Noteworthy Decision Summary

Decision: WCAT-2005-05830-RB **Panel**: Rob Kyle **Decision Date:** October 31, 2005

Compensable consequences – Depression caused by dealings with the Workers' Compensation Board – Policy Item #22.33 of Rehabilitation Services and Claims Manual, Volume I

Where the Workers' Compensation Board (Board) has acted in good faith, and the dealings between Board officers and the claimant are within the range of the norm, depression resulting from dealings with the Board is not a compensable consequence.

The worker had a complicated claim history dating back to 1989. He also had a history of depression, dating back to soon after the first injury. The worker claimed his depressive disorder was compensable because it was caused by his dealings with the Board with respect to his compensable claims.

The panel reviewed numerous appellate decisions on this topic, noting that the only time a depression was found to be compensable was when a Board officer appeared to have been reckless or negligent in dealing with the worker. In this case, the worker had a number of significant disagreements with the Board regarding decisions on a number of claims, but there were no special and exceptional circumstances that would warrant accepting the worker's depression as a compensable consequence of any of his work injuries.

This decision was subject of a reconsideration. See WCAT-2007-00024, dated January 4, 2007.

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Introduction

The worker appeals October 28, 1999, February 20, 2001, and September 20, 2001 decisions of the Workers' Compensation Board (Board). These decisions related to separate claims in 1989, 1998 and 2001, respectively. The employer at the time of the 1989 claim was a construction company that is no longer in business and there is no successor company registered with the Board. The employer for the 1998 and 2001 claims is a civic government.

The worker sustained a compensable right arm injury in 1989. The worker also sustained a compensable right hand strain while operating a jackhammer on November 19, 1998. Following the receipt of a consultation report which stated the worker's symptoms were suggestive of a major depressive disorder, the Board informed the worker in the October 28, 1999 decision that it was unlikely those symptoms were in any way related to the specifics of his right arm and right-hand injuries. The Board officer denied a reopening of either his 1989 or 1998 claim.

The February 20, 2001 decision informed the worker that his 1989 claim would not be reopened at that time because the latest medical report was two years old and was considered by the Board as insufficient to support any further action on the claim. The worker was apparently seeking a reopening for further wage loss and health care benefits because of a change in his work activities with his employer. The case manager suggested that the worker submit updated medical information for further consideration of his request.

A May 28, 2001 decision was a follow-up to the February 20, 2001 decision. By that time the worker had submitted further medical evidence, and after considering that evidence, the Board case manager was unable to conclude that the worker's condition had worsened or significantly deteriorated to a point that would warrant further benefits based on further temporary disability. She concluded the worker's then current condition fell within the normal fluctuations of his already compensated permanent partial disability.

In a March 25, 2005 submission to this panel, the worker's legal counsel stated that the worker had not appealed the May 28, 2001 decision. His legal counsel submitted that if the panel deemed it necessary to consider this letter as part of the appeal, then she

would file a request for an extension of time to appeal and seek to have this decision added to the decisions currently under appeal.

The panel will address the issue raised in the February 20, 2001 decision and by extension in the May 28, 2001 decision. It is standard practice for Workers' Compensation Appeal Tribunal (WCAT) panels to consider evidence submitted after the issuance of a decision by the Board related to that decision. While the panel does not have jurisdiction to address the May 28, 2001 decision directly, it does have jurisdiction to consider the February 20, 2001 decision and any subsequent evidence submitted related to that decision.

The September 20, 2001 decision informed the worker that his wage loss and health care benefits paid for a 2001 compensable injury would be terminated as of September 20, 2001 and that he was expected to return to light duties with his pre-injury employer as of September 21, 2001. This followed completion of a Board sponsored work-conditioning program. The case manager was aware that the worker was to be examined by an orthopedic surgeon and stated that she would review any associated examination report to determine further potential entitlement to benefits. The worker's claim had been accepted for a low back strain and left rib fracture following a workplace injury on May 22, 2001.

Legal counsel represents the worker. A compensation consultant represents the civic government employer with respect to the 1998 and 2001 claims. The employer at the time of the 1989 claim is no longer in business and was not represented.

An oral hearing was held on March 21, 2005 at the WCAT offices. In attendance were the worker, two legal counsel representing the worker, and a compensation consultant representing the civic government employer.

Issue(s)

1. Should the worker's 1989 claim be reopened for further wage loss and health care benefits as of January 2001?
2. Is the worker's diagnosed depression a compensable condition?
3. Is the worker eligible for vocational rehabilitation assistance?
4. Should the worker's permanent partial disability award be re-evaluated?
5. Is the worker entitled to an assessment for a loss of earnings pension?
6. Should the Board pay the worker's legal costs?

Jurisdiction

These appeals were filed with the Workers' Compensation Board Review Board (Review Board). On March 3, 2003, the Appeal Division and Review Board were replaced by the WCAT. As these appeals had not been considered by a Review Board

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panel before that date, they have been decided as a WCAT appeal. (See the *Worker's Compensation Amendment Act (No. 2), 2002*, section 38).

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the *Workers Compensation Act* (Act)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case.

Given the timing of the decisions under appeal, policy related to these appeals is found in *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

Background

The worker is now approximately 45 years old. At the time of the 1989 injury, the worker was employed as a stucco contractor. At the time of the 1998 and 2001 injuries, the worker was employed by a city government.

October 28, 1999 Decision

There are two accepted claims discussed in the October 28, 1999 decision under appeal here. The first is a 1989 fracture of the right radial styloid and laceration to the extensor muscles of the right elbow. On March 13, 1990, and again on March 7, 1995, the worker underwent surgery as a result of these injuries. The Board eventually awarded him a permanent partial disability pension on a functional basis.

The second occurred on November 19, 1998 when the worker sustained a right hand strain while operating a jackhammer. The Board paid wage loss benefits for several weeks and these benefits terminated upon his return to work on January 12, 1999. As noted above, the October 28, 1999 decision stated that a possible major depressive disorder was not related to either of those injuries and was not compensable under a reopening of either claim.

That October 28, 1999 decision stems in part from Dr. Nazif's July 21, 1999 psychiatric opinion, described below, and in part from the injury that occurred on November 19, 1998. The worker was apparently operating a 40 pound jackhammer for an extended period of time on that date and his right hand became swollen. The Board accepted the worker's claim; there was no protest by the employer.

Dr. Carlson, the worker's attending physician, examined the worker on November 18, 1998 (Dr. Carlson's report indicates the injury occurred on November 16, 1998.) He attributed the pain and swelling in the worker's right hand, arm and shoulder to an aggravation of his 1998 injury caused or aggravated by operating the jackhammer. He considered the worker disabled from working and likely to remain so for up to a week.

By December 3, 1998, the worker was back at work although still symptomatic. The worker apparently received wage loss benefits from November 20 to December 2, 1998 and his claim was reopened between December 11, 1998 and January 10, 1999 after which he returned to work on January 12. Dr. Carlson's January 4, 1999 physician's progress report indicated the worker had returned to his pre-injury condition.

The case manager sought and received an opinion from a Board medical advisor and the medical advisor pointed out that Dr. Nazif did not actually state the worker had a major depressive disorder, only that his symptoms were suggestive of such a disorder.

The case manager stated in the decision under appeal that it was unlikely that the symptoms suggestive of a major depressive disorder were in any way related to the worker's 1989 or 1998 claims. The case manager attributed the depression symptoms to the worker's ongoing disagreements with the Board. As such, the worker's symptoms and complex psychological problems would not be accepted as compensable. The case manager then referred to the 1998 claim that was accepted for a right hand strain because of the incident on November 19, 1998. The last medical information in the file indicated that his attending physician examined the worker on January 4, 1998 and at that time he was fit to return to his pre-injury employment.

February 20, 2001 Decision

On October 24, 1989, the worker was cleaning out a cement mixer when his shirt caught and his right arm was pulled into the mixer. The worker received immediate medical treatment at a local hospital. The employer reported that the worker sustained a broken right wrist and a significant laceration to his elbow that required 30 to 40 stitches to close. The accident employer, a construction company, did not protest acceptance of the claim.

The claim was accepted by the Board for a fracture of the radial styloid process and laceration to the extensor muscles of the right elbow. There was also an injury to the radial nerve, posterior interosseous branch. The Board accepted the worker's claim and he was paid wage loss benefits for a total of 319 days between October 25, 1989 and July 31, 1995. The initial period of wage loss ended on July 3, 1990.

The worker underwent surgery on his right wrist on March 13, 1990. The surgery was carried out by Dr. Guichon, a plastic and reconstructive surgeon.

Following that, in mid-September 1991, a Board disability awards medical advisor carried out a permanent functional impairment examination. There is no mention of any psychological conditions or concerns in the permanent partial disability examination report dated September 12, 1991. He concluded there was some slight limitation of right wrist flexion, radial deviation, ulnar deviation, supination and pronation motions.

He also had some slight weakness of the right hand grasp and of extension of the fingers of his right hand.

The Board awarded the worker a permanent functional impairment award equal to 5% of a totally disabled worker. The award was paid in a lump sum of just over $5,000.00. That award was based on some limitations of range of motion, weakness, and tenderness. There was some diminished sensation noted. The award letter is dated December 19, 1991.

Dr. Guichon examined the worker on January 16, 1992. He noted that the worker reported pain in his shoulder, arm and to a lesser extent in his neck. He also had elbow pain. The worker complained of weakness of grip and loss of power and function in his right arm and hand. On examination he found the worker to have almost normal strength on extension of the wrist and quite good strength of the common extensors of his fingers. He noted weakness in two muscle groups affecting the thumb. At that time, the worker apparently did not report any psychological symptoms.

Subsequent medical reports indicate that the worker was becoming more physically active although still experiencing pain with activity.

In November 4, 1993 findings the Review Board awarded the worker an additional 2% for his subjective pain complaints. The total award after that was 7% of a totally disabled worker. The Board did not award a loss of earnings pension and in a subsequent appeal, the Review Board panel confirmed that decision.

The Board forwarded another decision to the worker on June 3, 1994. The letter informing him that under section 23(5) of the Act, as it then was, the worker was entitled to an award of approximately $1,500.00 in recognition that disfigurement of his right arm could impair his earning capacity.

The worker sought a reopening of his claim in 1994 because of right hand problems. The worker's attending physician examined him on October 19, 1994 because of complaints of weakness of the right thumb and wrist which caused the worker to drop tools, among other things.

Dr. Guichon examined the worker on November 2, 1994. He noted the worker's hand was reasonably functional but did question whether tendon transfer surgery would improve the strength of the extensor tendons. He sought a second opinion from a Dr. Legge, a plastic and reconstructive surgeon. There is no mention of any psychological difficulties in either of these two reports produced as a result of the two examinations.

Dr. Favero, an orthopedic surgeon, examined the worker on December 8, 1994. In recording the worker's history, he makes no mention of any psychological conditions or

symptoms. Dr. Favero did agree with Dr. Guichon that tendon transfer surgery might be useful. The worker underwent that surgery on March 7, 1995.

The Board considered whether the worker's pensionable condition had deteriorated significantly. The Board concluded his condition had not significantly deteriorated and denied a reopening for the payment of further wage loss benefits. As there were no new traumatic injuries, the Board stated it would not consider a new claim. The Board forwarded a decision to that effect on December 22, 1994.

The worker sought a manager's review of that decision; this decision was issued on May 18, 1995. It noted that the worker had received wage loss and health care benefits beginning March 7, 1995 because of compensable surgery on his right thumb. The client services manager confirmed the claims adjudicator's decision and informed the worker that he was not entitled to wage loss benefits between October 6, 1994 and March 7, 1995.

File memo #43 dated June 30, 1995 describes a June 26 meeting attended by a Board hand unit physician, a Board occupational therapist, a Board vocational rehabilitation consultant and a Board claims adjudicator. Of note from that meeting is the hand unit physician's recommendation that for preventative reasons it might be prudent for the worker to avoid jack hammering in the future. The claims adjudicator stated she would contact the employer to determine their willingness to accommodate any possible permanent restrictions.

In late June 1995, the employer undertook a physical demands analysis for the worker's pre-injury position as a Labourer II. On the cover page sent to the Board, the employer's representative noted that the position could be modified within reason to meet the worker's limitations and restrictions. She used as an example an elimination of jack hammering duties. The employer noted that the worker was subject to working in extreme heat and cold, as well as extremely wet conditions. He was required to carry out significant lifting up to 50 kilogram weights. The employer described the duties as digging shafts and tunnels, installing sewer mains and connections, installing pipe and timbers, and breaking blacktop and concrete surfaces. For those duties he was required to use a jackhammer and compressor accessories.

Following the worker's surgery, he undertook a Board sponsored occupational therapy program. Upon discharge in mid-July 1995, he was considered capable of performing his regular duties, albeit with a number of restrictions. Board staff described the worker as a very hard worker, well motivated and very aggressive while conducting tasks. He apparently worked quickly and efficiently. Following that, he undertook a graduated return to work program during August 1995. Wage loss benefits were concluded on August 20. The rehabilitation center treatment team recommended that the worker's permanent functional impairment and permanent partial disability award be reassessed

in light of his then recent surgery. Following this, there was no further involvement of the Board's vocational rehabilitation department.

The Board re-evaluated the worker's permanent functional impairment in an examination on May 7, 1996. The worker reported that despite his right thumb extension improving with the surgery, he still considered himself to have an impairment of his right upper extremity. He experienced weakness and fatigue in his right hand and forearm at the end of the working day. He felt a certain amount of crepitation over the extensor tendons in the radial aspect of the right hand. The worker described cold intolerance in the right hand and aching in cold weather. The worker considered that his impairment rating should be much larger than it was and described this as the reason for his appeals and for him retaining legal counsel.

Based on objective range of motion measurements, the disability awards medical advisor concluded that the worker continued to have residual signs and symptoms in his right hand and forearm related to the injuries accepted under the claim. His then recent tendon reconstruction to his right thumb had improved his extension to some extent. There is no mention in this report of any psychological conditions or symptoms.

The Board issued its decision on a revised permanent partial disability pension on June 25, 1996. The Board increased the worker's permanent functional impairment from 7% to 9.5% of a totally disabled person. The disability awards medical advisor concluded that there was the same degree of restricted range of motion of the right wrist and right forearm affecting supination and pronation. He considered the impairment regarding the right wrist and forearm as the same as previously awarded, which was 5% of total. He did find additional measurable impairment of the right thumb which he assessed at 2.5% of total for the loss of movement and the weakness of the right thumb. This affected mainly extension and to some extent, abduction and adduction. The disability awards officer accepted the disability awards medical advisor's findings and granted an additional award of 2.5% of total for the impairment of the worker's right thumb.

The claim history following his return to work includes an evaluation for chronic right wrist pain on September 12, 1996. Dr. Favero associated his right wrist pain to his compensable right wrist fracture. While he noted that particular motions caused pain in the right wrist, he also stated that the worker reported his most significant problem with the right hand regarding the tendon transfer was using the throttle on his motorcycle. Dr. Favero told the worker that his right wrist symptoms were because of irregularities of the radial carpal joint surface because of his past intra-articular fracture. Short of fusion surgery which would cause a significant loss of wrist motion, there was nothing Dr. Favero could do to alleviate the symptoms.

A June 25, 1997 medical opinion by Dr. Carlson, the worker's attending physician, was provided at the request of the worker's then legal counsel. Dr. Carlson described the

worker as showing elements of depression and so he prescribed antidepressant medication. With respect to the worker's pain, he did not consider the worker as meeting the criteria for chronic pain syndrome. Dr. Carlson described a May 2, 1997 appointment with the worker at his office at which he described the worker as upset, frustrated and angry. The worker had apparently appealed a Board decision and had found that appeal jeopardized because his notice of appeal was apparently submitted beyond the statutory time frame. The worker had also apparently suffered some then recent financial losses. Dr. Carlson went on to state:

> [The worker], however, mentioned on that date [May 2, 1997] how his right arm disability was becoming of psychological concern as he was becoming more sensitive to its presence, and generally affected his confidence in himself. This, of course, is all easy to understand as the disability is apparent, however [the worker] has not mentioned this aspect of the injury in previous consultations. I feel pre-occupation with this however would likely be worsened during a time of depression. I feel this depressive component has not been adequately addressed, however I feel this is more of a problem of compliance.

Dr. Carlson offered to see the worker regarding these issues and stated he would forward a copy of his letter to the Board and to the worker.

Dr. Vondette, a physical medicine and rehabilitation specialist, examined the worker on March 4, 1998. In his associated March 10 consultation report, he described the worker's primary complaints as his level of pain after a day's work; his wrist, hand, elbow and forearm were reported as "quite tender." A secondary concern was poor grip strength. The worker reported numbness and/or pins and needles in the right hand particularly after a day of work. He described as very difficult operating any vibrating tools such as a chainsaw, and utilizing tools such as hammers, screwdrivers and wrenches.

Dr. Vondette noted that the worker reported he had taken "some antidepressant medication 'for awhile'" several months earlier. He recorded, with respect to depression, that the worker described his sleeping habits as "lousy" and that he felt "flat and empty." He noted that "on the other hand, [the worker] reported having 'lots' of energy" and did not tire easily.

After providing a detailed description of the worker's physical condition and of his examination, Dr. Vondette described his understanding of impairment and disability. He went on to describe the worker's limitations and described the Board's disability awards schedules as arbitrary. He concluded by stating that given the worker's occupational history and his future vocational prospects, the 9.5% permanent partial disability that had been awarded to the worker "represents a significant under-representation of his situation." He further stated, and this was referenced by the

worker's legal counsel at the oral hearing, that the worker's permanent partial disability assessment appeared to have been focused on the worker's hand and had perhaps not taken into account the impairments detected in the forearm and the shoulder.

The next medical opinion in the file, which is the opinion that led to this appeal, is Dr. Nazif's July 21, 1999 report. Dr. Nazif is a psychiatrist who examined the worker on July 19, 1999 after a referral by Dr. Carlson. On examination, the worker reported that he was anxious, depressed, tired, impatient, irritable, and lacked drive and ambition. Dr. Nazif reported a number of other symptoms. The worker reported that the condition of his right upper limb had deteriorated and he was having difficulty functioning in his physically demanding job. The worker also reported greater limitation of movement and increased pain. He further reported some labour relations issues with his work manager. Dr. Nazif reported that the worker considered his anxiety and depression symptoms to stem from early 1990. He concluded the main stressors seem to center around his 1989 work injury and his subsequent disagreements with the Board and the resulting appeals. The worker had been taking antidepressants, but had stopped about ten days prior to the examination without any change in symptoms. He concluded:

> Clinically, his symptoms are suggestive of a Major Depressive Disorder. He noted that his anxiety and depressive symptoms may go back to 1990 following a job accident in which he injured his right upper limb. … Clearly, [the worker] is presenting multiple symptoms and complex psychosocial problems, which I do not feel can be adequately handled on an office basis only. I would suggest his referral to a multidisciplinary center with a coordinated team approach [after which Dr. Nazif names a number of clinics]. The above treatment plan was discussed with [the worker] who concurred, and no further office appointments were scheduled.

There were no further medical reports until eight months later. At that time, the worker was depressed and was unable to purchase medications because of a lack of funds. His attending physician had requested a referral to a pain clinic. The case manager informed the worker that the Board would not accept responsibility for any recent diagnosis and was unable to connect or associate any of his then recent symptoms to a hand injury on November 18, 1989.

A March 28, 2001 physician's report, the last in the file, indicates the worker was having difficulty with heavy labour because of his right arm disability. Dr. Carlson noted that the worker's duties should be re-evaluated, and that if there were not alternate work available he might have to discontinue working.

The Board issued the second of the decision letters under appeal on February 20, 2001. The case manager noted that the worker had requested a meeting to discuss ongoing management of his file and was seeking a reopening of his claim for the payment of further wage loss and health care benefits. The case manager stated that a

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change in the worker's work activities had led the worker to seek such a reopening. The case manager then noted that there was no updated medical information in the file, and the last medical reports were those described above from Dr. Vondette and Dr. Nazif from 1998 and 1999, respectively. Because of the age of these medical reports, the case manager suggested the worker seek updated medical evidence, and until that occurred there would be no further action on the worker's claim. The worker's claim for the payment of further wage loss and health care benefits was denied.

An April 27, 2001 memo from the case manager to a Board medical advisor requested an opinion regarding the worker's ability to continue working with his then present medical condition. The case manager wanted to know if the worker's condition had deteriorated as compared to his condition when awarded his pension. She also wanted to know whether the worker was eligible for assistance from the vocational rehabilitation department.

Dr. Z, a Board medical advisor, responded on May 3, 2001. She provided a short history of the worker's claim and compared the objective findings obtained in the permanent functional impairment examination of May 7, 1996 and Dr. Vondette's examination of March 10, 1998. She concluded that the results of the two examinations revealed similar findings and concluded there was no significant difference in those findings between the 1996 and 1998 examinations. She further noted that the physician's progress report of March 2001 did not provide any description of objective findings.

The Board's May 28, 2001 decision was a follow-up to the February 20, 2001 decision. The case manager reviewed the claim history and noted that a Board medical advisor's comparison between strength testing in 1996 and in 1998 revealed no significant difference in the medical findings. The case manager further noted that the medical report of March 2001 from Dr. Carlson did not provide any descriptive objective findings. He stated that the worker was experiencing difficulties with heavy labour. The case manager concluded that there had been no significant deterioration of the worker's condition since the permanent functional impairment evaluation of May 7, 1996. As a result, the case manager denied the payment of further wage loss benefits based on further temporary disability. Board policy provides that further wage loss benefits may be paid in cases where the condition causing a permanent partial disability deteriorates and causes a worker temporary disability. The case manager denied a reopening of the 1989 claim.

September 20, 2001 Decision

The worker sustained an injury on May 22, 2001 that resulted in a low back strain and left rib fracture. The injury resulted after the worker hooked a chain around a 16 foot long - 2 inch by 10 inch piece of dimension lumber. The worker hooked the other end of the chain to the bucket of a backhoe and the backhoe lifted the board to pull it out of

its location. The board snapped and swung around and hit the worker in his left rib cage area.

Dr. Carlson examined the worker later that day and diagnosed a contusion of the chest wall and right shoulder and back symptoms. The chest wall contusion was later found to be a non-displaced fracture of the anterior aspect of the last 11th rib following an x-ray later on May 22. Dr. Carlson referred the worker for physiotherapy treatment.

The worker reported the injury to the Board on May 29. The employer reported the next day (May 30) and indicated it had no objection to claim acceptance. The employer wrote to the worker on June 1, 2001 and stated its commitment to assisting injured employees return to work. It offered to identify available transitional duties that would allow the worker to return to the workplace in a safe and productive manner. The employer's representative stated essentially that at the oral hearing of this appeal.

The Board referred the worker to a physiotherapy program in mid-June 2001 following consultation with Dr. Carlson.

A July 4, 2001 physician's report noted gradual improvement, although he was still not capable of returning to work.

The worker was admitted into the work conditioning program on August 1, 2001. The August 20 intermediate report found the worker reporting improvement in his right sided low back pain; this pain was still aggravated by certain activities. The intermediate report noted that lumber flexion was 80% and extension was 90%. His lower extremity flexibility and strength was improving. This report indicated the worker would require a further two weeks before returning to work as a construction worker.

The worker was discharged from the work conditioning program on September 5, 2001. While the worker reported some improvement, he was still reporting difficulties with prolonged walking, sitting, lifting and carrying. On discharge, he was cleared to return to modified work. These was to be no overhead lifting; no carrying over one shoulder; bilateral carrying at waist level was not to exceed 50 pounds; floor to waist lifting was not to exceed 50 pounds, and work involving alternating between standing, sitting and walking would be considered most beneficial.

The case manager spoke with a representative of the injury employer on September 20, 2001. The case manager was advised that there were confirmed light duties available for the worker effective September 21, 2001.

The Board issued the third and last decision under appeal here on September 20, 2001. The decision was with respect to the worker's continued entitlement to health care and wage loss benefits. The case manager noted that the worker's claim had been accepted for a low back strain and left rib fracture following the work incident

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of May 22, 2001. The case manager stated the worker had recently completed a work conditioning program, and while the program personnel had placed some restrictions on the worker's job activities, they also informed the Board that there was no objective evidence to support continued disability. The case manager also informed the worker that there was an arrangement to accommodate the worker's temporary restrictions. The worker was therefore informed that his wage loss benefits would be terminated as of September 20, 2001. He was cleared to return to light duties incorporating the restrictions from the work conditioning program treatment team.

A September 21, 2001 physician's report indicated the worker was incapable of returning to his pre-injury employment on a full-time basis and would likely remain in that state for between two and three weeks.

Dr. Chan, a neurosurgeon, examined the worker on September 25, 2001. After briefly reviewing the history and the results of his examination, he requested a CT scan of the lumbar spine because of the worker's persistent symptoms in that area. He reported that the lumbar nerve roots were functioning well. He stated that if the worker's pain improved, there was no contraindication for him attempting to return to work at least on a part-time basis and slowly advancing as tolerated. He also found no contraindication to lifting if done properly.

An October 11 physician's report recommended a graduated return to work and then return to full-time employment. He noted the worker was suffering from depression and had chronic pain features. A November 30 physician's report indicated the worker's condition was much the same as previous, and that he should only return to work on a graduated basis.

Dr. Chan examined the worker again on March 8, 2002. He noted that his condition had worsened since his previous examination. The worker's CT scan of mid-December 2001 indicated facet joint degeneration at the L4-5. There was a mild disc bulge but no herniation. There was no spinal stenosis. He stated the nerve root was functioning well and the disc bulge represented degenerative change. He recommended conservative treatment. He recommended the worker continue walking, and he noted his job entailed considerable walking.

Submissions

Worker's Submission

The worker did not provide a written submission prior to the oral hearing.

Employer's Submission

The employer did not provide a submission for these appeals.

Oral Hearing

As noted above, both the worker and the employer were represented at the oral hearing.

The worker has a grade seven education and began his career doing construction work with his father. He moved to B.C around 1988 and by 1989 was employed as a stucco contractor for a construction company.

He injured his arm in October 1989 when it became caught in a stucco mixer. He suffered lacerations and a broken wrist. The laceration was severe and damaged his lower arm. He broke his skin open. He was off work for approximately one year. After his return to work he was unable to carry out stucco work because of the severity of the injury.

He began his employment as a labourer with a city government in April 1992. The worker stated that he experienced difficulty carrying out his job tasks, which ranged from shovelling to operating chainsaws. By 1995 he had to undergo tendon transfer surgery, which was helpful. After returning to work, he was assigned to lighter construction work.

His 1998 injury occurred while he was working on a connection crew. At that time, he had work restrictions from the Board. His employer had agreed to those restrictions in part. Prior to the 1998 injury, he was assigned to operate a jackhammer and this resulted in a swollen hand. The worker testified that his doctor was surprised at the type of work he was carrying out. Following the 1998 injury, he was off for between two and three months.

On his return to work he was put back on a connection crew. This injury affected his ability to work, although he was expected to do construction work. His hand and arm were in a worse condition than they had been. The worker requested lighter duties but was apparently refused.

The May 2001 injury occurred while he was carrying out full duties as a labourer. The board that he was moving was used to stabilize the shoring in excavations. He was removing this board when it snapped and hit him with considerable force. His injuries included a fractured rib, shoulder pain and lower back pain. He was referred to a work conditioning program by the Board and was in this for two or three months. He did not return to work, as he states that the work-conditioning program personnel told him not to return.

Dr. Carlson referred him to a back specialist and he returned to work for his employer after about two or three weeks. His job duties included timing trucks and then inspecting catch basins and cleaning those basins. During this time he missed some

work because of hip and back symptoms. He experienced a daily limp, but did carry on with his job.

He was terminated from his compensation benefits and began to receive benefits from the employer's long-term disability carrier. By September 2002, the worker characterized himself as in poor condition. He tried to continue working but could not carry out a full days work.

The worker stated that he had suffered from depression since 1989. Following his 1995 surgery, his social life began to be affected. He is on antidepressant and antipsychotic medication and has lost friends because of this condition. The worker further stated that the medications have a significant impact on his personality. He described himself as having no psychological problems prior to 1989. The worker described having sleepless nights following his 2001 injury and the injury limited his activities. The worker stated that his depression was caused by his dealings with the Board and not because of his injuries.

The worker testified that the construction labouring work was the only job available with his employer for him.

Until the time of his 1995 surgery, he struggled daily with his arm and his pain was severe on some days. He stated the 1995 surgery helped somewhat with his symptoms.

The worker then referred to Dr. Vondette's 1998 report, which is described elsewhere in this decision. The worker stated that the Board only considered his hand injuries and not his whole arm. The worker stated he could not drive a truck or a motorcycle and cannot to this day.

Following the termination of the 2001 claim, the worker was provided with benefits by the employer's long-term disability carrier. Those benefits continued during his graduated return to work, as the Board provided no assistance for that. He returned to full-time duties in April 2002. He went on sick leave in September 2002 because he was having difficulties with his back, hip and arm which made it difficult to do his job.

He eventually left his employment with the city government because he could not do the work and he was very depressed. This depression started in 1989 and became more severe with each injury. After each of those injuries he was put on light duties for a period of time and then full construction labouring duties again.

Under cross-examination by the employer's representative, the worker stated that in April 1992 he was under no restrictions in his work as a construction labourer. He is still employed by the city government, but is collecting long-term disability benefits at present. The worker stated that he had relatively low seniority in his department and

there were many workers ahead of him in seniority. He stated that he had a permanent partial disability when he started with the city.

The worker stated that he did not utilize a lot of painkillers.

Following his return to work in 1998, he spent three years working on a connection crew.

Following his examination by Dr. Chan on September 25, 2001 he did not return to work, but his benefits were terminated on approximately September 20. He underwent a CT scan on December 14, 2001. His back condition is dependent on the type of activities carried out. He currently has no difficulties with his right arm. It is his back that prevents him from carrying out full activities. The worker stated that he has problems with his back three to five times per week. He is unable to afford a chiropractor.

On redirect examination by his legal counsel, the worker stated that the employer did offer employment to him, but it was only a labouring position.

In final submissions, the worker's legal counsel requested that if the panel determined that an examination by an independent health professional was required, that both parties be given an opportunity to provide submissions.

Legal counsel submits that the worker has had a sixteen year battle with the Board and should be entitled to reimbursement of legal costs. The worker has a complex medical file and the Board should become involved sooner than it did in these issues. The worker has had depression for many years and this condition is now deteriorating. He needs appropriate treatment.

The worker persevered in continuing to work with the city government despite his disability. At this point, the worker is so fragile that he cannot continue working. He seeks rectification of the present situation. The worker is now unemployable and the Board must become involved.

The worker's legal counsel stated that the panel's jurisdiction to award legal costs comes from section 99 of the Act, which states in part that the Board must make its decision based upon the "merits and justice" of the case. The Board was aware of potential repercussions from this worker's claim and should have acted, but failed to. In referring to section 7 of the *Workers Compensation Act Appeal Regulation*, the worker takes the position that this provision accounts for the availability of free representation. This is a special case, as the worker's trade union found it difficult to represent him.

With respect to section 7(2) of the above named regulation, the worker's legal counsel referred to the wording which states that the appeal tribunal "may not" order the Board

to reimburse a parties expenses. She described this as permissive wording that allows some leeway and discretion for the panel to award costs. This would provide accountability for the Board and is the right thing to do.

In her submission, the employer's representative stated that no costs should be awarded. The worker had access to the free services provided by the workers' advisers. Section 7(2) is clear that no legal expenses should be paid. Legal counsel is not required and has not resulted in a quicker appeal. There is no blatant error on the Board's part to support the payment of costs; it was the worker's choice to retain legal counsel.

With respect to the 2001 back claim, the employer supports the decisions of the Board. The representative referred the panel to Dr. Chan's September 25, 2001 report and March 8, 2002 reports, both contained in the worker submissions, which attributes the worker's back condition to degenerative change. The employer intends to seek relief of costs from the Board under section 39(1)(e) of the Act. Dr. Chan stated that the worker was able to work, although he was not 100 percent recovered. The worker was capable of returning to modified duties.

The worker's chronic pain condition is related to his low back and that is a non-compensable condition. The employer's representative again referred the panel to Dr. Chan's report. The employer submits that the worker left work in September 2002 because of chronic headaches and other non-compensable reasons. The worker's chronic pain condition has not been adjudicated by the Board and is not before the panel.

With respect to the worker's depression, this condition pre-existed the worker's 1998 injury and that injury was insignificant. The employer referred the panel to an October 12, 1999 medical opinion by Dr. Davis, a psychiatrist. This appeared at tab #7 in the worker's submissions.

The employer stated that it had work available to this worker on an ongoing basis that would accommodate his physical condition. Some of the worker's absences had more to do with labour relations issues than with his compensable injuries.

In rebuttal submissions, the worker's legal counsel stated that any comments regarding future work should be ignored. The worker's truck timing job was not always available. The work conditioning program treatment team concluded there were permanent restrictions on this worker. Legal counsel referred to Dr. Chan's September 25, 2001 opinion in which he stated the worker was asymptomatic until his 1998 injury and that he is now symptomatic.

As of September 2002, he was off work for back symptoms, depression and chronic pain. All of these conditions are compensable. Dr. Davis's opinion that was included in

the worker's submission is not in the Board's file. The worker's legal counsel submits that all of the worker's appeals should be allowed.

Further Submissions

The worker's legal counsel provided evidence in the form of four medical opinions to the panel and to the employer's representative on the date of the worker's WCAT appeal hearing. There were two medical opinions from the worker's attending physician, Dr. Carlson, and two medical opinions from Dr. Sandhu, a psychiatrist. Dr. Carlson's submissions are dated July 22, 2003 and March 15, 2005. Dr. Sandhu's opinions are dated March 9, 2005 and March 17, 2005.

At the start of the oral hearing, the employer's representative was informed that she would have an opportunity to provide further submissions regarding those medical opinions because of the timing of those submissions. She indicated at that time that she would be interested in providing a submission on these medical opinions. The employer's representative did not provide a submission following the oral hearing. At the time the panel began its deliberations on this file in early October 2005, the employer's representative was again provided with an opportunity to make a submission. Shortly thereafter, the employer's representative advised in an October 5, 2005 telephone message that there would be no further submissions regarding this appeal.

I have reviewed and considered those submissions as well as the medical documentation report dated March 18, 2005. The relevant portions of those reports are summarized in the analysis below.

Analysis

October 28, 1999 Decision - Is the worker's diagnosed depression a compensable condition?

The October 28, 1999 decision informed the worker that neither his 1989 claim nor his 1998 claim would be reopened for any consideration of symptoms suggestive of a major depressive disorder. The case manager based her decision on Dr. Nazif's July 21, 1999 medical opinion that the worker's symptoms were only suggestive of a major depressive disorder and not a determinative diagnosis of such a disorder.

The worker was also informed that no further wage loss or health care costs would be considered for either of those claims. The decision also stated that the worker would not be referred to a pain clinic. The case manager concluded that the Board was unable to find any connection or association with the injury sustained to his right hand in 1998.

Board policy on compensable psychological impairment is found in RSCM I, policy items #13.20, #22.33, and #32.10. Policy item #13.20 states that personal injury includes psychological impairment as well as physical injury. Psychological impairment may be accepted as compensable if it is a sequela to an accepted personal injury or occupational disease.

Policy item #22.33 states that psychological conditions arising from a physical or psychological injury are acceptable as compensable consequences of an injury. This policy requires that there be evidence that a worker is psychologically disabled. Such a disability cannot be assumed because a worker has unexplained subjective complaints or has difficulty in psychologically or emotionally adjusting to physical limitations resulting from the injury. Policy item #32.10 states that while the Board does accept claims for personal injury where the injury consists of a psychological condition or is a compensable consequence of a physical injury, the Board has not recognized any psychological or emotional conditions as occupational diseases related to employment.

The worker is claiming that his major depressive disorder can be primarily attributed to his dealings with the Board. There are a line of decisions both from the Workers Compensation Board Appeal Division and the Workers' Compensation Appeal Tribunal that address the issue of the compensability of psychological conditions arising from a worker's dealings with the Board. I have considered *Appeal Division Decision #2000-2036* and *WCAT Decisions #2003-02912, #2003-03406, #2004-02059, #2004-04247, #2004-06166*, and *#2005-03254*. All of these decisions are available on the WCAT or Board Internet sites.

Appeal Division Decision #2000-2036 took the approach that psychological conditions arising because of dealings with an administrative agency will be compensable when there are "special and exceptional circumstances". This will include circumstances such as where a Board officer knowingly attempts to cause psychological injury. This does not include any expected upset and distress that will arise through ordinary dealings with the Board. It is true in this case that the worker has had significant disagreements with the Board over the years. The worker has addressed those disagreements by exercising his appeal rights. The following quote from *Appeal Division Decision #2000-2036* summarizes my conclusions regarding the worker's ongoing conflicts with the Board:

> … that conflict is based on matters that fall within the category of matters that are necessarily part of the administrative structure that is workers' compensation. Obviously, the Board cannot allow every claim. There will always be workers who are unhappy with Board decisions and who will appeal those decisions, sometimes successfully. We have no doubt that workers become frustrated and angry.

WCAT Decision 2003-02912 sets out the test for compensability of a worker's diagnosed depression as whether the subsequent disablement caused by a depression condition was a compensable consequence of the work injury. The work injury must have had causative significance in producing the subsequent, in this case, depression. The panel concluded that an adverse psychological reaction to dealing with the Board is not, in and of itself, a compensable consequence of work injury. The panel stated:

> Dealing with administrative or regulatory agencies is a part of everyday life, and the fact that the agency in this case is the Board, does nothing to distinguish the worker's situation from that of other people who experience frustration, impatience or dissatisfaction through such everyday dealings. It was in this case the reaction of the worker, and not the actions of the Board that is responsible for his psychological distress. Consequently, insofar as the worker's diagnosed psychological impairment may be attributable to his dealings with the Board, it is not a compensable consequence of his November 29, 2001 work injury, and is not therefore a Board responsibility.

I agree with the panel's conclusions and find those conclusions applicable to this worker's circumstance. In reviewing the other decisions specified above, I note that *WCAT decision 2003-03406* addressed a circumstance in which the panel found that a Board officer may not have deliberately attempted to cause psychological harm to the worker, but appears to have been reckless or negligent in dealing with the worker. I have found no evidence of such behaviour here. The panels in the other decisions cited either applied the special and exceptional circumstance test or concluded that the psychological condition did not arise out of or was significantly aggravated by the compensable injury accepted under the claim. While I am not bound by any of those previous decisions when considering this worker's appeal, I do consider those decisions as useful references.

There is no doubt that this worker has had a number of significant disagreements with the Board regarding decisions on a number of claims. After having reviewed the claim files considered in this decision, I have found no special and exceptional circumstances that would warrant accepting the worker's depression condition as a compensable consequence of any of his work injuries. While there have been obvious disagreements between the worker and the Board over the years, I have found no instances in which the Board has acted in bad faith or has knowingly attempted to cause the worker psychological damage or has generally acted in a way that is outside of the range of the norm for dealings between Board officers and claimants. The worker's diagnosed depression condition is not compensable because of his dealings with the Board.

I have also considered whether the diagnosed major depressive disorder is a compensable consequence of any of his claims. I have reviewed the psychiatric and

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medical reports present in the claim files and submitted in support of this appeal. I accept the psychiatric reports as expert reports.

The first significant mention of a depression condition was in a June 25, 1997 medical opinion by Dr. Carlson. He noted the worker's frustration and anger over his dealings with the Board. Dr. Carlson stated that the first mention of a psychological component to the worker's medical problems was apparently on May 2, 1997. He stated that the worker had not mentioned the psychological aspects of the injury previous to this date.

Dr. Nazif, in his July 21, 1999 report, only went so far as to characterize the worker's symptoms as "suggestive" of a major depressive disorder. While the worker did report that his anxiety and depression symptoms may go back to 1990 from around the time of his arm injury, there is no mention of this in the medical reports until 1997 of such a condition.

Dr. Davis provided a psychological opinion in a report dated October 12, 1999. This report was prepared on behalf of the employer's long-term disability carrier. The primary source of the worker's psychological difficulty set out in this report were labour relations issues between him and his supervisor. Also mentioned is the worker's dealings with the Board. The worker's chronic pain is also mentioned.

Dr. Davis, in his clinical opinion, diagnosed an adjustment disorder with depressed mood under the DSM-IV criteria[1]. He stated that such a disorder usually begins within three months after the onset of any stressors. He described this disorder as "a response to psychosocial stressors with significant emotional and behavioral symptoms which present with marked distress that is in excess of what would be expected given the nature of the stressors and with significant impairment in social and occupational functioning."

Dr. Davis further diagnosed a personality disorder under DSM Axis IV criteria, which describes psychosocial and environmental problems, diagnosed "psychosocial stressors in the work situation, specifically anger at [his supervisor] compounded by legal problems".

Dr. Zhong, also a psychiatrist, examined the worker in early February 2000 after a referral from Dr. Carlson. Dr. Zhong recorded the worker reporting his depression starting after his 1989 injury, with his depression symptoms becoming worse in the two years before his examination. The worker described frustration with his legal counsel of the time, the indifference of his insurance company and his treatment by the Board. Dr. Zhong described the worker as anxious, agitated and noticeably shaking particularly when he discussed the disability insurance companies and the Board. He diagnosed

[1] standardized diagnostic criteria for mental disorders developed by the American Psychiatric Association.

the worker with a major depressive disorder without psychotic features and stated this disorder had not responded satisfactorily to medication. He described the worker's agitation and anger as a possible manifestation of his depression or a possible indicator of an underlying personality disorder. He stated that a bipolar II disorder should be included in the differential diagnosis. He did not provide a specific opinion on causation of the worker's depression.

The worker also provided two medical legal reports from Dr. Sandhu, a psychiatrist, dated March 9 and March 17, 2005.

In his March 9 report, Dr. Sandhu stated that he had reviewed the reports of Dr. Nazif, Dr. Davis and Dr. Zhong. He stated that the worker had been chronically depressed since the 1989 compensable injury. He stated that the worker's inability to recover from this injury triggered his chronic depression. He noted that the worker's 2001 back injury left him with chronic back pain. He diagnosed the worker with a chronic major depressive disorder and attributed this disorder to his work related injury in 1989. He stated that the depression became worse over time and that he experienced chronic stress from job-related difficulties and his dispute with the Board. The worker also has chronic pain in his back and right arm. The worker described resentment and frustration with the Board. Dr. Sandhu stated that the worker suffered from a chronic pain disorder involving his right arm and his back.

Dr. Sandhu provided an addendum to his March 9 report dated March 17, 2005. Dr. Sandhu provided this in response to a request from the worker's legal counsel that he answer three questions. The first was with respect to previous psychiatric history and is not particularly relevant to this appeal. The second was about the worker's ongoing headaches, to which Dr. Sandhu replied that his daily headaches are probably related to his depressive illness. The third was with respect to the severity of his chronic major depressive disorder. Dr. Sandhu characterized that disorder as severe.

In summarizing the evidence related to the compensability of the depression condition, Dr. Carlson noted that the worker had not mentioned any psychological component to his medical problems until May 1997, or approximately eight years after the 1989 injury. Dr. Davis did not mention the 1989 compensable injury, or any of his other compensable injuries, as contributing factors to his depression. He described the worker's adjustment disorder with depressed mood as attributable to the worker's response to psychosocial stressors and an excessive response on the part of the worker to those stressors. Dr. Zhong did not provide a specific opinion on causation of the worker's depression, but apparently accepted the worker's opinion as to causation. As noted above, the worker did not describe his 1989 injury or any other of his injuries as contributing to his depression, but rather did describe peripheral issues such as his treatment by the Board and frustration with his legal counsel as contributing factors. Dr. Sandhu accepted that the worker had been chronically depressed since his 1989

compensable injury, but there is little evidence to support that view, given that there was no psychological component mentioned until eight years after that injury.

While I have no doubt that the worker suffers from a number of severe psychiatric disorders, the medical evidence in front of me in this appeal does not support a conclusion that the worker's compensable injuries were a significant contributing factor to his depression condition. Those significant contributing factors, which are non-compensable, are labour relations factors in his workplace, and the worker's general reaction to his dealings with the Board. While the evidence does establish that the worker's compensable injuries may have played some role in his ongoing depression, that evidence is insufficient to establish that these compensable injuries were a significant contributing factor to his ongoing depression and general psychiatric conditions.

In reviewing the June 11, 1996 permanent functional impairment (PFI) review, I note that the only consideration of the worker's subjective pain complaints did not deal with chronic pain, but rather weakness in the right-handed forearm, crepitation over the extensor tendons, cold intolerance, and clumsy handgrip. Since then, there has not been any consideration of a chronic pain condition that may have developed since that 1996 assessment. As noted below, I have found sufficient grounds for the Board to carry out a reassessment of the worker's permanent functional impairment. That reassessment is to include consideration of any chronic pain condition that may have developed as a result of his compensable injuries. At that time, the Board should also consider the origin and progression of the pain condition and consider that in the context of the origin and progression of the worker's diagnosed depression. While there is sufficient evidence in front of me to determine that it is unlikely that the worker's compensable injuries, in themselves, were not significant contributing factors to his depression condition, there has been no determination by the Board regarding a possible chronic pain condition and the impact that may have had on the development of the worker's depression.

February 20, 2001 decision - Should the worker's 1989 claim be reopened for further wage loss and health-care benefits as of January 2001?

The worker has received a permanent functional impairment award for his 1989 claim. That award was reassessed following his 1996 surgery and that reassessment was the subject of a June 25, 1996 Board decision. At that time, the Board increased the worker's permanent functional impairment award from 7% to 9.5% of a totally disabled person. The Board originally denied the worker's request for a reopening of the 1989 claim because the only medical evidence that might have supported such a reopening was several years old.

RSCM I, policy item #34.12 sets out Board policy on the payment of further wage loss benefits once a worker is in receipt of a permanent disability pension. The policy states, in part:

> Wage loss benefits are terminated when the claimant's condition becomes permanent and prior to the assessment of any pension. However, they may again become payable because a further work injury or a natural relapse in the condition for which the pension is being paid causes a further period of temporary disability.

The policy further states that the Board recognizes that there is no condition that is absolutely stable or permanent and there will be some degree of fluctuation in any permanent disability. The policy further states that the Board will not pay wage loss benefits for any fluctuations that are within the range normally to be expected from the condition for which the worker has been awarded the pension. The pension is intended to cover such fluctuations. The policy concludes:

> Wage loss is only payable in cases where there is medical evidence of a significant deterioration in the worker's condition which not only goes beyond what is normally to be expected, but is also a change of the temporary nature. If the change is a permanent one, the worker's pension will simply be reassessed.

The Board issued the May 28, 2001 decision in order to further address the worker's request for further wage loss payments. As noted above, while the May 28, 2001 decision was not appealed, it is common practice in deciding WCAT appeals to utilize any relevant medical information arising subsequent to the decision under appeal, but before the appeal is decided. As that evidence is open for my consideration, I do not need to address my jurisdiction over the May 28, 2001 decision. The subject matter of that May 28, 2001 decision is before me as a result of the medical reports prepared following the issuance of the February 20, 2001 decision.

The Board's approach to assessing whether the further payment of wage loss benefits was warranted was to carry out a comparison between the permanent functional impairment assessment done by the Board in 1996 and the examination by Dr. Vondette in 1998.

The basis of the worker's request for further wage loss payments is the worker's contention that his employer, even after his 1998 injury, continued to place him in duties which involved considerable physical strain to his right arm and that his symptoms increased as a result. In January 2001, the employer, under protest by the worker, apparently placed him on heavy construction labouring work with no apparent restrictions to his work activities.

The Board and the employer both recognized in mid-1995 that the worker should not carry out such activities as jack hammering and using a chainsaw. As noted above, the employer stated in a late June 1995 letter to the Board that the worker's Labourer II position could be modified within reason to meet the worker's limitations and restrictions. The employer specifically cited the elimination of jack hammering duties as an example. That commitment apparently fell by the wayside as the worker's 1998 injury resulted from him carrying out jack hammering work.

This worker has a considerable disability in his right arm, which has been measured by the Board at 9.5% of a totally disabled worker. He has been able to continue with relatively heavy labouring work, but as was recognized by Dr. Carlson in his July 22, 2003 opinion, the worker is able to carry out labouring work, but has on occasion been given tasks of an inappropriate nature. He specifically points to the safe use of the chainsaw and the use of a jackhammer as problem work tasks. He concluded that the worker was "not particularly suited to some of the demands required in moderate or heavy construction." The medical evidence supports that conclusion.

There is little medical evidence to support the worker's contention that his permanent partial disability has deteriorated because of his work activities. The worker has made statements to that effect and I accept those statements as far as they go; the worker has no medical expertise. Nevertheless, the last formal assessment of the worker's permanent partial disability was in 1996. The February 20 and the May 28, 2001 decisions were based largely on comparisons between the 1996 permanent functional impairment assessment and Dr. Vondette's findings in 1998, and did not compare every aspect of those examinations. I consider that a reassessment of the worker's permanent functional impairment is warranted.

In reaching that conclusion, I also consider there to be insufficient evidence at this time that the worker has experienced either a temporary or permanent deterioration of his permanent functional impairment. The worker has been provided with tasks in his employment that have the potential to result in a deterioration of his permanent functional impairment. Furthermore, I am not persuaded that the Board's 1996 PFI assessment and Dr. Vondette's 1998 medical reports are directly comparable relative to all aspects of the worker's compensable functional impairment. In reviewing the two documents, it is apparent that there are differences between the units of measure used by the Board and by Dr. Vondette. For example the power in the right wrist and hand were apparently measured using two different methods. While a Board medical advisor did provide a comparison between the PFI examination and Dr. Vondette's examination, she only compared four of the variables from the two examinations and did not explain as to why that would be a sufficient comparison between the two examinations. Furthermore, there are references in the medical evidence to the worker having developed a chronic pain condition. Those factors are sufficient to direct a reassessment of his permanent functional impairment, including an assessment of the compensability of any chronic pain condition.

While the worker is of the opinion that his claim should be reopened for the payment of further wage loss benefits, there is currently insufficient evidence to establish that the worker is only experiencing a temporary deterioration (or any deterioration for that matter) of his permanent functional impairment beyond that which would be considered a normal fluctuation. That is an issue that the Board should consider at the time of the reassessment of his permanent functional impairment.

The worker has also requested a referral to the Board's vocational rehabilitation department and assessment for a loss of earnings pension. Those issues are not before me, and so I have no jurisdiction to address them. The reassessment of his permanent functional impairment is a first step in determining whether further support such as vocational rehabilitation assistance or loss of earnings assistance is warranted. It is left to the Board to make those determinations following the permanent functional impairment reassessment.

September 20, 2001 decision - did the Board appropriately terminate the worker's wage loss benefits as of September 20, 2001.

Following the worker's lower back injury and rib fracture, he was eventually referred to a work conditioning program by the Board. On discharge from that program on September 5, 2001 he was cleared to return to modified duties. The treatment team placed several restrictions on his activities. The treatment team also concluded that there was no objective evidence to support continued disability.

Dr. Carlson, on September 21, 2000, stated that the worker was incapable of returning to his pre-injury employment on a full-time basis. That conclusion is not significantly different from the one reached by the Board in terminating the wage loss benefits of September 20, 2001. Dr. Carlson did not state the worker could not return to work, just not to his pre-injury employment on a full-time basis. Dr. Chan, a neurosurgeon, stated on September 25, 2001 that the worker was capable of returning to work at least on a part-time basis and slowly advancing as tolerated.

The Board made an arrangement with the injury employer for the worker to return on light duties effective September 21, 2001. By this time, I am persuaded that the worker was capable of working light duties and should have returned to work.

The worker had ongoing symptoms in his back following the termination of benefits and was examined by Dr. Chan, a neurosurgeon, on March 8, 2002. He attributed the worker's ongoing symptoms in his lower back to a degenerative condition in the worker's spine. Such a condition would be non-compensable, and there is no evidence that the low back strain as a result of the May 22, 2001 injury aggravated or otherwise had any effect on the worker's degenerative back condition.

I am aware of a number of occasions on which the worker and the employer have demonstrated a seriously strained labour relations relationship. The employer has demonstrated at times an apparent disregard for this worker's permanent restrictions that resulted from his work related injury in 1989. In particular, I point to the restrictions against jack hammering which were disregarded and resulted in the worker's 1998 injury. At those times, the worker's restrictions have been overlooked and I consider that Dr. Carlson, in his July 22, 2003 letter, perhaps best summarizes the predicament which permeates this worker's relationship with both his employer and the Board:

> Apart from the multiple depressive episodes experienced by [the worker], he has some strong pervasive negative personality traits which likely have jeopardized the proper and realistic assessment of his disability. His anger, resentfulness, explosive, and at times physical responses would be included in these. He is definitely not a malingerer, but at times is intensely focused on this physical disability.

Having said that, the worker is aware of the restrictions placed on his work activities at various times and is present on the job site when job tasks are assigned to him. If he considers that his supervisor is assigning tasks that are beyond any restrictions placed on him, he should notify the employer's occupational health and safety department and/or the Board. There are fairly clear instances documented in the claim file when the worker has been required to undertake tasks that exceed the restrictions placed on him. On the other hand, the employer has stated a commitment to assisting the worker return to work in a safe and productive manner.

The evidence indicates that the worker was sufficiently recovered from his injuries by September 20, 2001 that he could have returned to modified duties with his employer. The employer undertook to provide such duties. Therefore, the Board's decision to terminate wage loss benefits as of September 20, 2001 is confirmed.

Decision

October 28, 1999 Decision

The worker's diagnosed depression condition is not compensable at this time, either because of the worker's dealings with the Board or as a compensable consequence of his 1989 or 1998 compensable injuries. There is sufficient evidence to direct the Board to reassess the worker's right hand and arm to determine if the worker's permanent functional impairment has increased since the last assessment in 1996. The Board will include in that reassessment an assessment of whether the worker has a chronic pain condition and any effect that possible chronic pain condition may have had in the development of his diagnosed depression.

The worker's appeal is denied, except to the extent just stated. The October 28, 1999 decision is confirmed, in part.

February 20, 2001 Decision

The worker is not entitled to the payment of further wage loss benefits as of January 2001, as there is insufficient evidence to establish that the worker has experienced a temporary deterioration of his permanent functional impairment beyond the fluctuations that would normally be expected with any permanent impairment. The issue of whether there is a permanent deterioration of his permanent functional impairment from that which existed in 1996 will be determined by the Board as noted above.

The appeal of the February 20, 2001 decision is allowed, in part. The February 20, 2001 decision is varied, in part.

September 20, 2001 Decision

The Board appropriately terminated the worker's wage loss benefits as of September 20, 2001. The worker's appeal of that decision is denied. The September 20, 2001 decision is confirmed.

Legal Costs and Expenses

The worker stated at the outset of the oral hearing that he was seeking reimbursement for expenses associated with medical reports, but had apparently received reimbursement for some or all of those reports. If my notes are incorrect, the worker may provide the panel with specific information as to which reports he is seeking reimbursement for and the amounts requested. The employer will be provided with an opportunity to comment on any submissions received.

The worker's legal counsel is seeking reimbursement of legal fees. She argues that the worker has had a sixteen year battle with the Board. She states that this is a special case and that the worker's trade union found it difficult to represent him.

I questioned the panel's jurisdiction to award legal costs given section 7(2) of the *Workers Compensation Act Appeal Regulation*, which states:

> The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

The worker's legal counsel stated that the panel's jurisdiction to award legal costs is rooted in section 250(2) of the act which states that the appeal tribunal must make its

decision based on the merits and justice of the case. She further stated that the use of the words "may not" constitutes permissive language and allows some leeway and discretion in the panel's decision making. Legal counsel submits that the Board should be held accountable for its actions and that awarding legal costs is the "right thing to do".

The employer's representative countered that no legal costs should be paid. The worker had access to the services provided by the Workers' Advisers. Section 7(2) of the regulation is clear that costs will not be reimbursed. This is not a circumstance in which lawyers were required and has not resulted in a quicker appeal. It was the worker's choice to engage legal counsel. The Board has not acted in such a way that legal counsel was necessary.

Section 7(2) of the regulation does indeed use the term "may" instead of "shall" or "will". The term "may" is permissive and does imply some discretion in applying that section. However, the term "may not" is not permissive. When combined with a plain reading of RSCM II, policy item #100.40, which states that "No expenses are payable to or for any advocate", there is virtually no question that the intent of both the legislature and the Board's board of directors is that no legal fees or other advocate fees will be paid in pursuit of a compensation claim or appeal. Board policy is binding on this panel under section 250(2) of the Act.

The worker could have obtained representation without charge either through his trade union or through the office of the Workers' Advisors. It was a personal choice to engage of the services of legal counsel to present this appeal. This appeal was not so complex that those avenues of representation were unreasonable. The worker's request for reimbursement of legal expenses is denied.

Rob Kyle
Vice Chair

RK/dw