSCM II item #96.30 was binding on the DAO (at the time of the July 26, 2004 decision), and he did not ask the Board officer to first address chronic pain before rendering his decision. I suggested to Mr. Jarmson that I could ask the Board under section 246(3) of the *Workers Compensation Act* (Act) to determine whether chronic pain was a permanent compensable consequence of the worker's injuries and, thus, assume jurisdiction over this matter. Mr. Jarmson agreed with my suggestion.

Upon reflection after the hearing, I noted RSCM II policy item #2.20, which provides as follows:

> References to business processes that appear in policies are only applicable under section 99(2) [and also 250(2)] of the *Act* in decision-making to the extent that they are necessary to comply with the rules of natural justice and procedural fairness. The term "business processes" for this purpose refers to the manner in which the Board conducts its operations. These business processes are not intrinsic to the substantive decisions required by the *Act* and the policies.

For purposes of this claim (where the referral to the Disability Awards Department was made prior to July 2, 2004 and the DAO addressed chronic pain as a permanent condition), I consider that the requirement in RSCM II policy item #96.30 for the Board officer to first accept pain as a permanent condition before the DAO can address it to be a business process, as set out in RSCM II policy item #2.20. Thus, I find that I have jurisdiction over the chronic pain issue, and do not need to refer the matter back to the Board under section 246(3) of the Act.

I informed Mr. Jarmson after the hearing that I was assuming jurisdiction over the chronic pain issue, and invited post-hearing submissions from him. He provided a September 28, 2005 submission.

Aggravation of degenerative disc disease

Mr. Jarmson submits that the work injury resulted in the worker sustaining a permanent aggravation of a pre-existing condition. The Board has yet to adjudicate whether there has been a permanent aggravation of the worker's degenerative lumbar disc disease. The Board's file shows in a March 27, 2003 claim log entry that the worker's claim is accepted for a temporary aggravation of his pre-existing degenerative disease; however, this decision has never been communicated to the worker. Mr. Jarmson would like this "loose end" tidied up. I said at the hearing that I would also consider

whether this is a matter that should be referred back to the Board under section 246(3) of the Act.

The decision before me deals solely with the worker's pensionable condition as of June 2004. I do not consider it necessary for purposes of this appeal to have the Board determine whether there has been a permanent aggravation of the worker's degenerative lumbar disc disease. The permanent functional impairment (PFI) assessment took into consideration any measurable impairment in the worker's lumbar spine, regardless of the cause, along with any subjective complaints. In other words, even if the Board had accepted the worker's claim for a permanent aggravation of pre-existing degenerative lumbar disc disease, I do not consider that it would have an impact on the PFI assessment done in June 2004.

I have decided that it is not necessary for me to rely on section 246(3) of the Act in this matter. Nevertheless, it remains open to the worker to ask the Board to provide him with an appealable decision concerning whether he sustained an aggravation of any pre-existing condition and, if so, whether it is a temporary or permanent aggravation.

Issue(s)

Does the worker's 3.45% of total PPD award appropriately reflect the impairment of earning capacity due to his permanent conditions?

Is the worker entitled to a loss of earnings assessment under section 23(3) of the Act?

Jurisdiction

This is an appeal of a Review Division decision pursuant to subsection 239(1) of the Act.

Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, it must apply a policy of the Board's 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 and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

The worker's compensable injury occurred after the June 30, 2002 effective date of the amendments to the Act made by the *Workers Compensation Amendment Act, 2002* (Bill 49). The law that applies to this appeal is that in effect after the amendments made by Bill 49. Policy applicable to this appeal is found in the RSCM II.

Section 239(2)(c) of the Act provides that a decision of the Review Division may not be appealed to WCAT where it concerns the application under section 23(1) of the Act of rating schedules compiled under section 23(2) of the Act, where the specified percentage of impairment has no range or has a range that does not exceed 5%. The Permanent Disability Evaluation Schedule (PDES), as it read on and after August 1, 2003, is a rating schedule compiled under section 23(2) of the Act, and was used in determining the worker's PPD entitlement.

In considering whether I have jurisdiction to address the range of motion aspect of the worker's section 23(1) award, I have reviewed the analysis of jurisdiction provided in *WCAT Decision #2004-02317*. In that decision, the vice chair concluded that, for the purposes of section 239(2)(c) of the Act, the range of specified percentages of impairment in the lumbar spine is 0% to 24%. I agree with the vice chair's analysis and find that the global assessment of lumbar range of motion should be considered for the purposes of section 239(2)(c). Accordingly, I conclude that I have jurisdiction to consider the worker's appeal concerning the award provided under section 23(1) of the Act in relation to his lumbar range of motion.

Background and Evidence

On October 18, 2002, the worker was moving a 40 to 50 pound television in an awkward manner when he experienced right-sided low back pain. He later developed left-sided leg pain. He was eventually diagnosed with a moderate-sized posterocentral L5-S1 disc herniation, which impinged on the thecal sac and the left S1 nerve root. He underwent surgery (a bilateral L5-S1 discectomy) on June 11, 2003.

During an initial vocational assessment on July 4, 2003, the worker said that he was still taking narcotic medications for his pain. He explained that his pre-injury job involved delivering furniture and appliances. He and a partner would do the driving, along with the loading and unloading of the various items. They did not have any mechanical devices to assist them with lifting.

During the hearing, the worker described his job as very strenuous and heavy. He had been with the accident employer since May 2001. Prior to that, he had worked as a courier driver for five years, a casino gaming representative for two years, a labourer/driver for a roofing company, and a log scaler. He had also owned his own taxi company from 1984 to 1988. The vocational rehabilitation consultant (VRC) noted that heavy labour was a necessary component of his pre-injury job. She thought that his back injury might preclude him from performing that work.

In a July 4, 2003 claim log entry, the VRC noted that the worker had strong transferable skills and a low wage rate (approximately $11.30 gross per hour).

On August 14, 2003, Dr. Gittens, a neurosurgeon at the Board's Visiting Specialists Clinic (VSC), reported that the worker had about 50 to 60% reduction in his midline lower back pain after surgery, but since then he had bilateral pain extending across the iliac crest, along with intermittent calf pain, which was severe at times, but of short duration. On examination, the worker had painful range of lumbar motion, no significant muscle wasting, well-preserved reflexes, and no sensory loss.

Dr. Gittens wrote that it was difficult to relate the worker's pain to lumbar disc pathology. He thought that it might be the result of localized tenderness and trigger points, but could also be related to other pathology. In Dr. Gittens' opinion, there was good clinical evidence that the lumbar discectomy was successful in relieving the compromise of the S1 nerve root. As a result, he did not think that the worker's current symptoms reflected any ongoing significant compromise of the SI nerve root. He recommended a further MRI, bone scans, and possible trigger point injections.

An August 23, 2003 MRI revealed post-surgical granulation tissue on the left at L5-S1. Mild bilateral facet osteoarthritis was also present at that level. A mild L4-5 disc bulge was also shown. A September 25, 2003 bone scan did not reveal anything of significance.

On November 13, 2003, Dr. Gittens noted that the MRI did not show any evidence of a recurrence of the L5-S1 disc herniation. He also noted that the disc bulge at L4-5 was of no clinical significance. He did not think that the worker had any significant pathology related to lumbar disc problems, and suggested that he proceed with rehabilitation, which might include trigger point injections and pain management techniques.

The worker began an occupational rehabilitation program 2 (OR2) on December 4, 2003, which was suspended from December 12, 2003 until February 16, 2004 while the worker was treated for an unrelated medical condition.

Upon discharge from the OR2 on March 26, 2004, the OR2 staff reported that the worker continued to have reduced lumbar range of motion. He demonstrated 5/5 strength with manual muscle testing to both lower extremities. He had normal neurological findings.

The OR2 staff discharged the worker as fit to return to work "with limitations". They thought that he could perform his pre-injury duties, but only at modified hours (they did not indicate how many hours he could work). Upon testing, the worker was able to complete job demands within the "lower heavy strength" category. The OR2 staff also thought that the worker's sitting tolerance of approximately 60 minutes posed a barrier to a return to truck driving.

On March 26, 2004, the employer told the VRC that she did not have any appropriate work for the worker.

An April 4, 2004 x-ray revealed narrowing at L4-5 and L5-S1, with no evidence of fracture or malalignment. There was fairly prominent posterior osteophyte formation at L5-S1.

By decision dated April 7, 2004, the case manager informed the worker that his claim was accepted for a low back strain "with a L3-4 disc herniation" and left leg symptoms. (I accept that the case manager meant to accept the claim for a herniation at L5-S1, and not at L3-4). She also informed the worker that his condition had reached a plateau on April 11, 2004, and he would be referred for vocational rehabilitation assistance, since he was "not able to fulfill his pre-injury employment" and his employer could not accommodate him.

By decision dated April 14, 2004, the VRC informed the worker that he was not considered to be capable of returning to his pre-injury job, since it required heavy lifting. He could, however, perform work in the Medium to heavy strength category. The VRC noted that the worker had previously driven a taxi and managed a taxi company. He thought that those occupations remained suitable for the worker, and offered vocational rehabilitation assistance to find a job.

On May 4, 2004, the worker told the VRC that he had a few job leads. He had also spoken to a couple of cab drivers, but did not think that he could "make any real money at this".

At a May 14, 2004 team meeting, Dr. B, another Board medical advisor, confirmed that the worker had restrictions for bending, twisting, and exposure to vibration. Dr. B also advised that the worker was not to be in static, prolonged positions of standing or sitting. Dr. B thought that he should be restricted to Medium strength work, as per the Canadian Classification Dictionary of Occupations (CCDO).

In a May 28, 2004 claim log entry, the case manager noted that, at the request of a claims adjudicator in disability awards (CADA), she had reviewed the worker's file. She then wrote that "[t]here is no indication the worker cannot return to his pre-injury job of driving truck. This would not be considered impossible therefore there is no need for a Sec. 23 meeting."

In a June 1, 2004 claim log entry, the CADA referenced the case manager's May 28, 2004 claim log entry, and concluded that the worker was "able to perform the essential skills of the (pre-injury) occupation, and his circumstances would not be considered so exceptional as to warrant consideration under section 23(3) of the Act."

In a June 2, 2004 recommendation for expenditure, the VRC noted the case manager's May 28, 2004 "opinion". The VRC disagreed with the case manager. He indicated that he did not consider the worker capable of returning to his pre-injury job, since it required

heavy to very heavy lifting of appliances, and Dr. B had restricted the worker to Medium strength work.

The worker attended a PFI evaluation on June 23, 2004, with a Board-approved external service provider (ESP). The worker reported that his main complaint was performing any activities for a prolonged period of time. In particular, he described dull aching and sharp pain in his lumbar spine and buttocks, which was aggravated by prolonged sitting and standing. In a functional tolerance chart, which was based on the worker's evidence during the evaluation, the worker noted that his sitting/driving tolerance was one hour.

The PFI clinician thought that the worker demonstrated objective signs of effort throughout the evaluation. The physician associated with the ESP, Dr. Khunkhun, thought that the worker's range of motion findings were likely reliable, and consistent with his diagnosis.

The worker's excised disc was assessed at 2.0% of total impairment. This was compared to his range of motion measurements, which revealed loss of flexion (49 degrees compared to the norm of 60 degrees), and extension (16 degrees compared to the norm of 25 degrees). Based on the Board's computer generated system of impairment ratings, this amounted to 3.45% of total disability (1.65% for reduced flexion and 1.80% for reduced extension).

In her July 20, 2004 form 24, the DAO noted that the loss of range of motion of the lumbar spine was greater than the impairment for the one level discectomy. The DAO accepted that the range of motion demonstrated at the PFI evaluation was representative of the worker's permanent impairment, and was properly calculated at 3.45% of total disability. In addition, the DAO concluded that there were no additional factors to warrant a further award, since the worker demonstrated normal strength, sensation, and reflexes upon discharge from the OR2 in March 2004.

The DAO then considered the worker's ongoing complaints of pain, and concluded that they "were not disproportionate to the associated objective findings." As a result, the DAO decided a separate award was not warranted for the worker's pain complaints.

Finally, the DAO concluded that the worker was not entitled to a section 23(3) assessment, since the case manager indicated that the worker was capable of returning to his pre-injury employment.

A July 30, 2004 CT scan revealed a central disc herniation at L5-S1, which mildly to moderately impinge upon the thecal sac. The nerve roots exited unimpeded. There was very minor facet sclerosis and bony overgrowth present.

On September 15, 2004, Mr. Jarmson asked the DAO whether the worker's PFI would be reassessed, given the recent CT scan. The DAO noted that there would not likely be any basis for the case manager to make a re-referral to disability awards at that time.

On December 13, 2004, Dr. Locht, an orthopaedic surgeon, reported that the worker's flexion was 50% of normal, but he did not have any neurological signs or amplified pain behaviours. He noted that the July 30, 2004 CT scan described L5-S1 tissue, which was impinging on the thecal sac. In Dr. Locht's opinion, the worker had chronic lumbar degenerative disc disease, which was previously asymptomatic. This indicated to Dr. Locht that the worker's degenerative disc disease had been enhanced by the October 2002 injury. Dr. Locht then diagnosed the worker as suffering from "Failed Back Syndrome". He thought that epidural scarring might be contributing to his pain generation, as well as an enhancement of his central pain perception pathways, including the dorsal root ganglion, which was often implicated in "Failed Back Syndrome". Dr. Locht recommended medication, exercise, and a trial of epidural steroids.

In the decision under appeal, the review officer made the following findings:

- He did not have jurisdiction to address chronic pain.

- The terms of acceptance of the worker's claim related back condition was not before him on the review.

- There would be no change to the calculation of the worker's measurable functional impairment.

- The worker retained the essential skills of his pre-injury "occupation". As a result, he was not entitled to an assessment for a loss of earnings award.

During the hearing, the worker said that he continues to use Demerol and Valium for his back pain, but only when it is "excruciating", since he tries to avoid using medication. His pain increases with activity and has increased over time. He feels that it is now no better than when he was first injured.

The worker has not yet found a job. He said that most of his pre-injury employment involved heavy labouring and/or driving, which he cannot manage. He is presently doing volunteer driving of cancer patients. This requires him to drive one and one-half hours each way, with a two to three hour break in between. He said that he must take a ten minute break from driving every 60 to 90 minutes to ease his pain and continue driving.

The worker also said that he had been at a loss about what to do until he attended a career decision-making program, which led him to consider obtaining his real estate licence. He hopes that the Board will sponsor his training.

Reasons and Findings

Mr. Jarmson does not take issue with the effective date of the PPD award or the calculation of the age adaptability factor. I see no error in those aspects of the decision.

Section 23(1) of the Act provides that the physical impairment method, which results in an award being based on a percentage of disability, is the mandatory method for assessing permanent partial disability.

RSCM II policy item #39.00 states that the percentage of disability determined under section 23(1) reflects the extent to which a particular injury is likely to impair a worker's ability to earn in the future. The section 23(1) award reflects such factors as reduced prospects of promotion, restrictions in future employment, reduced capacity to compete in the labour market, variations in the labour market, and short-term fluctuations in the compensable condition.

Lumbar range of motion

With respect to any measurable impairment under the PDES, Dr. Khunkhun found that the worker's lumbar range of motion was impaired. Based on his findings, the Board granted the worker an award under section 23(1) of the Act in the amount of 3.45% of total disability (plus 0.07% for age adaptability).

Policy item #97.40 of the RSCM II provides that the reports of the ESP are to be considered "expert evidence" and the "primary input" in the assessment of the worker's PFI, and this evidence should not be disregarded without other evidence to the contrary.

No medical evidence or opinion has been provided that challenges the results of the PFI evaluation concerning the worker's lumbar range of motion. I have examined the whole of the medical evidence, with particular attention to the findings in the PFI evaluation report. I find no error in the assessment of the worker's impaired range of lumbar motion at 3.45% of total disability, and accept that it was properly calculated based on the Board's computerized impairment rating system. I deny this aspect of the worker's appeal.

Chronic pain

Awards for subjective complaints of pain and chronic pain are governed by Board policy and are not scheduled awards within the Board's PDES.

Policy item #39.02 of the RSCM II sets out detailed guidelines and definitions for the assessment of section 23(1) awards for chronic, disabling pain. The DAO decided that the worker's subjective complaints were not disproportionate to his range of motion impairment findings and did not grant an additional award for chronic pain.

The evidence establishes that the worker has had ongoing low back pain since his injury, along with iliac crest pain since his surgery. His main complaint at the PFI evaluation was the constant aching in his low back and buttocks, which was aggravated by sitting and standing. The evidence also establishes that the worker did not have any significant back problems prior to the October 2002 injury. He was involved in a very strenuous job, without apparent problem, until the incident in October 2002. I find that the weight of the evidence establishes that the worker has chronic pain, and that his ongoing low back and buttock pain is a permanent compensable consequence of his claim injury, as was accepted by the DAO.

Under RSCM II policy item #39.02, I must determine if the worker's permanent pain complaints fall into the category of specific or non-specific chronic pain. The former is defined as pain with clear medical causation or reason, such as pain associated with a permanent disability The latter is defined as pain that exists without clear medical causation or reason.

In August 2003, Dr. Gittens reported that he was unable to explain the worker's ongoing pain, since the surgery had been successful. Subsequent to the worker's PFI assessment, a July 30, 2004 MRI revealed a disc herniation at L5-S1. The worker said at the hearing that he has not been offered any specific treatment for this herniation. While the Board has yet to adjudicate whether there has been a recurrence of the worker's injury, Dr. Locht offered his impression in December 2004 that the worker's pain might be caused from epidural scarring and enhancement of his central pain pathways, which is often implicated in "Failed Back Syndrome". Dr. Locht also thought that the worker may have permanently aggravated his degenerative disc disease in October 2002.

Dr. Locht's opinion provides several possible causes of the worker's ongoing pain. In addition, I am mindful that the worker sustained a significant low back injury, which resulted in surgery. I am satisfied that there is sufficient evidence of clear medical causation or reason for the worker's pain, (although the exact diagnosis remains uncertain), so as to find that he has specific chronic pain under item #39.02 of the RSCM II. Accordingly, I find that the worker's ongoing pain is properly characterized as specific chronic pain.

A worker may have specific chronic pain, which is either consistent with or disproportionate to the injury. It is only in the latter case that a separate section 23(1) award for chronic pain will be granted to the worker. In such a case, the policy provides for an award of 2.5% of total disability.

According to the policy, specific chronic pain is considered to be disproportionate when the extent of the pain is greater than that expected from the objective physical impairment.

As to whether the extent of the worker's pain is greater than that expected from the impairment, I have considered the medical reports in order to determine whether the worker has a disproportionate degree of pain.

Dr. Gittens reported on August 13, 2003 that it was difficult to relate the worker's pain to any lumbar disc pathology. His opinion did not change after reviewing the August 23, 2003 MRI and the September 25, 2003 bone scan. In my view, Dr. Gittens' opinion suggests that the worker is experiencing pain beyond what would be expected, given the worker's objective impairment. Dr. Gittens recommended that the worker be referred to learn pain management techniques. This also suggests that the worker's pain may be disproportionate to his injury.

In addition, Dr. Locht's opinion suggests that the worker's impaired range of motion does not entirely explain his ongoing back pain. It is his impression that the worker's pain may be caused by epidural scarring and enhancement of his central pain pathways.

On review of all of the evidence, I am satisfied that the worker's pain is disproportionate to his objective impairment. It meets the criteria for a chronic pain award under item #39.02 of the RSCM II. I find that the worker is entitled to an additional PPD award of 2.5% of total disability with respect to his chronic pain.

Loss of earnings

Sections 23(3), (3.1) and (3.2) of the Act provide that a worker is only entitled to a loss of earnings pension if the Board determines that the combined effect of his pre-injury occupation and his compensable disability is "so exceptional" that the section 23(1) award does not appropriately compensate him for the injury. In making this determination, the Board must consider the worker's ability to continue in his pre-injury occupation or to adapt to another suitable occupation.

On the other hand, section 23(1) of the Act provides for a functional award that is estimated by the nature and degree of the injury. RSCM II policy item #38.00 provides that the section 23(1) assessment is mandatory, whereas the section 23(3) assessment is discretionary and only undertaken in exceptional cases. Policy provides that

generally the effect of a disability on a worker will be appropriately compensated under section 23(1) of the Act. In other words, in only rare cases will a worker be entitled to an assessment under section 23(3) of the Act for a potential loss of earnings award.

The DAO concluded (and the review officer agreed) that the worker's circumstances were not so exceptional as to warrant an assessment under the loss of earnings method. The worker disagrees. He has not yet been able to find suitable employment, within his restrictions.

RSCM II policy item #40.00 states that while a worker may suffer a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under sections 23(3) and (3.1) of the Act. The policy sets out the following threshold criteria which must be satisfied in order for a worker to be assessed under section 23(3) of the Act:

- The injury occupation requires specific skills which are essential to that occupation or an occupation of a similar type or nature. The policy defines "occupation" broadly, as a collection of jobs/employments that are characterized by a similarity of skills. "Skills" are defined as the learned application of knowledge and abilities;

- As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the injury occupation or an occupation of a similar type or nature; and

- The effect of the disability is that the worker is unable to work in his occupation or an occupation of a similar nature or to adapt to another suitable occupation, without incurring a significant loss of earnings. This determination includes consideration of both the worker's transferable skills and his post-injury functional abilities.

The policy goes on to state that in the vast majority of cases, a worker's entitlement to a PPD award is determined under the section 23(1) method, and this estimate of impairment of earning capacity is considered appropriate compensation. In exceptional cases, however, the section 23(1) award may not appropriately compensate a worker where medical evidence establishes that the injury makes it "impossible" for him to continue in the injury occupation or a similar occupation, and he is unable to adapt to another suitable occupation without incurring a significant loss of earnings.

The Board's policy involves a two-step process. The first step is outlined above and involves a determination whether a worker meets the threshold criteria to be eligible for an assessment under section 23(3) of the Act. If the worker satisfies those criteria, the second step is an actual section 23(3) assessment. This decision addresses only the first step.

The DAO concluded that the worker could return to his pre-injury job. The VRC disagreed. I concur with the VRC that the worker could not return to his pre-injury job, given that he was restricted to Medium strength lifting and was to avoid prolonged sitting. His pre-injury job required him to perform Heavy strength lifting, and also required prolonged sitting.

But the fact that the worker cannot return to the one specific job does not mean that he meets the "so exceptional" test in section 23(3.1) of the Act. The Board must consider whether the worker was capable of returning to his pre-injury "occupation", in the broad sense of the word, or to a similar type of occupation or another suitable occupation, without incurring a significant loss of earnings, as set out in the policy in item #40.00 of the RSCM II. In this case, the worker's pre-injury occupation was as a truck driver. He has not returned to that occupation, and does not believe that he can, given his accepted restrictions for sitting.

As further noted in the Board's policy, the mere existence of an actual loss of earnings beyond that recognized by the functional award is not sufficient, in and of itself, to create entitlement to a loss of earnings award under the "so exceptional" provision contained in section 23(3.1) of the Act. The circumstances must satisfy the three criteria set out in the policy in item #40.00 of the RSCM II.

Given the conclusion of the DAO that the worker could have returned to his pre-injury job without suffering any loss of earnings, the Board did not conduct any further investigation into the worker's circumstances with respect to the criteria in RSCM II policy item #40.00.

Generally, when it is determined that a worker cannot return to his or her pre-injury job, the Board will convene a "section 23(3) meeting" where a VRC, a DAO, and others will address the criteria in RSCM II policy item #40.00. Generally, they will consider Practice Directive #46, which provides guidance to adjudicators in determining whether a worker may be entitled to a section 23(3) award. Practice directives are issued to assist Board staff and external parties in interpreting and applying the Act, regulations, and policies; they are not published policy.

Practice Directive #46 elaborates on the criteria under policy item #40.00 of the RSCM II. The Practice Directive suggests that the worker's occupation at the time of injury should be identified in terms of the four digit (unit group) code in the National Occupational Categories (NOC). A "similar occupation" should be defined as one where the first three digits of the NOC code (minor group) are the same as the worker's pre-injury occupational code. It is only where a worker is considered unable to perform any one or more of the jobs in the four digit occupational code or the three digit code group that the worker may meet the "so exceptional" test.

Practice Directive #46 states that the medical evidence must confirm that the disability makes it impossible to perform the essential skills of the occupation. It further states that skills are "not to be confused with physical demands" such as standing and sitting. If the physical demands can be mitigated by workplace modifications, then the worker would still be able to perform the essential skills of the occupation.

If the worker is considered to meet the "so exceptional" test, the worker will be entitled to a section 23(3) assessment, which includes an employability assessment.

Since a section 23(3) meeting did not occur, there is no evidence on file from the Board concerning what NOC code captured the worker's occupation at the time of the injury, what essential skills were required, and what modifications, if any, might be necessary.

In light of my finding that the worker's restrictions precluded him from returning to his pre-injury job and he is currently experiencing a loss of earnings, further investigation is required to make a reasoned decision on whether the worker meets the threshold criteria for consideration of an award under section 23(3) of the Act. The Board has not yet had an opportunity to conduct that investigation.

Although the criteria for a loss of earnings award under the new legislation and policy are very restrictive, an adequate evidentiary foundation is still necessary in order for a WCAT panel to determine whether or not the criteria have been met in an individual case. I recognize that the worker is seeking a final determination of his pension entitlement through the appeal system, but I do not have the necessary evidence before me to make that final determination.

Accordingly, I direct the Board to conduct this investigation and to render a new decision regarding any entitlement that the worker may have to an assessment under section 23(3) of the Act. The Board may wish to consider the provision of vocational rehabilitation assistance as part of its inquiry into the worker's residual employability, prior to rendering a further decision on the worker's entitlement, if any, to a section 23(3) assessment.

I allow this aspect of the worker's appeal to the extent that I direct the Board to render a new decision on the loss of earnings issue, given my findings:

(1) the worker's compensable injuries precluded him from returning to his pre-injury job when his condition became permanent; and

(2) the worker is currently experiencing a loss of earnings that exceeds the amount recognized by the functional award alone.

Whether this situation meets the "so exceptional" criteria specified in section 23(3.1) of the Act is a matter for the Board to decide.

Conclusion

I vary the March 2, 2005 Review Division decision, and find that the worker's PPD award should be increased by 2.5% of total disability to recognize his disproportionate chronic low back pain. I also direct the Board to investigate whether the worker meets the threshold criteria under RSCM II policy item #40.00, and render a new decision regarding any entitlement that the worker may have to an assessment under section 23(3) of the Act.

The worker seeks payment of his mileage expenses to attend the oral hearing on August 18, 2005. Pursuant to section 7(1)(a) of the *Workers Compensation Act Appeal Regulation*, *B.C. Reg. 321/02*, the worker will be reimbursed for his mileage expenses from his residence to attend the oral hearing and return, in accordance with the tariff established by the Board. No other expenses were requested and none are awarded.

Elaine Murray
Vice Chair

EM/ml