Precedent Panel Decision Summary

Decision: WCAT-2005-06624 **Decision Date:** December 13, 2005

Three Member Panel: Jill Callan, Herb Morton, Susan L. Polsky Shamash

Section 238(6) Precedent Panel Decision – Permanent Disability Award – Scope of WCAT's jurisdiction under section 239(2)(c) – Local range interpretation versus global range interpretation – Impairment of the lumbar spine – Sections 23(1), 23(2), 238(6), 239(2)(c), and 250(3) of the Workers Compensation Act – Section 8 of the Interpretation Act – Policy item #39.10 of the Rehabilitation Services and Claims Manual, Volume I – Policy items #75 and #76 of the Permanent Disability Evaluation Schedule in the Rehabilitation Services and Claims Manual, Volume II – Policy item #8.20 of the WCAT Manual of Rules of Practice and Procedure

A Workers' Compensation Appeal Tribunal (WCAT) precedent panel was assigned to determine whether, in applying policy items #75 and #76 of the Permanent Disability Evaluation Schedule (the Schedule) in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) concerning the lumbar spine, WCAT has broad jurisdiction to consider the worker's appeal based on the maximum of 24% (the global range interpretation), or limited jurisdiction to consider only the portion of the award pertaining to loss of flexion for which a range in excess of 5% is provided (the local range interpretation). The panel concluded that the global range interpretation is correct because it best fits with item #39.10 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), the wording in the Schedule, sections 23(1) and 23(2) of the *Workers Compensation Act* (Act), the reasoning expressed by the core reviewer, the statements of the Minister regarding the intent of section 239(2)(c), and section 8 of the *Interpretation Act*. The local range interpretation would unduly restrict appeal rights. The panel found that the global range interpretation applies to items #75 and #76 of the Schedule contained in RSCM II.

The worker appealed his pension award for disability of his lumbar spine. The award was made under the Schedule in RSCM II. The issue assigned to the precedent panel was whether WCAT has jurisdiction only over the flexion component of the award because it is the only loss that has a range greater than 5% (the local range interpretation), or whether it has jurisdiction over the entire award because the range for the whole of the lumbar spine is 24% (the global range interpretation).

Pursuant to section 239(2)(c) of the Act, WCAT does not have jurisdiction to hear an appeal from a review officer's decision respecting the application of the Schedule where the scheduled percentage of impairment range does not exceed 5%. The global range interpretation best fits with item #39.10 of RSCM I which states that the Schedule is a set of guide-rules, not a set of fixed rules. A decision-maker is free to apply other variables relating to the degree of physical impairment in arriving at a final pension. Inasmuch as item #76 of the Schedule sets a maximum award of 24% of total disability for impairment of the lumbar spine, and item #39.10 and the explanation in the Schedule both support the application of the Schedule as a set of guide-rules, there is room for the exercise of discretion in the making of the award. Limiting WCAT's jurisdiction by reference to the ranges set for particular aspects of the disability would

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seem to have the effect of treating these ranges as a set of fixed rules, rather than recognizing the exercise of discretion contemplated by policy.

The global range interpretation is also more consistent with sections 23(1) and 23(2) of the Act. Section 23(1) stipulates that "the impairment of earning capacity must be estimated from the nature and degree of the injury." This wording supports viewing the injury to the worker's lumbar spine on a global basis. The worker did not sustain separate injuries in respect of his limitations in flexion or extension, or the other factors taken into consideration in making the pension award.

Section 23(2) provides that the Workers' Compensation Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases. Again, the rating schedule is a guide which relates to specified injuries. The panel considers that the intent was to evaluate the overall effects of the injury.

The panel found that the local range interpretation would unduly restrict appeal rights. Where a worker suffers an injury to their spine, it would be more appropriate to assess this disability on a global range approach, rather than separating it into multiple discrete injuries or impairments affecting different ranges of movement or other measurable components. While the global range approach includes consideration of these separate components of the disability, the pension award is for the overall effects of the worker's injury and disability.

Finally, the global range interpretation best accords with the reasoning expressed by the core reviewer, the wording of the Schedule, the statements of the Minister regarding the intent of section 239(2)(c), and section 8 of the *Interpretation Act*. Upon considering the analyses in prior WCAT decisions and submissions from the representative groups, the panel found persuasive the reasons which support a global range interpretation of the Schedule.

In view of section 250(3), the precedent panel carefully restricted its decision to the issues necessary to the consideration of this particular appeal. The panel found that the global range interpretation applies to items #75 and #76 of the Schedule contained in RSCM II. The binding effect of this decision is restricted to pension awards for disabilities of the lumbar spine.

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1. Introduction

The worker has appealed the January 12, 2005 Review Division decision (*Review Decision #21490*) concerning the assessment of his permanent functional impairment (PFI) award. His appeal to the Workers' Compensation Appeal Tribunal (WCAT) raised a preliminary issue regarding the scope of WCAT's jurisdiction under section 239(2)(c) of the *Workers Compensation Act* (subsequently cited as the Act or simply by reference to section numbers). The WCAT chair concluded that the preliminary jurisdictional issue raised in this appeal was one of special interest or significance to the workers' compensation system as a whole, and appointed a "precedent panel" under section 238(6).

Consideration of the preliminary issue proceeded on the basis of written submissions from the employers' adviser as the deemed employer (section 248(3)), and from the representative groups shown below. The worker did not make a submission. We find this preliminary issue involves an issue of law and policy which can be properly determined on the basis of written submissions without an oral hearing. The due date for the WCAT decision was extended by 120 days to January 31, 2006, on the basis of complexity (section 253(5)(a)). Submissions were closed on November 16, 2005.

2. Issue(s)

In considering the worker's appeal of his pension award for disability of his lumbar spine, does WCAT have jurisdiction only over the flexion component of the award (because it is the only loss that has a range greater than 5%), or does WCAT have jurisdiction over the entire award because the range for the whole of the lumbar spine is greater than 5% (i.e. not to exceed 24%)?

3. Jurisdiction

Under section 239(1), a final decision made by a review officer in a review under section 96.2 may be appealed to WCAT. WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (sections 250(2) and 251 of the Act).

4. Precedent Panel – Participation by Representative Groups

The role of a "precedent panel" is described at item #8.20 of WCAT's *Manual of Rules of Practice and Procedure*, and in *WCAT Decision #2005-03622* (accessible at: www.wcat.bc.ca/research/precedent_decisions.htm).

WCAT may request any person or representative group to participate in an appeal if the tribunal considers that this participation will assist the tribunal to fully consider the merits of the appeal (section 246(2)(i)). WCAT invited participation by the following additional groups:

> B.C. Federation of Labour
> Business Council of B.C.
> Coalition of B.C. Businesses
> Employers' Forum to the WCB
> Workers' Adviser
> Workers' Compensation Advocacy Group

In notice letters dated June 16, 2005 to these representative groups, WCAT's counsel explained:

> Where there is anatomic or surgical impairment present, as well as loss of range of motion, the final impairment is based on the greater of the two. The worker's impairment for the surgical fusion is rated at 4%. His loss of range of motion was rated at 3% for flexion, 4% for extension and 2.8% for right lateral flexion, for a total of 9.8%. As the worker's loss of range of motion was greater than his surgical loss, he was granted a permanent disability award equal to 9.8% of total on a loss of function basis.
>
> …
>
> The issue concerning the interpretation of section 239(2)(c) arises where the overall or global range for a permanent disability award for a specified body area is more than 5% but it has various components which individually may have a range of less than 5%. WCAT panels have reached different conclusions concerning the scope of WCAT's jurisdiction in such circumstances as to whether WCAT has jurisdiction over the whole award for that area of disability, or just in relation to the specified components of the award which have a range which exceeds 5%.
>
> Examples of WCAT decisions on this topic are #2004-01848 (local range interpretation) and #2004-02317 (global range interpretation).

…

> The specific question on this appeal is whether WCAT has jurisdiction only over the flexion component of the award because it is the only loss that has a range greater than 5%, or over the entire award because the range for the whole of the lumbar spine is greater than 5% (i.e. not to exceed 24%).
>
> There are other issues before WCAT on this appeal. However, only the jurisdictional question has been assigned to the precedent panel. Once that has been decided, another panel will be assigned to consider the merits of this appeal separately.

The notice letter cited item #76 of the Permanent Disability Evaluation Schedule (the Schedule, or PDES) contained in Appendix 4 of *Volume II* of the *Rehabilitation Services and Claims Manual* (RSCM II), which sets out the percentages for losses of range of motion in various planes.

Submissions were received from the Workers' Adviser (July 15, 2005), the Workers' Compensation Advocacy Group (July 15, 2005), and the Employers' Adviser (October 21, 2005). All submissions were disclosed to the worker.

5. Background

The worker suffered an L5-S1 disc herniation as a result of a back injury at work on September 25, 1992. He underwent surgery in November 2000 for an L5-S1 fusion, following which wage-loss benefits ended on June 11, 2001 (followed by rehabilitation assistance). He underwent a PFI examination on May 27, 2004. By decision dated June 24, 2004, he was awarded a pension of 9.8% of total disability, effective June 12, 2001. The worker received a loss of earnings pension award. The worker requested review by the Review Division of the pension decision. *Review Decision #21490* confirmed the worker's PFI assessment, and concluded that no additional award for subjective complaints or chronic pain was warranted. With respect to the loss of earnings pension award, the review officer referred the decision of June 24, 2004 back to the Board with directions, including the requirements that the Board conduct another employability assessment and provide the worker with a new decision.

The worker's current appeal to WCAT only concerns the aspects of the June 24, 2004 pension decision which were confirmed by the review officer. Section 4 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02, provides:

> For the purposes of section 239 (2) (a) of the Act, the following are classes of decisions that may not be appealed to the appeal tribunal:

…

(d) decisions about whether or not to refer a decision back to the board under section 96.4 (8) (b) of the Act;

Prior WCAT decisions have held that if the Review Division decides one issue, and refers another issue back to the Board under s. 96.4(8)(b) of the Act, that part of the decision which decides one issue is appealable to WCAT. Examples of such situations are *WCAT Decisions #2003-02890*, *#2004-01272* and *#2005-01601* (see also *WCAT Decisions #2004-03685* and *#2004-05230*).

6. Law and Policy

Section 239(2)(c) provides:

> The following decisions made by a review officer may not be appealed to the appeal tribunal:
>
> …
>
> (c) a decision respecting the application under section 23(1) of rating schedules compiled under section 23 (2) where the specified percentage of impairment has no range or has a range that does not exceed 5%;

The determination of the worker's pension entitlement involved section 23 of the Act as it read immediately prior to June 30, 2002. The worker's date of injury, and the first indication of permanent disability, were both prior to that date. Section 23(1) and (2) of the Act provided:

> 23(1) Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.
>
> (2) The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

The policy which applies is contained in *Volume I* of the *Rehabilitation Services and Claims Manual* (RSCM I). RSCM I item #39.10 provides:

> **39.10 Scheduled Awards Permanent Disability Evaluation Schedule**
>
> For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule.*
>
> Scheduled awards are awards made under the Permanent Disability Evaluation Schedule, which is set out in Appendix 4. This is a rating schedule of percentages of impairment for specific injuries or mutilations. [Footnote: Section 23(2)](4)
>
> The Permanent Disability Evaluation Schedule is a set of guide-rules, not a set of fixed rules. The Disability Awards Officer or Adjudicator in Disability Awards is still free to apply other variables in arriving at a final pension; but the "other variables" referred to means other variables relating to the degree of physical impairment, not other variables relating to social or economic factors, nor rules (including schedules and guide-rules) established in other jurisdictions. In particular, the actual or projected loss of earnings of a worker because of the disability is not a variable which can be considered. [Footnote: Permanent Disability Evaluation Schedule Appendix 4]
>
> Any revision of the schedule must be undertaken by procedures that are appropriate to changes of a legislative nature. It will not be done through appeal decisions in individual cases. The schedules in use in other jurisdictions are part of the material that would be looked at in any revision of the schedule used here; but they are not part of the material relevant in the decision of any individual claim.
>
> In cases where the specific impairment is not covered by the schedule, but the part of the body in question is covered, the Disability Awards Officer or Adjudicator must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the Disability Awards Medical Advisor and other medical and non-medical evidence available. The final award is arrived at by taking this percentage of the percentage allocated in the schedule to the disabled part of the body. Because the schedule is used in the calculation, this type of award is still considered as a scheduled one. For example, the amputation of an arm down to the proximal third of the humerus or its disarticulation at the

> shoulder is scheduled at 70% of total disability. Suppose a worker suffers a severe crush injury to the arm which culminates in a permanent loss of half its function. The final assessment would be 50% of 70%, i.e. 35% of total disability.

The Permanent Disability Evaluation Schedule is contained in Appendix 4 to the RSCM I. The first paragraph of Appendix 4 similarly states:

> For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule.*

Board of Directors' Resolution Number 2003/06/17-06, "Permanent Disability Evaluation Schedule", June 17, 2003, is published in Volume 19 of the *Workers' Compensation Reporter* at pages 33-84 (accessible at: www.worksafebc.com/publications/newsletters/wc_reporter/). This policy contained substantial revisions to the Schedule. Paragraph 3 of the resolution stated:

> This resolution applies to all section 23(1) award assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003.

As the worker's PFI assessment occurred on May 27, 2004, the applicable policy regarding the assessment of his pension award is contained in RSCM II (even though the worker's appeal is otherwise being decided based upon policy contained in RSCM I). The Schedule contains the following introductory explanation (quoted in part):

EXPLANATION OF THE SCHEDULE

> This is the Schedule used for guidance in the measurement of partial disability under section 23(1). The Schedule attributes a percentage of total disability to each of the specified disablements. For example, an amputation of the arm, middle, third of humerus, is indicated to be 65%. When that percentage rate is applied, it means that a worker will receive a section 23(1) award based on 65% of 90% of average earnings as determined by the *Act*.
>
> The Schedule does not necessarily determine the final amount of the section 23(1) award. The Board is free to take other factors into account.

Thus, the Schedule provides a guideline or starting point for the measurement rather than providing a fixed result.

Only a minority of disabilities are listed in the Schedule. In other cases, however, a Schedule can still be of some guidance value if the injury is similar to one that is listed.

The Schedule contains the following explanation regarding awards for impairment of the spine:

THE SPINE
(Codified March 1, 1990)

This schedule recognizes that anatomical loss or damage resulting from injury or surgery may contribute to physical impairment of the spine. When anatomic and/or surgical impairment is present as well as loss of range of movement of the spine, the final disability rating will be based on the greater of the two.

Range of movement of the spine is difficult to assess on a consistent basis because the joints of the spine are small, inaccessible and not externally visible. Only movement of a region of the spine can be measured; it is not possible to measure mobility of a single vertebra. Spine movement also varies with an individual's body type, age and general health. Because of these, a judgment factor will continue to be necessary in spine assessment.

The Schedule has separate subheadings for the neck (cervical spine), the mid-back (dorsal or thoracic spine), and the low back (lumbar spine).

Items 75 and 76 of the Schedule concern impairment of the lumbar spine:

Lumbar Spine:	
75.(a) Compression fractures to include D12	
(i) Up to 50% compression	0 - 2%
(ii) Over 50 % compression	2 - 4%
(b) Impairment resulting from surgical loss of intervertebral disc D12 to S1	2% per level
(c) Ankylosis (fusion) D12 to S1 including surgical loss of intervertebral disc	4% per level

76. Loss of range of motion	
Flexion	0 - 9%
Extension	0 - 5%
Lateral flexion right and left	each 0 - 5 %
Maximum disability rating not to exceed	24%

The Schedule also provides the following normal range of motion values:

Lumbar Spine	
Flexion	60 degrees
Extension	25 degrees
Lateral Flexion	25 degrees

The vertebral column (spine) consists of seven cervical vertebrae, twelve thoracic (dorsal) vertebrae, five lumbar vertebrae, and the coccyx (formed by the fusion of four or more rudimentary vertebrae). Discs are fibrocartilagenous structures, between the vertebrae, which are strong to withstand compression, but are also flexible to allow movements between the vertebrae. Each disc has two parts: the inner part (nucleus pulposus) is a gel, and the outer part (annulus fibrosus) is made up of concentric layers of collagen. The spinal cord and its coverings, and the spinal nerves, are contained within the vertebral canal.

Item #74 of the Schedule defines the lumbar spine as including the area from D12 to S1. This means the area between the last or 12th thoracic (dorsal) vertebra (D12), including the five lumbar vertebrae (L1, L2, L3, L4 and L5), and the area between the fifth lumbar vertebra and the first sacral vertebral segment (L5-S1). Accordingly, there are normally six levels of the lumbar spine which may be affected.

Policy at #39.12 of *Volumes I* and *II* of the RSCM II further provides:

> Prior to October 27, 1977, the Board did not normally permit an enhancement factor in respect of spinal column disabilities. However, subsequent to that date, the Board has concluded that such a factor may be added for combinations of disabilities when one of those disabilities involves the spinal column and that disability is shown to have been enhanced by the others. A factor of 50% of the disability attributed to the spine is added. Therefore, if the disability in the back is 10%, and the sum of the other disabilities is 16%, the enhancement factor is 5% and the

total disability awarded 31%. This has not been retroactively applied to awards made prior to October 27, 1977.

7. Other WCAT Decisions

(a) Local Range Interpretation

WCAT Decision #2004-01848 dated April 14, 2004 reasoned:

> The use of the 24 percent figure to determine jurisdiction, in my opinion, would require me to ignore the range specified for each of those ranges of motions. Section 239(2)(c) refers to the "specified percentage of impairment". As I have pointed out above, the percentage of impairment in relation to lumbar spine range of motion is specified in terms of four separate types of motion. In the case of each type of motion a "specified percentage of impairment" is provided. In each case a range of percentage of impairment is specified. Therefore, in my view, the preferred approach is that each range of motion be considered separately. Following this line of reasoning, the only range of motion which is appealable to WCAT is flexion where the range specified is 0 to 7 percent. The other ranges of motion do not exceed 5 percent. Thus there can be no appeal to WCAT from a decision of a review officer concerning the other ranges of motion. I appreciate that my approach may be considered overly technical. However, I consider that it is more clearly in compliance with section 239 of the Act. It is true that 24 percent is potentially at stake when a worker's lumbar spine range of motion is assessed. However, a worker may have a limitation in one range of motion only. In that case the decision whether WCAT has jurisdiction based on the 24 percent cumulative figure is, in my view, questionable. I consider it important that an interpretation of a jurisdictional question be capable of application to as many possible scenarios as possible. My more restrictive view provides a clearer jurisdictional rule in my view. Also, the interpretation I have adopted is clearer when the schedule in Volume II which applies to assessments after August 2003 is considered. The new schedule is drawn up differently and more clearly indicates that each of the ranges of motion has a range of impairment attached to that range of motion. The 24 percent figure is more clearly a maximum total of the individually listed ranges.
>
> As a result of this limited jurisdiction I find that I have jurisdiction only over the award in relation to flexion of the lumbar spine where the range is 0 to 7 percent.

(b) Global Range Interpretation

WCAT Decision #2004-00820 dated February 18, 2004 reasoned:

> …I conclude that the "specified percentage of impairment" in [section 239(2)(c)] refers in this case to the global category of loss of range of motion of the cervical spine in item #109 of the schedule, not the separate sub-components used to measure the total loss of cervical motion. I accordingly find that 239(2)(c) does not preclude me from addressing the scheduled portion of the worker's section 23(1) pension award because the range of impairment in item #109 extends from 0 to 21 percent. I thus have jurisdiction to address the scheduled portion of the worker's section 23(1) award under the general provisions of section 239(1).

WCAT Decision #2004-02317 dated May 4, 2004 reasoned:

> Section 239(2)(c) is a jurisdictional provision. The Supreme Court of Canada has on a number of occasions considered the manner in which statutory provisions describing an administrative tribunal's jurisdiction should be construed. Many of these decisions arose in the context of the Canadian Charter of Rights and Freedoms, but the principles can be of assistance in a case such as this. For example, in *Cooper* v. *Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, the Court said, at pages 888-889:
>
> > In considering whether a tribunal has jurisdiction over the parties, the subject matter before it, and the remedy sought by the parties, it is appropriate to take into account various practical matters such as the composition and structure of the tribunal, the procedure before the tribunal, the appeal route from the tribunal, and the expertise of the tribunal. These practical considerations, in so far as they reflect the scheme of the enabling statute, provide an insight into the mandate given to the administrative tribunal by the legislature. At the same time there may be pragmatic and functional policy concerns that argue for or against the tribunal having constitutional competence, though such concerns can never supplant the intention of the legislature.
>
> The Supreme Court of Canada was considering the jurisdiction of an arbitration board in *Alberta Union of Provincial Employees v. Lethbridge Community College***,** 2004 SCC 28. The Court said:

> As affirmed by this Court in *Rizzo Shoes*, *supra*, at para. 27, "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences". Further, an interpretation may be viewed as absurd where it is incompatible with other provisions or with the object of the legislative enactment: see P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 456. Professor R. Sullivan similarly notes that "[a]n interpretation that would tend to frustrate the purpose of legislation or the realization of the legislative scheme is likely to be labelled absurd": see *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 243-44.

It is a well established principle that workers' compensation legislation is based on the so called "historical compromise," in which employers participate in a mandatory, no-fault scheme to provide workers with compensation for workplace injury and disease. In order to resolve the inevitable disputes that arise by virtue of the nature of such a compensation system, the legislature has enacted a series of provisions creating appellate bodies. The structure of the workers' compensation appellate system has changed over time, but in each instance the decisions of the appellate tribunal have been the subject of a privative clause. Currently, section 255 of the Act states that any decision or action of the appeal tribunal is final and conclusive and not open to question or review in any court. Further, the Board is required to comply with a final decision of the appeal tribunal.

The level of "appeal" below the WCAT is the Review Division of the Board, which issued the decision appealed by the worker in this case. The Review Division is given the authority to reconsider its own decisions by section 96.5 of the Act, and presumably decisions of the Review Division are subject to judicial review, and the privative clause in section 96 of the Act.

Thus, a narrow interpretation of WCAT's jurisdiction with respect to item #112 in the PDES could lead to a situation where a worker or employer aggrieved by a Review Division decision respecting a lumbar spine permanent disability award must appeal the "flexion" range of motion determination to WCAT, and must take the aspects of the decision respecting "extension", "lateral flexion right and left," and "rotation right and left" on judicial review. The procedural complexities involved in such multiple proceedings would be daunting to any but the most sophisticated participant in the system.

In my view, such a narrow interpretation can lead to an absurd result in an individual case, which creates procedural complexity. That procedural complexity could create additional "churn" in the system, by encouraging a multiplicity of appeal methods in one case.

Item #112 in the PDES addresses loss of range of motion of the lumbar spine. As in the worker's case, the loss of motion is usually the result of a discrete injury or insult to the lumbar spine, such as a surgical procedure. As is noted in the preamble to the spine section of the PDES, range of movement of the spine is difficult to assess on a consistent basis, and only movement of a *region* of the spine can be measured [emphasis added]. In my view, the difficulties inherent in assessing range of motion of the spine are recognized in the PDES by virtue of the statement that maximum impairment of function is not to exceed 24%. The values listed for the various motions in item #112, even if determined at the maximum percentage allowed, do not add up to more than 24% in any event. As such, the maximum impairment percentage is unnecessary except as recognition of loss of range of motion of the lumbar spine on a global basis. I consider that recognition to support a conclusion that for the purposes of section 239(2)(c) the range of specified percentages of impairment of the lumbar spine is 0 to 24%.

. . .

The PDES makes special provision for the spine, recognized by the preamble to the section. It recognizes that the motion of the spine is complex and involves the movement of many small joints, the range of motion of which is not directly measurable. While there are other items in the PDES that are broken down into component parts, they relate for the most part to anatomical loss such as amputations, or to the range of motion of joints that lend themselves to easily verified and objective measurement. For example, the range of motion of a finger joint is readily and consistently measured by a trained assessor. I consider that the structure and layout of the PDES, in addition to the preamble to the section involving the spine, recognizes the necessity of global assessment of spine range of motion. The ranges relating to the particular planes of movement can be viewed as components providing guidance in the determination of where the worker's impairment fits into the overall range from 0 to 24%, which is the range specified for immobility of the lumbar spine.

(c) Effect where section 239(2)(c) applies – scope of appeal rights

WCAT Decision #2005-02034 dated April 22, 2005 (flagged as a noteworthy decision on WCAT's website at: www.wcat.bc.ca/research/noteworthy_decisions.htm) also addressed a preliminary issue concerning WCAT's jurisdiction under section 239(2)(c) of the Act. The WCAT panel found that the applicable item of the Schedule which applied to the worker's partial finger amputation had no range or a range that did not exceed 5%. The panel proceeded to consider whether this meant that the worker's pension award was not appealable to WCAT at all, or whether it meant that the worker's appeal of his pension award must be restricted to consideration of factors other than the scheduled portion of his award (1.6% of total disability). While this decision concerned a somewhat different issue, the panel's reasoning with respect to the interpretation of section 239(2)(c) is relevant to the issue before us. The panel reasoned (in part):

> Returning to section 239(2)(c), the terminology used and the process described in subsections 23(1)(2) and (3) indicate that the better interpretation of the phrase "a decision respecting the application … of rating schedules" is that it refers to the narrow decision regarding the percentage of impairment that is due to an injury as per the schedule in Appendix 4. This is only one of the decisions made when deciding a worker's entitlement to compensation for permanent partial disability.
>
> Consistent with this interpretation, I note that, if the term "decision" is construed broadly to refer to the permanent disability award decision, there would be no appeal from a review officer's decision made under section 23(3) of the Act - if the impairment of earning capacity was based on the application of the PDES (and there is no range or the range exceeds less than 5%). Permanent disability awards made under section 23(3) are frequently referred to as loss-of-earnings awards. I consider it unlikely that the legislature intended to limit a worker's appeal rights with respect to loss of earnings pensions in the absence of specific language to that effect.
>
> I am drawn to the narrow interpretation of the term "decision" as a result of the statutory provisions and the nature of the rights involved. I have also, however, referred to the Debates of the Legislative Assembly (*Hansard*) regarding the enactment of subsection 239(2)(c), and I view that statements regarding the purpose of subsection 239(2)(c) also support that interpretation.
>
> At the House in Committee of the Whole session on October 28 and 29, 2002, the following exchange took place between Joy MacPhail and the Honourable Graham Bruce, Minister of Skills Development and Labour:

> **J. MacPhail**: This is the second division of the whole appeal process. It's entitled "Appeal Rights." I have two areas of concern. The first is under sections 239(2) (b) and (c)…These decisions were appealable…Why was the change made to make this not appealable now?
>
> **Hon. G. Bruce**: …In regards to (2)(c), this isn't in the aspect of whether there is to be an amount that is awarded. This speaks to where that amount - and there's some debate within 5 percent one way or the other – is not appealable. Basically, it's trying to focus people on those things – and the board and the tribunal – in bringing through a timely decision rather than having these things extended through appeal after appeal.
>
> [1040]
>
> **J. MacPhail**: So just to be clear on the second point, which says…. Yes, 239(2)(c) says that there will be no appeal "where the specified percentage of impairment has no range or has a range that does not exceed 5 percent."
>
> My understanding, then, from the briefing that we received, is that if the decision for compensation is 23 percent and you want to appeal it….If the range for compensation was 21 to 25 percent, that's not appealable, *but you can appeal the level of compensation awarded*.
>
> **Hon. G. Bruce**: The member is correct in that definition. [Footnote: British Columbia, Debates of the Legislative Assembly (Hansard), volume 9, 10 (29 October 2002) at 4126. The Hansard index is accessible at http://www/leg.bc.ca/37th3rd/hansard]
>
> [emphasis added]

These comments indicate that the competing values underlying this amendment are the preservation of adequate appeal rights on the one hand and efficiency and timeliness of decision making on the other.

The comments directed specifically to an explanation of the section indicate that the legislature intended to restrict the right of appeal with respect to one aspect of the permanent disability award only: the scheduled percentage of impairment. The larger question of the worker's

> entitlement to compensation, that is, the amount of the permanent disability award is appealable.
>
> Accordingly, with respect to this appeal, the worker may not appeal the decision that the scheduled portion of his award is 1.6%. He may however appeal other aspects of the permanent disability award.
>
> Admittedly, this interpretation leads to the result that section 239(2)(c) has little effect in terms of altering the practice that was in place prior to the enactment of this provision. This would also appear to run counter to the stated legislative intent of improving efficiency and timeliness of decision-making by restricting certain rights of appeal. In my view though, this interpretation of section 239(2)(c) accurately reflects the language of the section in the context of the related provisions and the specific intent of the section as recorded in *Hansard*.

The WCAT panel found that section 239(2)(c) prohibits an appeal of the narrow decision respecting the application of the schedule under section 23(2) where the scheduled percentage has no range or the range does not exceed 5%. However, the panel found this is only one aspect of a permanent partial disability award under section 23(1) of the Act. The panel concluded that WCAT has the jurisdiction to address chronic pain, other variables where they have not been included in the scheduled percentage, and the estimated impairment of earning capacity.

(d) Other decisions concerning section 239(2)(c)

The question raised by this appeal concerns the interpretation and application of section 239(2)(c) in relation to an award for impairment of the lumbar spine. In considering this issue, we have taken note of WCAT decisions addressing other items in the Schedule concerning other types of impairments.

WCAT Decision #2004-01848 dated April 14, 2004 (cited above under the "Local Range Interpretation") further reasoned, in relation to the worker's disability with respect to his ankle:

> In the case of ankle disability the schedule specifies a percentage for immobility only. The percentage is 12 percent. Although no range is actually spelled out in the schedule, I interpret this figure to indicate that range of motion in the ankle is assessed on a scale from 0 to 12 percent. As a result the worker's pension appeal is within the jurisdiction of WCAT set out in section 239(2)(c) of the Act. This interpretation is supported by policy set out at item #39.10 of both Volumes I and II, RSCM. Item #39.10 indicates that an award is considered a scheduled award where there is a figure given for a more devastating injury (in this case

immobility of the ankle) and some percentage of that figure is used in the particular worker's case.

The 12 percent figure for ankle immobility could also be interpreted as not applying to the worker's situation, since the worker's ankle is not immobile. He has some range of motion in the ankle. If I were to interpret the provision in that way, there is no specified percentage of impairment or range of impairment for limited mobility of the ankle. Since there is no specified percentage of impairment the limitation on jurisdiction in section 239(2)(c) does not apply. As a result the worker's appeal falls within the jurisdiction of WCAT. However, I do not consider that this interpretation is supported by policy and I do not adopt it. Section 239(2)(c) refers to the "application under section 23(1) of rating schedules compiled". Although there is no specified amount or specified range for limited mobility of the ankle in the schedule, it is not the schedule alone which I must consider. Section 239(2)(c) indicates that jurisdiction is based on "the application …of rating schedules". In my view the application of the rating schedule by the Review Division involves the application of Item #39.10 RSCM. Once it is applied it can be seen that there is a range of 0 to 12 percent for impaired ankle mobility, 12 percent representing an immobile ankle. Impaired ankle mobility is considered a scheduled award even though no amount is specified for it. In my view this is part of the "application... of rating schedules".

WCAT Decision #2005-04313 dated August 17, 2005 concerned a worker's shoulder disability. The vice chair reasoned:

Item #6 in the PDES provides an impairment rating of up to 35% for immobility of the shoulder, including the following components for various planes of movement:

(a)	Flexion	14%
(b)	Extension	3.5%
(c)	Abduction	7%
(d)	Adduction	3.5%
(e)	External Rotation	3.5%
(f)	Internal Rotation	3.5%

… the subcomponents for the various planes of movement of the shoulder are identified by letters: (a) through (f). However, I do not consider this to be the determining factor in whether the global impairment rating for the shoulder or the subcomponents for the various planes of movement of the shoulder are the "specified percentage of impairment in the schedule" for the shoulder under section 239(2)(c).

> I consider a more significant factor to be the requirement in section 23(1) that the Board estimate the impairment of earning capacity from the nature and degree of the worker's injury. In this case the injury accepted as resulting in permanent disability, and referred to Disability Awards for assessment, was the worker's right shoulder injury (including the fractures to the scapula and clavicle). The fact that the Board's PDES rates impairment due to shoulder immobility based on measurements of various planes of movement of the shoulder does not, in my analysis, detract from the fact that it is impairment resulting from the shoulder injury that is being assessed. For this reason I consider the "specified percentage of impairment" in section 239(2)(c) to refer to the global range of impairment (0% to 35%) for the shoulder. This approach is more consistent with the language of section 23(1) than treating each separate plane of shoulder movement as if it were a permanent disability being assessed separately.

WCAT Decision #2005-06031 dated November 10, 2005 concerned a worker's disability with respect to his hand. The vice chair reasoned:

> 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 that 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.
>
> …
>
> 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.

WCAT Decision #2005-03167 dated June 17, 2005 also discussed the consideration to be given to additional factors not contained in the Schedule:

> The review officer referred to the Board's *Additional Factors Outline*. This document is publicly accessible at www.worksafebc.ca and provides guidelines for the consideration of additional factors that are not formally contained in the PDES. The current version on the Board's website is dated June 2004 and indicates it was prepared after consultation with DAMAs and Board medical specialists, as well as after a review of current medical literature and schedules from other jurisdictions, including the American Medical Association Guides, 5th Edition. As stated in the introduction, the purpose of the outline is to provide guidelines for consideration of additional factors that are not formally contained in the PDES. The outline also states that policies #39.10 and #39.50 should be referenced to determine if the additional factor is scheduled or unscheduled. The outline does not constitute published policy of the board of directors of the Board. However, it can provide useful guidance in certain circumstances.

The Board's practice directives, including a current version of the Disability Awards' *Additional Factors Outline*, are accessible at:
www.worksafebc.com/regulation_and_policy/practice_directives/default.asp

8. Submissions

(a) Workers' Compensation Advocacy Group

A submission dated July 15, 2005 was provided by James Sayre on behalf of the Workers' Compensation Advocacy Group. He submits that WCAT has jurisdiction over the worker's entire award since the range for functional disabilities to the entire lumbar spine is more than 5%. He cites four main reasons in support of this position (numbering added):

(i) The Legislative History of Section 239(2)(c)

The restrictions on appeals in s. 239(2) were enacted along with the rest of the existing appeal structure as part of Bill 63 [the *Workers Compensation Amendment Act (No. 2), 2002*], which was based on the recommendations in the Core Services Review on Law and Policy Issues that was released on March 11, 2002 [accessible at: www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf].

The Core Reviewer wrote at page 35 to 37 that the Review Division should generally conduct its proceedings on a substitutional rather than a supervisory basis, except for certain issues where the scope of review should be limited to substantial and material errors of fact, errors of law, or contravention of Board policy. At pages 50 to 51, he recommended that for similar reasons, there should be no further appeal to the WCAT on those issues. The list of such issues where the scope of review and further appeal rights would apply include Item (iv) at p. 36, which refers to functional pension assessments where the range is no more than 5%.

The Reviewer referred at p. 36, item (iv) to the chapter on pensions to explain the reasons for his recommendations. At p. 203 to 204, he wrote that the limited scope of review (and hence lack of an appeal to the WCAT) "…would apply only when the percentage specified on the PDES *has no range, or has a range which does not exceed 5%*." The phrase in italics is precisely the language used in s. 239(2)(c).

The Core Reviewer went on to explain that "When the range of percentages does exceed 5%, the exercise of the decision-maker's discretion within the broader range has a potentially much greater impact on the worker's entitlement to a functional pension award, and therefore warrants the broader standard of review upon an appeal of the initial decision-maker's determination." [reproduced from original at page 204] Thus, the basis for the 5% standard is the importance of the impact on the worker's entitlement.

We submit that it would therefore contradict the purpose of s. 239(2)(c) to interpret it as denying the WCAT the jurisdiction to consider the worker's permanent pension entitlement – which in many respects is the most important decision the Board will make on a claim for a serious injury or disease, merely because the range of percentages for the disability in question has been divided into segments of 5% or less, or because the range of one element of the assessment process is 5% or less. If the range of assessments of the worker's disability could vary by more than 5%, the importance of the matter and its impact on the worker justify an independent review of the merits of the decision by the WCAT.

(ii) Exceptions to general appeal rights should be interpreted restrictively

The Workers' Compensation Act is a social benefit law (indeed, one of the earliest such laws) and injured workers are the intended beneficiaries. The right to challenge a decision that determines the worker's compensation for a permanent disability is crucial to ensuring that each worker receives the benefits to which he or she is entitled. Any exception like s. 239(2)(c) to the worker's right of appeal to an independent tribunal, should be interpreted strictly:

In two decisions concerning the UI Act, another social benefit law, the Supreme Court of Canada applied this principle to the interpretation of ambiguous language:

> Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant.
>
> Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2, at p. 10

> Since the purpose of the Act is to make benefits available to the unemployed, a liberal interpretation of the re-entitlement provisions is warranted, given that the Act was not designed to deprive innocent victims of a labour dispute of the benefits of the Act and also given that employees do contribute to the unemployment insurance fund.
>
> Hills v. Canada, [1988] 1 S.C.R. 513, at p. 537

(iii) Injuries to Workers Affect the Whole Person

The approach taken in WCAT-2004-01848 ignores the reality of disability. An injured worker, or anyone else with a disability, cannot be divided up into theoretical pieces. The worker's functional disability must be measured in terms of the overall impact which it has upon his or her capacity to engage in employment and other activities. The PDES itself says that the range of disability for an injury to the lumbar spine can extend to 24%. That is a reflection of the seriousness of such a disability to a person's ability to work and function. As the Core Reviewer has said, such a serious condition "warrants the broader standard of review" and therefore also the right to appeal to the WCAT.

(iv) Impractical Effect of a Broad Interpretation of s. 239(2)(c)

At p. 7 of the Vice Chair's reasons in WCAT-2004-02317, she pointed out the additional complexity that would occur if, in a case such as this, only the percentage for flexion could be appealed to the WCAT, and the other findings of the Review Division could only be challenged by judicial review. We agree with these observations. In fact, that interpretation would also cause confusion to the Board itself in implementing a decision on appeal. In cases such as this one, the Board is making a single assessment of the worker's functional lumbar spine disability, although doing so requires it to compare two alternative methods of measurement. The assessment is based on expert medical evidence. If the WCAT only had jurisdiction over the assessment of the worker's loss of flexion, it will still have to examine the Board's evidence and weigh it against other evidence, if any, but would not be able to conclude that the other evidence as a whole should be preferred. This makes no sense in terms of the purpose of s. 239(2)(c), which is to avoid appeals over issues that are essentially disputes about a narrow exercise of judgment by the Board. Such appeals will often occur anyway, and the effect of broadly interpreting s. 239(2)(c) would be to tie the hands of the panel so that it may not be able to make the right decision given its view of the evidence.

(b) Workers' Adviser

A submission dated July 15, 2005 was provided by Rachia van Lierop, Workers' Adviser/Law and Policy. She commented:

From the perspective of workers, many who appear before the Tribunal unrepresented, the piecemeal approach to adjudication that would result from the local range interpretation would prove difficult to understand and would lead to many legitimate claims not being pursued. Judicial review

> options for aspects of a disability which relate to one body part or area would create absurd and unjust results as many workers have no realistic recourse to judicial review. Creating complex and inaccessible appeal rights would not improve the workers' compensation system or serve the needs of individual injured workers.
>
> We submit that the global range approach provides clear guidance for Tribunal Vice-Chairs – this is in fact already the case as the majority of Vice-Chairs are applying this approach without difficulty.

The workers' adviser submitted that the global range approach has proven to be a reasonable and workable interpretation of section 239(2)(c). The workers' adviser also provided submissions concerning a number of sub-issues related to the interpretation and application of section 239(2)(c). She summarized her submissions as follows:

- The Precedent Panel should be guided by the majority of decisions of the Tribunal and adopt the global range interpretation as the appropriate approach to the application of section 239(2)(c).

- The Precedent Panel should confirm the reasoning in *WCAT Decision #2004-01848* with respect to impairment awards for ankle immobility and endorse the "implied range" interpretation as it applies to other fixed impairment awards in the PDES.

- The Precedent Panel should provide clear direction to the Tribunal that the global range interpretation should not be limited to awards for impairment of the spine made under the pre-August 1, 2003, PDES set out in RSCM Vol. I. The global range interpretation has been applied to a number of other impairment awards under both pre- and post-August 1, 2003, versions of the PDES and that approach is appropriate.

- Finally, the Precedent Panel should clarify that the limitation set out in section 239(2)(c) only applies to scheduled awards. Tribunal decision-makers have jurisdiction to consider all non-scheduled aspects of an award even in cases where the underlying *quantum* of the impairment cannot be appealed.

(c) Employers' Adviser

A submission dated October 21, 2005 was provided by Steve Hodgins, Employers' Adviser. He restricted his comments to the jurisdictional issue assigned to this precedent panel. He argued, in part:

We agree with the global range interpretation for the following reasons:

- Under the global range interpretation, as argued in *WCAT Decision #2004-02317*, the whole range of the specified body area is considered and if it exceeds 5% the WCAT panel has jurisdiction and renders a decision. This is in compliance with the spirit of Bill 63 in limiting the number of appeals in the system to a more manageable level and is in synchronization with the Core Services Review.

- Under the local range interpretation, as argued in *WCAT Decision #2004-01848*, the separate range of motion consideration would result in a system too complex for the average worker, especially the majority that attends hearing unrepresented. At present very few have any idea how to argue law and policy effectively on their behalf. Any complexity that limits or discourages a workers right to appeal could be seen as counter to the integrity of the system. This goes equally well for the employer community. The amount of resources an employer has to deal with their compensation issues vary from employer to employer and are already thin in some cases. The employer who has to contract out or hire a specialist to decipher this complex of a system or not participate is also counter to the integrity of the system overall.

- We agree with the argument presented by Vice Chair in *WCAT #2004-02317* with emphasis that the local range interpretation leads to a narrow interpretation with an absurd outcome. The intent of legislation is not to frustrate its own purpose or realization as the Vice Chair noted on page 6.

- The structure and layout of the PDES is a clue to its own intent. The sections of the spine are laid out together with their respective rages and a total maximum range. This structure suggests the global range is the more appropriate interpretation of the PDES. The preamble to this section speaks of the global assessment of the spines range of motion.

[reproduced as written]

No submission expressed support for a “local range interpretation” of section 239(2)(c) of the Act.

9. Reasons and Findings

In considering the jurisdictional issue raised by this appeal, we began by examining the plain or ordinary meaning of the wording of section 239(2)(c). We consider, however, that both the local and global range interpretations represent viable or possible

interpretations of the statutory wording. On examining the statutory wording alone, we find no basis for concluding that one interpretation is "more correct". Accordingly, it is necessary to consider this issue more broadly, with reference to the Act and policy as a whole, and with reference to relevant background materials (including the reasoning and recommendations contained in the core reviewer's report which provided the basis for many of the legislative changes contained in Bill 63, and statements of the Minister, recorded in *Hansard*, concerning the intent of the statutory amendments). It is also useful to consider the effects of alternative interpretations of section 239(2)(c), in respect of the functioning of the workers' compensation system. We are also guided by section 8 of the *Interpretation Act*, which provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

We have the benefit of the different analyses expressed in several WCAT decisions (including those summarized above). It is evident that each of the panels considering the effect of section 239(2)(c) sought to make a decision which best gave effect to the intent of the statutory provision. The reasoning provided in the series of decisions concerning the effect of this section, and the submissions by the representative groups provided in the context of this "precedent panel" case, were of assistance in identifying a range of relevant considerations.

The submission by the Workers' Compensation Advisory Group has identified key passages from the report of the core reviewer (the Winter Report) which provided the basis for the current section 239(2)(c). As with Royal Commission Reports, caution must be exercised in using the Winter Report as a basis for interpreting the legislative changes brought into force by Bill 63. Not all of the core reviewer's recommendations were adopted by the legislature. Where, however, a new statutory provision mirrors a recommendation provided in the Report, it may assist in understanding the background to the legislative changes. In addition to the passages in the Winter Report cited above, the core reviewer further reasoned, at pages 202-203:

> I further recommend that the WCB conduct a review of the Permanent Disability Evaluation Schedule ("PDES") to ensure it is reflective of current medical/scientific knowledge, and can be readily understood by the decision-makers who must utilize it. I raise the following comments for the WCB's consideration when conducting this review:
>
> …
>
> (iii) Where a range of percentages is utilized with respect to the impairment of earning capacity associated with a particular physical or psychological injury which is specified on the PDES, the WCB

> should endeavor to keep the range within a narrow scope (which should be defined as a range of no more than 5%).
>
> My reasoning is that the determination of what percentage, from within a specified range of percentages, should be applied in a particular case is a matter of discretion and judgment being exercised by the initial decision-maker. Provided that the decision-maker is acting in good faith, his/her exercise of judgment, within the identified range of percentages, should not be second-guessed on appeal by subsequent decision-makers.
>
> Accordingly, I have previously recommended (in the section of this Report entitled "Appellate Structure") that the standard of review should be limited on appeals involving the application of the indicated percentage of impairment of earning capacity when the specified physical or psychological impairment under consideration is listed on the PDES. However, this limitation on the standard of review would only apply when the percentage specified on the PDES has no range, or has a range which does not exceed 5%. When the range of percentages does exceed 5%, the exercise of the decision-maker's discretion within the broader range has a potentially much greater impact on the worker's entitlement to a functional pension award, and therefore warrants the broader standard of review upon an appeal of the initial decision-maker's determination.

We agree with the argument presented by the Workers' Compensation Advisory Group as to the significance of the background material cited from the Winter Report. While the recommendation that "grounds for review" be applied to certain reviews by the Review Division was not adopted by the legislature, the related recommendation that the Review Division decision be final on certain types of issues appears to have been given effect by section 239(2). It may be inferred from this background that when the range of percentages for specified impairment exceeds 5%, there was an intent to preserve full appeal rights to WCAT (in recognition that the exercise of the decision-maker's discretion within this broader range has a potentially much greater impact on the worker's entitlement to a functional pension award). Interpreting section 239(2)(c) to limit WCAT's jurisdiction in such situations would appear contrary to this intent.

Policy at RSCM I item #39.10 states that the Schedule is a set of guide-rules, not a set of fixed rules. The decision-maker is still free to apply other variables relating to the degree of physical impairment in arriving at a final pension. The introduction to the Schedule similarly explains that the Schedule does not necessarily determine the final amount of the section 23(1) award. The Board is free to take other factors into account.

The Schedule provides a guideline or starting point for the measurement rather than providing a fixed result.

We consider that the "global range interpretation" best fits with this policy guidance regarding the manner in which the Schedule is intended to be applied. Inasmuch as item #76 of the Schedule sets a maximum award of 24% of total disability for impairment of the lumbar spine, and policy at RSCM I item #39.10 and the explanation provided in the Schedule both support the application of the Schedule as a set of guide-rules, there is room for the exercise of discretion in the making of the award. It is evident from the Winter Report that there was an intent to allow for appeals to WCAT where the pension decision involved the exercise of judgment or discretion in respect of a range in excess of 5%. Limiting WCAT's jurisdiction by reference to the ranges set for particular aspects of the disability would seem to have the effect of treating these ranges as a set of fixed rules, rather than recognizing the exercise of discretion contemplated by policy.

We also consider the global range interpretation to be more consistent with the wording of section 23(1) and (2) of the Act. Section 23(1) stipulates that "the impairment of earning capacity must be estimated from the nature and degree of the injury." This wording supports viewing the injury to the worker's lumbar spine on a global basis. The worker did not sustain separate injuries in respect of his limitations in flexion or extension, or the other factors taken into consideration in making the pension award.

Section 23(2) provides that the Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases. Again, the rating schedule is a guide which relates to specified injuries. We consider that the intent was to evaluate the overall effects of the injury.

We agree with the reasoning expressed by the panel in *WCAT Decision #2005-02034*, that there appears to have been an intent to balance the preservation of adequate appeal rights on the one hand with efficiency and timeliness of decision making on the other. While section 239(2)(c) was obviously intended as a limitation on WCAT's jurisdiction, this "tempered" effect must be kept in mind.

In *WCAT Decision #2004-01848*, the panel noted that its "local range" interpretation might be considered overly technical. However, the panel concluded that this interpretation was more clearly in compliance with section 239 of the Act. The panel further found it important that an interpretation of a jurisdictional question be capable of application to as many possible scenarios as possible.

We agree that the local range approach does have the benefit of making more obvious the precise area in which the Board is exercising its judgment or discretion, in making an award from a range exceeding 5%. Upon consideration of the full range of

arguments brought to bear on this subject, however, we find that this interpretation would unduly restrict appeal rights. Where a worker suffers an injury to their spine, we find it more appropriate to assess this disability on a "global range" approach, rather than separating it into multiple discrete injuries or impairments affecting different ranges of movement or other measurable components. While the "global range" approach includes consideration of these separate components of the disability, the pension award is for the overall effects of the worker's injury and disability.

We consider that the "global range" interpretation best accords with the reasoning expressed by the core reviewer, the wording of the Schedule, and the statements of the Minister regarding the intent of section 239(2)(c). We are not persuaded that this interpretation gives rise to such serious difficulties of interpretation or application that it must not have been intended. We further consider that if timeliness in achieving final resolution of certain issues had been the overriding objective, the Minister would not have expressed the intent that pension decisions be appealable even where the limitation in section 239(2)(c) applies (i.e. in relation to other aspects of the pension award). We consider that this was indicative of an intent to preserve appeal rights, except as expressly limited by the statutory amendment. This is consistent with the court decisions cited by the Workers' Compensation Advisory Group. Accordingly, while we appreciate that the intent of *WCAT Decision #2004-01848* was to give full effect to the legislative intent underlying section 239(2)(c), we are not persuaded that there was in fact an intent to restrict appeal rights to the extent produced by a "local range" interpretation.

The submissions by the employers' adviser and the workers' representative groups who participated in this case all supported applying an interpretation which, while respecting the statutory constraint contained in section 239(2)(c), would permit the fullest and most meaningful exercise of the right of an appeal to WCAT. We find this approach to be correct, bearing in mind the specific statutory wording, the relevant background materials, and section 8 of the *Interpretation Act*. Upon considering the analyses expressed in the prior WCAT decisions, together with the submissions by the representative groups, we find persuasive the reasons which support a "global range" interpretation of the Schedule.

As noted by the core reviewer, it is open to the board of directors to structure the Schedule so as to keep the range for a specified injury within a narrow scope of no more than 5%. However, where the Schedule may reasonably be interpreted as setting a range in excess of 5% (i.e. such as where the Schedule permits a maximum award of 24% of total disability for impairment of the lumbar spine), WCAT has jurisdiction to hear an appeal under section 239 with respect to the exercise of judgment or discretion inherent to the review officer's decision regarding the percentage award.

The workers' adviser requests that this precedent panel provide clear direction on a range of issues relating to section 239(2)(c) of the Act. We consider, however, that a

precedent panel appointed under section 238(6) of the Act must be careful to restrict its decision to the issue(s) necessary to the consideration of the particular appeal. Section 238 states:

> **238** (1) All appeals to the appeal tribunal must be heard by panels appointed under this section.
>
> …
>
> (6) If the chair determines that **the matters in an appeal** are of special interest or significance to the workers' compensation system as a whole, the chair may appoint a [precedent panel] . . .
>
> [emphasis added]

Our authority is, fundamentally, to hear an appeal. The fact that we have been appointed as a precedent panel does not give us any additional authority to decide issues which are not necessary to consideration of this particular appeal. While section 250(3) confers a particular legal effect on a precedent panel's decision, this does not give a precedent panel any greater authority in terms of what is before it for decision. Indeed, we consider that there may be a greater obligation on the part of a precedent panel to refrain from *obiter* (comments which are not necessary to the decision), as such comments could well give rise to confusion regarding the effect of the decision for the purposes of section 250(3).

The workers' adviser requests that we provide clear direction that the global range interpretation not be limited to awards for impairment of the spine made under the pre-August 1, 2003, PDES set out in RSCM Volume I. In this case, the worker's pension award was made under the post-August 1, 2003 Schedule contained in RSCM II. Accordingly, we have decided that the global range interpretation applies to items 75 and 76 of the Schedule contained in Appendix 4 of the RSCM II.

The workers' adviser further requests that we clarify that the limitation set out in section 239(2)(c) only applies to scheduled awards, and that WCAT panels have jurisdiction to consider all non-scheduled aspects of an award even in cases where the underlying quantum of the impairment cannot be appealed. We find that this question is not properly before us in this appeal (in view of our conclusion that the underlying quantum of the impairment can be appealed in this case). We similarly refrain from addressing the other issues flagged by the workers' adviser which are not necessary to our decision regarding WCAT's jurisdiction to hear this worker's appeal. To the extent that additional jurisdictional issues may arise in respect of the hearing of this worker's appeal, they may be addressed by the panel assigned to hear the worker's appeal. We have limited our decision to the specific issue on which WCAT requested comments from the representative groups.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to the determination of this preliminary issue. The panel hearing the merits of the worker's appeal may further consider any claim for reimbursement of expenses.

10. Conclusion

This precedent panel was assigned to determine whether, in applying items 75 and 76 of the Schedule in the RSCM II concerning the lumbar spine, WCAT has broad jurisdiction to consider the worker's appeal based on the maximum of 24% (the global range interpretation), or limited jurisdiction to consider only the portion of the award pertaining to loss of flexion for which a range in excess of 5% is provided (the local range interpretation). For the reasons set out above, we find that the global range interpretation is correct. The worker's appeal will be returned to the WCAT Registry for further handling.

Jill Callan
Chair

Herb Morton
Vice Chair

Susan L. Polsky Shamash
Vice Chair

HM/cda/jd