Noteworthy Decision Summary

Decision: WCAT-2005-06031 **Panel**: Elaine Murray **Decision Date:** November 10, 2005

Permanent disability – Loss of function award – Hand – Jurisdiction where impairment has no range or a range that does not exceed 5% – Global vs. Local approach – Loss of earnings award – Interpretation of statute and policy – Meaning of similar occupation – Meaning of essential skills – Sections 23 and 239(2)(c) of the Workers Compensation Act – Policy item #40.00 of the Rehabilitation Services and Claims Manual, Volume II

- Where a worker has a loss of function in multiple fingers, the Workers' Compensation Appeal Tribunal (WCAT) has jurisdiction over all the fingers where the combined upper end of the range of motion value for all the measurably impaired joints exceeds 5%.

- In determining whether a worker can return to his pre-injury or similar employment, decision-makers should look to the National Occupational Classification (NOC) code groupings, as directed in Practice Directive #46. When all the occupations in the NOC code groupings require heavy lifting, and the worker can no longer do heavy lifting, the first two requirements in policy item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* are met. A worker does not experience a significant loss of earnings if he is provided with an alternate job which will net him more income in the long-term.

The worker, a construction helper, injured his hand and the Workers' Compensation Board (Board) granted him a permanent functional impairment award which recognized the loss of range of motion of four joints in three of his fingers. The Board determined that he was not eligible to be assessed for a loss of earnings award. The case manager concluded that the worker was capable of returning to his pre-injury job without incurring any loss of earnings. The review officer concluded it would also be possible for the worker to perform the essential skills of a similar occupation. The worker contended that he was unable to return to his pre-injury occupation or a similar type of heavy work, and that he was experiencing a significant loss of earnings as a result.

Under hand chart 4 of the Permanent Disability Evaluation Schedule (PDES), an amputation at any one of the three joints of any one of the index, long, and ring fingers is valued at less than 5% per joint. An injury that is less than an amputation, such as one that results in a loss of range of motion, is assessed at three-quarters of the amputation value at the joint concerned. When more than one finger is involved, the appropriate multiple finger chart from the PDES is used to determine the amputation value at the joint concerned. The multiple finger charts build-in enhancement factors in each joint, which reflects that the impairment in one finger is increased in that finger if another finger is also impaired.

The panel considered the various possible approaches to determining jurisdiction over hand impairment awards as expressed in other WCAT decisions. One could determine jurisdiction based on:

- the range of motion values for the individual joint;
- the combined joint range of motion values assigned to each finger individually;
- the combined joint range of motion values assigned to all the fingers affected; or
- the combined joint range of motion values only of the joints affected in all the fingers.

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Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

The panel noted that different considerations apply to hand awards than apply to spinal awards. The global approach to spinal impairment is recognized by WCAT, in part, because it is not considered possible to separate spinal function into discrete planes of movement. In contrast, a worker can lose a finger and still maintain a high level of overall hand function. However, the built-in enhancement factors in the multiple finger charts illustrate that the fingers do not function completely independently. The inclusion of loss of pinch/grip strength is further recognition that the hand functions as a whole.

The panel concluded that, while not free from doubt, the upper end of the range of motion value for those joints where measurable impairment is noted should determine jurisdiction. If the range exceeds 5%, as in this case, WCAT would have jurisdiction over the entire percentage granted without being faced with the situation where it has jurisdiction over only some of the fingers. It would also restrict jurisdiction only to those cases where there was the potential for an overall reduced range of motion award that exceeded 5%. This would be in keeping with the intention of section 239(2)(c) of the *Workers Compensation Act* to limit WCAT's jurisdiction to those cases involving the potential for impairment beyond 5%.

Having found that WCAT has jurisdiction over the permanent functional impairment award, the panel reviewed the evidence and denied this aspect of the appeal on these merits.

With respect to the loss of earnings assessment, in determining whether a worker can go back to his pre-injury employment, Practice Directive #46 suggests that a worker's occupation at the time of injury should be identified in terms of the four digit unit group in the NOC. A "similar occupation" should be defined as one where the first three digits of the NOC code are the same (minor group). The physical ability to perform heavy, manually intensive, labour must be considered a "skill" required of a trades helper or labourer, and of the "similar occupations" with the same first three digits of the NOC code. Since the worker could no longer do heavy lifting, he could not return to his pre-injury or similar occupation.

While the worker could not return to his pre-injury or similar employment, he would not experience a loss of earnings. The vocational rehabilitation consultant found a light production assembly job opportunity for the worker. The worker worked only one day and said he could not do the job. The panel disagreed, and found that the work was suitable for the worker and that, over the long-term, he would have been provided with similar earnings to his pre-injury income.

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Introduction

The now 41-year-old worker injured his non-dominant left hand while using a power saw on September 6, 2003 in the course of his duties as a construction helper. The Workers' Compensation Board (Board) accepted his claim for lacerations to his left index, long, and ring fingers, along with chronic pain.

By decision dated June 18, 2004, a disability awards officer (DAO) informed the worker that he was entitled to a permanent partial disability (PPD) award of 7.04% of total disability (2.62% for loss of finger range of motion, 1.92% for sensory loss based on two-point discrimination testing, and 2.5% for chronic pain), effective March 24, 2004. The DAO also informed the worker that he was not eligible to be assessed for an award based on a loss of earnings.

The worker submitted a request for review of the June 18, 2004 decision to the Board's Review Division. By decision dated January 27, 2005, a review officer confirmed the Board's decision.

The worker now appeals the review officer's decision to the Workers' Compensation Appeal Tribunal (WCAT). The employer is not participating in this appeal, although it was invited to do so.

The worker attended an oral hearing on August 15, 2005. He testified under oath, with the assistance of an interpreter. The worker's representative informed WCAT that he would not be appearing at the hearing, and the worker was content to proceed without a representative. The worker seeks an increase in his pension award because he does not think that it accurately reflects the extent of his disability.

Issue(s)

Does the worker's PPD award of 7.04% of total disability appropriately reflect the level of functional impairment associated with his permanent conditions?

Is the worker entitled to a loss of earnings assessment under section 23(3) of the *Workers Compensation Act* (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, as brought about by the *Workers Compensation Amendment Act, 2002* (Bill 49). The law that applies to this appeal is that in effect after the Bill 49 amendments. Policy applicable to this appeal is found in the *Rehabilitation Services and Claims Manual, Volume II* (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. It was used in determining the worker's section 23(1) entitlement.

Hand impairments under the PDES, which are based on loss of range of motion or amputation, are scheduled awards. Hand chart 4 of the PDES is used when three fingers are involved. The worker's PPD award of 2.62% recognizes the loss of range of motion of four joints in three of his fingers. It includes 1.42% and 0.44% for reduced range of motion at the distal interphalangeal (DIP) joint and the proximal phalangeal (PIP) joint of the index finger, respectively, along with 0.48% for reduced range of motion at the DIP joint of the long finger, and 0.28% for reduced range of motion at the DIP joint of the ring finger.

Under hand chart 4, an amputation at any one of the three joints of any one of the index, long, and ring fingers is valued at less than 5% per joint. An injury that is less than an amputation, such as one that results in a loss of range of motion, is assessed at three-quarters of the amputation value at the joint concerned, in accordance with RSCM II policy item #39.31. This formula is used as it is normally considered that a fused (completely immobile) finger joint is equal to three-quarters of the value of an amputation at the same level. When more than one finger is involved, the appropriate multiple finger chart from the PDES is used to determine the amputation value at the joint concerned. The multiple finger charts build in enhancement factors in each joint, which reflects that the impairment in one finger is increased in that finger if another finger is also impaired.

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On the facts of this case, the Board measured the joints in each of the worker's three injured fingers to determine if he had any impairment. Under hand chart 4, the fixed amputation percentages for the index finger DIP, PIP and metacarpal phalangeal (MP) joints are 3.4%, 3.4%, and 1.7%, respectively; the long finger percentages of impairment are identical to the index finger; and the DIP, PIP, and MP joints in the ring finger are fixed at 2.1%, 2.1%, and 1.1%, respectively. Since the specific percentages of impairment for the individual finger joints under hand chart 4 have a range of less than 5% per joint (even before using the three-quarters formula), it is arguable that WCAT has no jurisdiction over the award of 2.62% or any portion of it.

I question, however, whether the upper end of the range of motion values for the individual joint should be the deciding factor. Is it more appropriate, for example, to consider the upper end of the range of values for the entire finger, since the Board measures all three joints in each finger when determining any impairment? Furthermore, it is arguable that the finger joints basically operate as a whole in relation to the overall function of a finger, such that it makes little sense to view them as discrete areas of impairment other than for purposes of measurement.

Based on the loss of range of motion formula set out in the policy in item #39.31, the maximum award for the combined value of the range of motion percentages for the joints in the index finger would exceed 5% (3.4% + 3.4% + 1.7% = 8.5% x three quarters = 6.375%). The long finger has the same combined value, but the combined value for the ring finger is less than 5% (2.1% + 2.1% + 1.1% = 5.35% x three-quarters = 3.975%). If WCAT determined its jurisdiction based on the combined joint range of motion values assigned to each finger individually, it would have jurisdiction over the percentages granted for the worker's index and long fingers, but not for the ring finger.

Another option is to consider the combined value of the joints in all three fingers (regardless of whether there is measurable impairment in all of those joints) when determining whether there is a range greater than 5%. That approach would provide WCAT with jurisdiction over the entire award of 2.62%.

Finally, one could consider the combined value of only those joints where there was measurable impairment. In this case, the combined value of the four impaired joints has a range that exceeds 5% (three-quarters of 3.4% + 3.4% + 3.4% + 2.1% = 9.23%). That approach would also result in WCAT having jurisdiction over the entire award of 2.62%.

The issue of jurisdiction over hand impairment awards is generating different approaches in recent WCAT decisions. I refer interested readers to *WCAT Decision #2005-02864-RB, Decision #2005-03167, Decision #2004-02598,* and *Decision #2005-02230* as examples (WCAT decisions are available on WCAT's website at www.wcat.bc.ca). Those decisions contain useful discussions of the approach that

various WCAT panels have taken with respect to this matter. Some panels have taken a broad global approach and decided that if there is more than one digit involved, the upper end of the range is based on the combined value of all of the joints in those fingers are affected. Other panels have decided that each digit should be considered separately, and if the range for the combined value of the three joints in an individual digit exceeds 5% the panel will have jurisdiction over that digit. Finally, some panels have found that the individual joint within each digit determines jurisdiction, and the joints are not considered collectively to determine the range.

The panel in *WCAT Decision #2005-02864-RB* addressed the question of whether the global approach, used in determining jurisdiction for spinal awards should, for example, be applied when determining jurisdiction for hand impairment. The global approach to spinal impairment is recognized by WCAT, in part, because it is not considered possible to separate spinal function into discrete planes of movement – all are required for activities of daily living and working. The panel noted, however, that there are variables present in hand impairments that are not evident with spinal awards. For example, a worker can lose a finger and still maintain a high level of overall hand function.

The panel decided that where only one digit is involved that has a range of less than 5% (after combining the range for all three joints) and there is no other impairment of the hand or fingers, WCAT did not have jurisdiction. Although not necessary to her decision, the panel added that where there are multiple impairments, she would consider the combined value of the fingers as representing the upper end of the range. She thought that the built-in enhancement factors for multiple finger disabilities warranted a global approach.

I agree, in part, with the panel's approach in *WCAT Decision #2005-02864-RB*. By building in enhancement factors to the multiple finger charts, the Board has recognized that the fingers do not function completely independently. For example, if only the index finger were injured, hand chart 1 would apply, and the maximum award available for complete immobility of that finger would be three-quarters of 4.0%. If, however, the index and long fingers both had reduced range of mobility, hand chart 2 would apply, and the maximum award available for complete immobility of the index finger would then increase to three-quarters of 7.0%. This significant increase for enhancement factors recognizes that impairment in even one joint in one finger increases if a second finger also has any impairment. In other words, it is recognition that the finger joints work together to function as a whole. While it is possible to separate the joints in each finger for measurement, it is not possible to separate the actual function.

I also note that the amputation values in the hand charts include loss of sensation and loss of pinch/grip strength. The inclusion of loss of pinch/grip strength is further recognition that the hand functions as a whole. While only one joint in one finger may be impaired, it can have an impact on the grip strength of the entire hand.

The WCAT panel in *WCAT Decision #2005-02864-RB* thought that the upper end of the range should be determined by reference to the combined value of the joints in the fingers affected (regardless of whether any impairment was found in the joints). This could result in the situation where WCAT takes jurisdiction even where the upper end of the range of the impaired joints could not exceed 5% (for example, if the DIP joints were affected in the long, and ring fingers, the upper end of the range would be less than 5% for those impaired joints, but the combined value of all the joints in those two fingers would exceed 5%).

In my view, and while not free from doubt, the upper end of the range of motion value for those joints where measurable impairment is noted should determine jurisdiction. That range would represent the maximum award available to the worker for those joints that were impaired, and would take the interdependence of joint function into consideration.

If the range exceeds 5%, as in this case, WCAT would have jurisdiction over the entire percentage granted without being faced with the situation where it has jurisdiction over only some of the fingers. It would also restrict jurisdiction only to those cases where there was the potential for an overall reduced range of motion award that exceeded 5%. This would be in keeping with the intention of section 239(2)(c) to limit WCAT's jurisdiction to those cases involving the potential for impairment beyond 5%.

Accordingly, I have considered WCAT's jurisdiction in this case with reference to hand chart 4, and the upper end of the range of the combined value of the joints affected. I find that I have jurisdiction over the entire award granted of 2.62%, since impairment in the joints affected could attract an award beyond 5%. I point out that my analysis may be limited to range of motion awards under the hand charts, since there may be different considerations involving amputations.

I have further considered whether the limitation found in section 239(2)(c) of the Act affects my ability to review any additional factors, such as sensory loss (the two-point discrimination testing) and cold intolerance, along with chronic pain. In this regard, I have considered *WCAT Decision #2005-02034.*

The panel in that decision addressed various interpretations of section 239(2)(c), and found that WCAT has jurisdiction to address other variables where they have not been included in the scheduled percentage, along with chronic pain. I agree with the reasoning in *WCAT Decision #2005-02034*. However, since I have jurisdiction over the 2.62% granted, my jurisdiction for any additional factors would not be limited even if any additional factors were included in the scheduled award for finger range of motion.

Background and Evidence

The worker was taken to hospital on the day of his injury. He then followed up with Dr. Oxley, a plastic and reconstructive surgeon. In his September 10, 2003 report,

Dr. Oxley described the worker as having a well proximated laceration at the level of the DIP flexor crease of his middle finger; a one centimetre by one centimetre area of complete tissue loss on the radial aspect of the left index finger at the distal phalanx; and a slightly dusty area of skin distal to the site of a laceration to his ring finger.

The worker's long-term wage rate was based on his gross annual income of $27,073.00 ($519.21 gross per week). He made two unsuccessful attempts to return to his pre-injury job in late 2003. Dr. Oxley reported that the worker's return to heavy work caused the skin in his scar sites to continuously break down. The worker was complaining of significant numbness and pain. The Board decided that the worker would not be able to return to his pre-injury job, which required heavy pinching and gripping when lifting lumber and using tools in a fast and repetitive environment. It arranged for him to receive vocational rehabilitation assistance and also referred him to an occupational rehabilitation 2 (OR2) program.

On December 23, 2003, the OR2 staff reported that the worker described his pain as being eight to nine on a scale of ten. He said that his pain was aggravated by gripping, cold weather, and pressure to his fingertips. He also reported having a cold sensation in his fingers. The OR2 staff noted that he was pain-limited and pain-focused.

A January 26, 2004 initial vocational assessment described the worker as having a grade 12 education in Albania. During the hearing, the worker said that he went into carpentry in high school and his grade 12 is in that trade. He primarily worked as a construction helper in Europe before coming to Canada in 1999. His began his first job in British Columbia in June 2001, with the accident employer.

On January 29, 2004, Dr. Oxley reported that the worker needed to continue to desensitize his index finger with physiotherapy, and work on his strength. In Dr. Oxley's opinion, the worker could "do any work that requires lesser duties with the left hand (than his pre-injury job), or right hand only duties."

In its February 20, 2004 discharge summary report, the OR2 staff suggested that the worker pursue alternate employment at a LIGHT/MEDIUM strength category compatible with his present functional capabilities, which included decreased lifting and sustained gripping abilities. The OR2 staff also recommended that he wear gloves while working, since the skin over the volar index tip was prone to breakdown. In addition, they thought that a glove would provide some benefit with respect to the worker's cold intolerance. The worker reported that his thermal glove (provided by the Board) was beneficial, but it restricted his movement somewhat.

At a team meeting on February 26, 2004 (see claim log entries from March 4 and 12, 2004), Dr. M, a Board medical advisor, thought that the worker's cold sensitivity would improve over time and not result in any permanent limitation, although she noted that his sensitivity could impact on his ability to work in a cold environment if he did not wear

gloves. With Dr. M's input, the Board officer accepted that the worker had chronic pain, and his injuries resulted in the following permanent limitations:

- LIGHT to MEDIUM unilateral and bilateral lifting;
- Left hand grip strength (64% of right dominant hand) impacted by pain sensitivity, with guarding of the left index finger; and
- Highly repetitive and sustained work involving the left hand.

During a March 17, 2004 team meeting, a vocational rehabilitation consultant (VRC) outlined that the worker's pre-injury job was categorized under National Occupational Classification (NOC) Code 7611, Construction Trades Helpers and Labourers. According to the NOC, construction trades labourers and helpers assist skilled tradespersons and perform labouring activities at construction sites. They are employed by construction companies and trade and labour contractors. The VRC concluded that although the worker could not return to his pre-injury job, it would not be impossible for him to return to another job in the broad occupational category of NOC Code 7611, which included job titles such as clean-up person, insulator, painter, painter's helper, and plumber's helper. The VRC thought that these jobs would be well within the worker's capabilities.

On March 21, 2004, the Board terminated the worker's temporary wage loss benefits, since it concluded that his condition was at a plateau. The worker then began to receive wage loss equivalent vocational rehabilitation benefits.

In a March 18, 2004 claim log entry, a claims adjudicator in disability awards (CADA) referenced his attendance at the March 17, 2004 team meeting. He noted his agreement with the VRC that that the worker retained the essential skills of his pre-injury occupation, and his injury did not prevent him from applying those skills. I am unable to locate where the VRC and CADA set out the essential skills of NOC Code 7611. The only possibly relevant documentation on file was contained in the initial vocational assessment, where the VRC outlined the following "main duties" of construction trades helpers and labourers:

- Load and unload construction materials, and move materials to work areas
- Erect and dismantle concrete forms, scaffolding, ramps, catwalks shoring and barricades required at construction sites
- Mix, pour and spread materials such as concrete and asphalt
- Assist trades persons such as carpenters, bricklayers, cement finishers, roofers and glaziers in construction activities

- Assist heavy equipment operators to secure special attachments to equipment, signal operators to guide them in moving equipment and provide assistance in other activities
- Assist in aligning pipes and perform related activities during oil and gas pipeline construction
- Assist in drilling and blasting rock at construction sites
- Level earth to fine grade specifications using rake and shovel
- Assist in demolishing buildings using prying bars and other tools, and sort, clean and pile salvaged materials
- Remove rubble and other debris at construction sites using rakes, shovels, wheelbarrows and other equipment
- Operate pneumatic hammers, vibrators and tampers as directed
- Tend or feed machines or equipment used in construction such as mixers, compressors and pumps
- Clean up chemical spills and other contaminants, and remove asbestos and other hazardous materials
- Oil and grease hoists and similar equipment
- Direct traffic at or near construction sites (flagmen/women may require a traffic control certificate).
- Perform other activities at construction sites, as directed.

In his March 18, 2004 claim log entry, the CADA also wrote as follows:

> The pre-accident job is a subset of the "occupation", which is defined by policy as a collection of jobs or employments. Therefore, the injury does not make it impossible for this worker to continue in the occupation at the time of the injury. Therefore the test set out under Section 23(3) and (3.1) have not been met and the circumstances are not so exceptional such that an amount determined under Section 23(1) does not appropriately compensate the worker for the injury.
>
> The worker retains the essential skills needed to continue in his occupation and the circumstances are not so exceptional to warrant consideration under Section 23(3). The effect of the disability will be appropriately compensated under Section 23(1).

On March 25, 2004, Dr. Oxley reported that the worker continued to complain of cold sensitivity, along with slight discolouration in cold weather, and difficulty with gripping at the fingertips. Dr. Oxley explained that cold sensitivity was very common after the worker's type of injury. He hoped that it would get better, but there was no guarantee. Dr. Oxley told the worker that he must continue to use and exercise his hand. Over time, Dr. Oxley thought that his symptoms would become more tolerable. Other than amputating the tips of his fingers, Dr. Oxley could not offer anything further.

On April 28, 2004, Dr. Oxley reported that the worker continued to complain of cold sensitivity and pain.

Dr. Monks, a Board recognized external service provider (ESP), assessed the worker at a permanent functional impairment (PFI) evaluation on May 7, 2004. During the assessment, the worker said that his main complaint was finger pain, along with numbness in his index and ring fingers. He also reported that his fingers felt very hot or very cold when the weather changed, which would cause them to swell and bleed. Finally, he reported that extreme temperatures also caused increased pain, bleeding, weeping.

The worker was assessed for loss of range of motion and sensory loss (two-point discrimination testing). Dr. Monks reported that the worker demonstrated variable signs of effort during all left hand testing (pinch grip, handgrip, and static strength); however, Dr. Monks thought that the range of motion and non-range of motion measurements were likely in keeping with the medical information provided.

The worker's range of motion and two-point discrimination measurements were put into the Board's computerized impairment rating system. It calculated the worker's impairment as follows:

Index finger – ROM	DIP	1.42%
	PIP	0.44%
	MP	0.00%
Sensation	DIP	1.00%
		2.86%
Long finger – ROM	DIP	0.48%
	PIP	0.00%
	MP	0.00%
Sensation	DIP	0.00%
		0.48%
Ring finger – ROM	DIP	0.28%
	PIP	0.00%
	MP	0.00%

	Sensation	DIP	0.92%
			1.20%
Left hand total			4.54%

In his PFI review (form 24), the DAO accepted the range of motion and sensory measurements provided by Dr. Monks, and concluded that the worker's measurable impairment was correctly calculated by the Board's computerized impairment rating system at 4.54% of total disability. The DAO also concluded that the worker had chronic pain, which warranted an additional award of 2.5% of total disability. He commented that "these would be the only factors to take into consideration on this claim" and, therefore, the worker would be granted an award of 7.04% of total disability. The DAO informed the worker of his PPD award in the June 18, 2004 decision.

In a June 22, 2004 recommendation for expenditure, the VRC noted that the physical demands of jobs within NOC Code 7611 required HEAVY strength activities (HEAVY is defined in the NOC as activities that involve handling loads in excess of 44 pounds). The VRC decided that the worker was eligible for some vocational rehabilitation assistance to target jobs such as light production worker, warehouse worker, green house worker, etc. He provided the worker with a number of job leads for production workers, truck washer, warehouseman, vehicle assembler, pallet maker, forklift truck operator, and labourer. The VRC thought that the worker could secure a job with six weeks of assistance from a job placement provider (JPP). Since the worker has limited English skills, a JPP was provided.

The worker first met the JPP on July 29, 2004. On August 6, 2004, the JPP arranged for the worker to attend an interview for a light production job, where he would assemble bed railings and hinges. It would pay $10.00 per hour to start and progress to $18.00 per hour in three to five years. The JPP and the worker observed where the worker would work and what duties would be involved. The worker did not express concerns with the tasks involved.

The worker worked a full day on August 11, 2004, but did not return. He did not initially inform the JPP or the Board that he did not intend to carry on working. He did not seek medical treatment until August 16, 2004 when he saw Dr. Luk, his family physician.

On August 16, 2004, Dr. Luk reported that the worker told him his fingers were bleeding when he returned to work. Dr. Luk did not provide any examination findings. He referred the worker to Dr. Oxley and noted that the worker could try to work full duties, full time, but he might be pain-limited.

In an August 18, 2004 letter, the worker wrote that his fingers began to bleed from the pain within five hours of starting the job.

The VRC met with the worker on August 17, 2004. The worker said during that meeting that he did not believe that he could ever return to the workforce because of his injuries.

In an August 17, 2004 decision (which appears to have been dictated by the VRC sometime prior to August 11, 2004 and not revised before being sent out), the VRC informed the worker that production worker and warehouse worker were jobs within his physical capabilities and reasonably available to him. He suggested that he also target jobs as a hotel valet, porter, and light courier driver (I note that the worker does not have a driver's licence). The VRC also noted that his job search benefits would end on August 8, 2004, but he would be entitled to a four-week work assessment or training on the job if he found a suitable job opportunity.

In a September 2, 2004 decision, the VRC informed the worker that he was no longer entitled to job search benefits (as of August 8, 2004), given his lack of active participation in the process. The offer of a work assessment or training on the job remained open, should he obtain a suitable opportunity.

On September 2, 2004, Dr. Oxley referred the worker to Dr. Lee, another plastic surgeon, for a second opinion concerning amputation surgery to resolve the worker's pain. On November 21, 2004, Dr. Lee offered his opinion that surgery would not be a good idea. He recommended that the worker use his left index finger more, since the less he used it, the stiffer and more painful it became. Dr. Lee also said that cold intolerance could occur for at a least a couple of years and coincide with hypersensitivity of the fingertips. He diagnosed the worker with chronic pain.

On November 30, 2004, Dr. Oxley referred the worker for further desensitization therapy. The worker told Dr. Oxley that his index finger was still very painful in cold weather. Dr. Oxley thought that the worker had stopped using his left index finger over the last few months, which had allowed it to become hypersensitive again.

By the decision under appeal, dated January 27, 2005, the review officer confirmed all aspects of the DAO's decision. She also concluded that the jobs of light production worker, warehouse worker, and greenhouse worker would be within the MEDIUM strength category of the NOC. As a result, she concluded that it would not be impossible for the worker to continue in "another occupation of a similar type or nature" (I presume that she was referring to jobs within the NOC three-digit code).

On February 9, 2005, Dr. Oxley noted that the worker was complaining of significant cold intolerance and his fingers were very sensitive. On examination, Dr. Oxley observed slight hypersensitivity and slight erythema of the tips of the second and fourth digits, consistent with vascular flushing. Dr. Oxley also observed that the worker "went through quite the demonstration of trying to move his fingers and then once I was not watching them they seemed to move a lot better." Dr. Oxley told the worker that he needed to work at wearing warm gloves and continue with desensitization exercises because his hand would become more sensitive if he ignored it.

In an April 7, 2005 Review Division decision, a review officer confirmed the VRC's September 2, 2004 decision to terminate job search benefits, but left open the opportunity for a work assessment or training on the job.

On May 5, 2005, Dr. Oxley reported that the worker complained that he was not back at work because all of the work that he does is too heavy on his hand and causes him discomfort. Dr. Oxley suggested he could probably discuss job retraining where he has "less demand for his left index finger."

During the hearing, the worker said that he had yet to find employment. He had worked the odd day here and there, but always returned to carpentry/construction work, which he could not manage. He said that he had looked for lighter jobs, but had not been offered any. He is presently in receipt of social services benefits, and has been attending a program for the last two months to assist him in finding employment. I asked him what he thought he could do. He replied that he would first like to get better; but if he could not, then he thought that cleaning the parks would be a good job.

The worker also said that the only work experience he had, beyond construction, was working in the fields. He did not understand why the Board did not provide him with more vocational rehabilitation assistance.

Reasons and Findings

The worker is not satisfied that his PPD award of 7.04% of total disability is sufficient compensation for his permanent injury. I will address the following elements of the worker's PPD award: the effective date of the award; the degree of functional impairment (the percentage award); and whether the worker is entitled to an assessment for an award based on a loss of earnings under section 23(3) of the Act.

Effective date

The effective date of the award is March 24, 2004, which is the first day (based on a five day work week) following termination of the worker's temporary disability benefits. RSCM II policy item #42.10 provides the general rule that PPD payments commence when the worker's temporary disability ceases and his condition stabilizes or is first considered to be permanent.

In this case, the worker's condition stabilized on March 21, 2004 and the Board considered that he was left with a permanent condition as of that date. The worker has not provided any persuasive reason to depart from the general rule in RSCM II policy item #42.10. I find that March 24, 2004 is the appropriate effective date of his PPD award.

Functional impairment

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 PPD.

RSCM II policy item #39.00 states that the percentage of disability determined under section 23(1) of the Act 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, and reduced capacity to compete in the labour market.

Dr. Monks found that the worker had reduced range of motion in three fingers and sensory loss in two of those fingers. Based on Dr. Monks' findings, the Board granted the worker an award under section 23(1) of the Act in the amount of 4.54% of total disability.

RSCM II policy items #39.01, #96.30, and #97.40 provide that the report on a section 23(1) evaluation conducted by an ESP is expert evidence which, in the absence of other expert evidence to the contrary, should not be disregarded. Although the evaluation is not the only medical evidence that the DAO may use, it is usually the primary input.

No medical evidence or opinion has been provided to challenge the results of the PFI evaluation concerning the worker's reduced range of finger motion and sensory loss measurements. I have examined the whole of the medical evidence on file, 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 finger motion and sensory loss, 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.

The DAO granted the worker a further 2.5% of total disability for chronic pain, in accordance with the policy in RSCM II policy item #39.02. That policy item provides that where a worker has disproportionate permanent chronic pain, a fixed award of 2.5% of total may be granted. I agree with the DAO and the review officer that the worker is left with permanent disproportionate chronic finger pain.

The worker believes that his chronic pain warrants a greater award, but 2.5% is a fixed amount in policy, by which I am bound. As a result, I deny this aspect of the worker's appeal.

RSCM II policy item #39.10 states that the rating schedule of percentages of disability in the PDES is a set of guidelines, not a set of fixed rules. The DAO is free to apply "other variables" relating to the degree of physical impairment in arriving at a final award. The review officer considered the application of this policy, but agreed with the DAO that the worker's complaints did not justify an additional award.

Guidelines relevant to awards with respect to other variables are set out in the *Additional Factors Outline* (Outline), which is available on the Board's website at www.worksafebc.com. The Outline is not Board policy, and I am not required to follow it. It does, however, set out practice within the Disability Awards Department, and I consider it appropriate to be guided by that practice.

The worker seeks an increase in his award to recognize his cold intolerance. The Outline does not specifically mention cold intolerance. The absence of a specific reference to cold intolerance does not, in my view, preclude an award in appropriate circumstances. I have, however, considered whether cold intolerance is already appropriately reflected in the PPD award of 7.04% of total disability.

The Outline states that the amputation values in the hand charts include loss of sensation and loss of pinch/grip strength. The Outline does not define what symptoms are captured by "loss of sensation." Clearly, reduced sensation is captured, and I also accept that numbness and tingling are recognized by loss of sensation. I do not consider that cold intolerance would be captured by "loss of sensation"; rather, it appears that cold sensation is related to increased sensation. As opined by Dr. Lee, cold sensitivity can coincide with hypersensitivity, which the worker has.

Reduced pinch/grip strength may encompass some of the effects of cold intolerance. For example, the worker's fingers stiffen up in the cold. This would have a negative impact on his pinch and grip strength. It would also have a negative impact on his range of motion. To some extent then, it could be said that his sensitivity to cold is reflected in his award for loss of range of motion (which includes recognition of reduced strength).

Furthermore, I do not doubt that the worker experiences an increase in his pain and aching when the weather is cold and wet. Permanent disabling chronic pain has been accepted under his claim, and he has been granted the award of 2.5% in recognition. I find, therefore, that some degree of cold intolerance is encompassed by the chronic pain award as well. The question then is whether the extent of cold intolerance experienced by the worker represents a greater impairing factor than is reflected in his award of 7.04% of total.

The worker has consistently complained of cold intolerance; however, I am not satisfied on the facts of this claim that the extent of his cold intolerance warrants an additional award. His complaints have waxed and waned over time, and he is able to reduce them with the use of a thermal glove. His physicians have also commented that his symptoms would lessen if he performed the recommended desensitization exercises. After reviewing the evidence regarding the nature and extent of the worker's symptoms and findings, I conclude that his complaints of pain, two-point discrimination sensory loss, reduced range of motion (which recognizes loss of sensation and reduced

pinch/grip strength), and cold intolerance are appropriately compensated by the existing PPD award of 7.04% of total disability. I deny this aspect of the worker's appeal.

In summary, I find that the PPD award of 7.04% of total disability appropriately reflects the estimated impairment of earning capacity due to the worker's permanent injuries. I deny this aspect of the worker's appeal.

Eligibility for a section 23(3) assessment

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 the worker's pre-injury occupation and the compensable disability is "so exceptional" that the section 23(1) award does not appropriately compensate the worker 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 that the worker's circumstances were not so exceptional as to warrant an assessment under section 23(3) of the Act because he was capable of returning to his pre-injury job without incurring any loss of earnings. The review officer went a step further and concluded that it would also be possible for the worker to perform the essential skills of a same or similar occupation, which she identified as including light production worker, warehouse worker, and greenhouse worker. The worker contends, however, that he is not capable of returning to his pre-injury occupation or a similar type of heavy work. He states that he is experiencing a significant loss of earnings as a result. He maintains that his section 23(1) award does not adequately compensate him for the effect of his disability.

RSCM II policy item #40.00 states that while a worker may have 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. It notes that "Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills." The policy sets out the three following threshold criteria, which must be satisfied in order for a worker to be assessed under section 23(3) of the Act:

- The occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature;

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

- The effect of the compensable disability is that the worker is unable to work in his or her occupation or in an occupation of a similar type or nature, or to adapt to another suitable occupation, without incurring a significant loss of earnings.

The policy further states that in all cases, the Board must determine if, following recovery from a work injury, a worker is either able to return to the occupation at the time of injury or to adapt to another suitable occupation. This determination includes consideration of both the worker's transferable skills and the worker's 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. This occurs where medical evidence establishes that the injury makes it "impossible" for the worker to continue in the injury occupation or a similar occupation or adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.

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 that criteria, the second step is an actual section 23(3) assessment. This decision addresses only the first step.

In addition to published policy, Practice Directive #46 (available on the Board's website) provides guidance to adjudicators in determining whether a worker may be entitled to a section 23(3) award. A practice directive is not published policy. Practice directives are issued to assist Board staff and external parties in interpreting and applying the Act, regulations, and policies.

Practice Directive #46 elaborates on the three 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 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.

The practice directive states that the essential skills of the occupation 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.

In this case, the worker was considered unable to return to his pre-injury job because of his residual limitations. The fact that he cannot return to the specific job does not mean that he meets the so exceptional test under section 23(3) of the Act. The DAO concluded that the worker was capable of returning to his pre-injury "occupation," which includes a variety of jobs categorized under NOC code 7611. The DAO thought that the injury did not make it impossible for the worker to continue to work in some of the jobs captured under that NOC code.

The DAO and review officer did not identify what the essential skills were under NOC code 7611. Nor did they address that the worker's broad occupational category under NOC code 7611 requires the performance of heavy manual labour. Yet, the worker is permanently limited to performing light to medium lifting, along with avoiding highly repetitive and sustained left hand work. I recognize that Practice Directive #46 provides that skills are "not to be confused with physical demands such as standing and sitting," and 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. The difficulty in differentiating between essential skills and physical demands has been the subject of several WCAT decisions.

In *WCAT Decision 2005-03022*, the panel commented as follows:

> I find the notion of separating physical demands from general skill attributes to be an exceedingly difficult concept to grasp. However, it is appropriate to note that Practice Directive #46 does not suggest that physical demands are not to be considered, and instead seemingly only suggests that they are not to be a primary consideration, considering that workplace modifications may be available. The question then is what should occur when workplace modifications are not available; neither the policy nor Practice Directive #46 really discusses such an event, which is unfortunate, because job site modification is not always an available or viable option.

The panel relied on the analysis contained in *WCAT Decision #2004-06402*, which discussed the same concept. Of interest, that decision also addressed the situation of a worker whose pre-injury job fell within NOC code 7611. The vice chair in that appeal commented as follows:

> The CADA noted that the question was whether the worker still had the ability to apply those skills, and referred specifically to understanding

directions, identifying the materials, equipment and tools used on the jobsite, and using the tools in his tool belt.

I agree that the worker does retain those specific skills. However, if the listed duties are considered, it becomes apparent that one of the essential "skills" necessary for occupations in NOC #7611 is the ability to handle potentially heavy materials. It is difficult to envision any job falling within NOC #7611 that could be performed by a worker who is limited to light/medium work, with no repetitive bending or flexing of the trunk, no fixed static standing and no sustained forward bending. Although those activities are not necessarily "skills" and could be classified as "physical demands," they are not the type of physical demands that could be mitigated through workplace modifications. If the worker were a skilled trades person, he may have "helpers" available to do the heavy lifting and bending, but the worker's skills, and his employment history, all required the ability to perform relatively heavy physical labour. I consider that his L1 compression fracture, which is acknowledged to constitute a serious injury, to have limited his ability to perform an essential "skill" of his occupational category, which is heavy physical labour.

I acknowledge that in most cases heavy physical labour is not a "skill," in the sense that it is a learned application of knowledge and abilities. However, in the limited circumstances of this case, where the vast majority of jobs in the NOC classification require heavy physical labour, it must be considered a "skill." There is very little else that could be classified as a "learned application of skills and knowledge" in the jobs listed, and while the worker retains the ability to follow directions, and identify his tools, he is limited in his ability to use those tools because of his compensable disability, which includes chronic pain and the inability to do heavy lifting, sustained standing or bending.

In support of that conclusion, and as an example, if the worker had become paraplegic because of his spinal injury, he would still retain the ability to follow instructions, to identify his tools and to "use" the tools in his tool belt, but he most certainly would not have been able to return to work as a trades helper or labourer. As such, physical ability to perform heavy labour must be considered a "skill" required of a trades helper or labourer.

In this case, the worker's pre-injury occupation as a construction trades helper involves heavy manually intensive labour. I consider that the "main duties" of the vast majority of the jobs under NOC code 7611 require bilateral heavy lifting, along with some sustained left hand work. While the worker retains the ability to follow directions, and identify his tools, he is limited in his ability to use those tools because of his compensable disability. I accept that the physical ability to perform heavy manually intensive labour must be considered a "skill" required of a trades helper or labourer. I find therefore that the

evidence establishes that, as a result of the compensable disability, the worker was no longer able to perform the essential skills needed to continue in his occupation (NOC code 7611) at the time of injury.

The review officer concluded that the worker could perform the essential skills of a similar occupation. Practice Directive #46 explains that 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. The review officer identified "similar occupation" to include greenhouse worker, light production worker, and warehouse worker. I question whether those jobs could be considered a similar occupation under the three-unit digit code. There is no evidence on file outlining what occupations are included in the three-unit digit code; however, the NOC is publicly available on the Board's website and I accessed it to research this matter.

The NOC reveals that there is only one three-unit digit code under 7611. It is 7612 and is entitled "Other trades helpers and labourers." The NOC describes jobs under this occupational category as including trade helpers and labourers, not elsewhere classified, who assist skilled tradespersons and perform labouring activities in the installation, maintenance and repair of industrial machinery, refrigeration, heating and air conditioning equipment, in the maintenance and repair of transportation and heavy equipment, in the installation and repair of telecommunication and power cables and in other repair and service work settings. They are employed by a wide variety of manufacturing, utility and service companies.

The NOC provides the following examples of job titles under code 7612: aerial spraying assistant, aircraft mechanic helper, cable installer helper, diesel mechanic helper, telecommunications ground worker, automotive mechanic's helper, millwright helper, refrigeration mechanic helper, and surveyor helper. It does not include warehouse worker, greenhouse worker, or light production worker.

I note that the VRC did not have the worker target jobs in either category 7611 or 7612. In my view, the essential skills required for jobs under NOC code 7612 are virtually identical to those required under NOC code 7611. Given my finding that the worker was no longer able to perform the essential skills needed in his occupation (NOC code 7611) because of his compensable disability, I also reach the same finding with respect to occupations of a similar type or nature (NOC code 7612).

The final question under RSCM II policy item #40.00 is whether the worker would be able to adapt to another suitable occupation, without incurring a significant loss of earnings. For this purpose, Practice Directive #46 provides that a worker is considered to retain all the essential skills of the pre-injury occupation, with the exception of the limitations caused by the permanent disability. Pre-injury transferable skills (considering as well the possibility of enhancements or re-certifications, through vocational rehabilitation assistance) will also be included to determine the worker's residual (post

injury) skill set. Where the worker is considered able to return to a suitable occupation, it must further be determined whether the worker will incur a significant loss of earnings.

Although the CADA concluded in the March 18, 2004 claim log entry that the worker could return to his pre-injury occupation, the VRC focused on finding the worker another suitable occupation. I must decided whether light duty production worker, greenhouse worker, or warehouse worker are suitable for the worker and whether he can adapt to those occupations without incurring a significant loss of earnings.

The evidence establishes that the JPP secured a light production assembly job opportunity (weights of three to five pounds) for the worker. He worked a full day on August 11, 2004, but did not return. He said that he could not do the job because his fingers began to bleed. Yet, he did not seek medical attention for five days, and the medical evidence on file does not confirm that he was unable to do the job. The evidence suggests that the worker believed that he was unemployable. I do not agree.

In my view, the evidence suggests that the job found by the JPP was suitable for the worker, but he was convinced that he was unemployable. That job paid $10.00 per hour, with increases over three to five years up to $18.00 per hour. This would exceed the worker's wage rate over the long-term, which is approximately $14.00 to $15.00 per hour.

After considering the information in the worker's file, and the evidence at the oral hearing, I am not persuaded that the worker is unable to adapt to another suitable occupation without incurring a significant loss of earnings because of his work injury. The worker may be unable to work in an occupation requiring heavy manually intensive labour, but he was given the opportunity to adapt to another occupation and, in essence, rejected it. It is most unfortunate that the worker did not take full advantage of the vocational rehabilitation assistance offered to him, but I do not have jurisdiction to address that matter. I note, however, that the Board has extended (as confirmed by the review officer in an April 7, 2005 decision) the offer of a work assessment or training on the job should the worker find an employment opportunity. He may wish to contact the Board to inquire about its offer, as it was apparent from his evidence at the hearing that he believes the Board has completely abandoned him.

The job opportunity that the JPP found for the worker would have provided him with similar earnings to his pre-injury income over the long-term. I accept that the employment prospects that the VRC suggested, and the JPP targeted, which included light production work, do not require the physical skills that heavy manual labour require and would replace the worker's pre-injury income over the long term. As such, I find that the worker is not entitled to assessment of a possible permanent disability award based on section 23(3) of the Act.

In summary, I find that although the worker's residual disability prevents him from performing the essential skills needed to continue in his previous occupation as defined

under 7611 of the NOC or adapt to a similar occupation under 7612 of the NOC, he is able to adapt to another suitable occupation without incurring a significant loss of earnings (light production worker, for example). This occupation would be within his limitations. As a result, the worker is not entitled to an assessment on a loss of earnings basis, and his PPD award remains at 7.04% of total disability. I deny the worker's appeal of this issue.

Conclusion

I confirm the January 27, 2005 Review Division decision.

No expenses were requested and none are awarded.

Elaine Murray
Vice Chair

EM/hb