

## Noteworthy Decision Summary

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**Decision:** WCAT-2006-00573      **Panel:** Guy Riecken      **Decision Date:** February 6, 2006

***Permanent disability award – Loss of earnings – Worker’s ability to continue in occupation or similar occupation – Ability to adapt to other suitable occupation – Physical demands versus skills – Restrictions versus limitations – Sections 23(3), 23(3.1), and 23(3.2) of the Workers Compensation Act – Policy item #40.00<sup>1</sup> of the Rehabilitation Services and Claims Manual, Volume II – Practice Directive #46***

This decision is noteworthy for its consideration of the test of eligibility for a permanent disability award (PDA) on a loss of earnings basis under the current *Workers Compensation Act* (Act). The panel concluded: (1) it is important to consider a worker’s physical abilities to handle materials and equipment necessary for the occupation and (2) in determining the worker’s ability to continue in their pre-injury occupation or a similar occupation it is suitable to consider any medical restrictions as well as limitations.

The 62 year old worker, a steel fabricator, injured his head and neck. The Workers’ Compensation Board (Board) granted the worker a PDA based on a permanent functional impairment of 13.41%. The Board concluded the worker was not entitled to be assessed for a PDA on a loss of earnings basis under section 23(3) of the Act. The worker requested a review by the Review Division of the Board, which confirmed the decision. The worker appealed to the Workers’ Compensation Appeal Tribunal.

The panel noted the worker needed to meet the criteria under policy item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* in order to be assessed for a loss of earnings award under section 23(3) of the Act. The panel also noted that Board Practice Directive #46 provided useful guidance. Practice Directive #46 states that skills are not to be confused with the physical demands of an occupation as work sites may be modified to address the latter.

The Board had found the worker was unable to return to his pre-injury job. However, under section 23(3.2) the Board was also required to consider whether the worker was able to continue in his occupation or adapt to another suitable occupation. Under item #40.00 “occupation” is broadly defined as a collection of jobs that are characterized by a similarity of skills, whereas “skills” are defined as the learned application of knowledge and abilities.

The panel concluded the worker’s pre-injury occupation as a steel fabricator required specific skills and that these were more extensive than those found by the Board. The panel also concluded the worker was unable to apply these skills to an occupation of a similar type or nature. The panel adopted the reasoning of the panels in *Decision #2004-06402* and *Decision #2005-03022* respecting the difficulty in separating physical demands from skills. The panel noted that section 23(3.2) of the Act makes consideration of “ability” mandatory under section 23(3) and that it does not distinguish between skills and physical demands. Thus, the

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

panel considered it appropriate to consider the worker's physical abilities to handle the materials and equipment needed to apply the essential skills of his occupation. The panel also noted there was no indication in the file of any potential work site modifications that may have assisted the worker.

The panel noted the Board had referred to the worker's medical restrictions as well as limitations, but appeared to base its decision only on the restrictions. The panel noted the Act and Board policy do not refer to restrictions or limitations and concluded it was suitable to consider both restrictions and limitations in determining a worker's ability to continue in his occupation or in another suitable occupation.

The panel concluded it was unlikely the worker was capable of adapting to another suitable occupation without experiencing a loss of earnings that could not have been anticipated by the section 23(1) method of estimating loss of earning capacity. The panel placed significant weight on the fact that at the effective date of the PDA the worker was 64 years of age, had been working in the same occupation for the same employer for over twenty years, and had only eight years of formal education, which took place in another country and in another language.

The worker's appeal was allowed in part. The panel directed the Board to perform a loss of earnings assessment to determine the worker's possible entitlement to a section 23(3) award.

**WCAT Decision Number :** WCAT-2006-00573  
**WCAT Decision Date:** February 06, 2006  
**Panel:** Guy Riecken, Vice Chair

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## Introduction

On November 18, 2002 the 62-year-old worker was employed as a steel fabricator when he struck the welding helmet he was wearing on a steel beam. The Workers' Compensation Board (Board) accepted his claim for a neck sprain, permanent aggravation of cervical osteoarthritis, post-traumatic recurrent vestibulopathy (PRV) and chronic pain. The Board paid temporary disability (wage loss) benefits to the worker from November 19, 2002 until March 28, 2004 when the Board determined that his conditions were at a plateau. The case manager referred the worker's file to the Disability Awards Department and to Vocational Rehabilitation Services. On June 14, 2004 the Board granted the worker a permanent partial disability (PPD) award based on a permanent functional impairment (PFI) of 13.41% (9.17% for loss of mobility of the cervical spine, 2.5% for chronic pain and a 1.74% age adaptability factor).

The worker appeals the December 7, 2004 decision of a review officer at the Board (*Review Decision #19842*). The review officer confirmed the Board's June 14, 2004 PPD decision. The review officer found that the PFI rating is correct and that the worker is not entitled to an assessment for a PPD award on a loss of earnings basis. The review officer referred back to the Board the matter of the worker's PRV to determine the extent of any permanent disability award entitlement.

## Issue(s)

1. Whether the PPD award based on a 13.41% PFI correctly reflects the worker's entitlement under section 23(1) of the *Workers Compensation Act* (Act) due to the permanent aggravation of his cervical osteoarthritis and chronic pain.
2. Whether the worker is entitled to a loss of earnings assessment.
3. Whether the worker should continue to receive payments of his PPD award after he reaches the age of 65 years.
4. Reimbursement of legal expenses

## Jurisdiction and Procedural Matters

The worker's appeal of the review officer's decision was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Worker's Compensation Act* (Act).

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has 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 (section 254).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The worker attended an oral hearing on June 13, 2005 and was represented by his legal counsel, Craig Paterson. The employer was represented at the hearing by a manager from the company. A Serbo-Croatian interpreter was provided for the worker.

At the oral hearing the worker's representative made a number of applications with respect to the conduct of the appeal. He requested that after the worker's evidence was presented, the hearing be adjourned for further evidence from three people that he wished to examine: Mr. A, a principal of the employer company, the vocational rehabilitation consultant (VRC) at the Board who dealt with the worker's case and the claims adjudicator in disability awards (CADA) at the Board who dealt with the worker's case. The worker's representative also requested that I make a site visit of the worker's pre-injury work place. He submitted that Mr. A has evidence with respect to the worker's pre-injury job demands and the worker's current ability to perform them. He submitted that as there is evidence from the VRC and the CADA in the claim file about the worker's participation in vocational rehabilitation and his ability to return to his pre-injury occupation, and he should be able to question them about those matters.

The worker's representative also requested that the appeal be suspended under section 252(1) of the Act pending the completion of Board decisions on related matters, namely the decision on the worker's entitlement to a PPD award for PRV and a decision by a review officer on the worker's entitlement to vocational rehabilitation (VR) assistance.

The worker's representative also requested an opportunity to provide written submissions including possible further medical evidence. He noted that at the time of the hearing the worker had recently been assessed by a medical specialist and that he had not yet seen the results.

There was no indication from the employer that Mr. A intended to attend the hearing and there was no expectation that the VRC or the CADA would attend the appeal hearing. The worker's representative did not indicate that he had made any attempts prior to the hearing to arrange the attendance of any of these proposed witnesses. He did not submit a written application to WCAT prior to the hearing for an order to compel any of the three to attend. I was not persuaded that it was necessary for the purposes

of a fair and full hearing to adjourn the hearing for the attendance of these people so the worker's representative could examine them, or to conduct a site visit.

In a letter from WCAT dated June 21, 2005 the worker's representative was informed of the decision not to issue an order compelling the attendance of the three proposed witnesses, not to continue the oral hearing for further evidence and not to conduct a site visit. The oral hearing was considered to be concluded. The letter also informed Mr. Paterson that the appeal was suspended under section 252(1) pending the Board's decision on the worker's entitlement to a PPD award for PRV.

On July 21, 2005 the Board issued a decision granting the worker a further PPD award based on a PFI of 5% for the his PRV. The worker requested a review of the decision from the Review Division. On August 2, 2005 the worker's representative wrote to WCAT and acknowledged the July 21, 2005 Board decision on PRV. He noted that the Review Division had not yet made a decision on the issue of VR and requested that the appeal remain suspended until that decision (in *Review #21179*)

On August 23, 2005 the appeal was suspended pending the Review Division decisions with respect to the Board's PRV decision and the VR decision.

On October 7, 2005 the workers' representative wrote to WCAT and, noting that the Review Division had issued *Decision #21179* (with respect to VR), requested the WCAT appeal to be reactivated. On October 26, 2005 WCAT wrote to the worker's representative to inform him that the appeal had been reactivated.

In his December 19, 2005 written submissions the worker's representative requested that the appeal be suspended again pending the decision from the Review Division on PRV (*Review #R0054314*). WCAT did not make a decision with respect to this request before December 30, 2005 when the Review Division issued its decision confirming the Board's PPD decision with respect to PRV. There is no longer a basis on which to suspend this appeal under section 252(1) of the Act pending the Review Division's decision.

The Review Division decisions respecting VR and the PPD award for PRV are not before me in this appeal.

The worker's representative has provided written post-hearing submissions. The employer's representative was given an opportunity to provide written submissions but did not do so.

## **Background and Evidence**

In his November 28, 2002 application for compensation the worker stated that he had been hit by a piece of steel six inches by six inches by 30 feet.

Following his injury the worker's progress was followed by Dr. Murphy, his family physician, who submitted reports to the Board. The worker commenced physiotherapy for his neck symptoms in January 2003.

An x-ray report for the worker's cervical spine from January 28, 2003 describes mild spondylosis and left sided foraminal narrowing.

The worker was referred to a work conditioning program (WCP). The January 31, 2003 intake assessment report indicates that after the assessment the worker left the WCP due to dizziness.

On February 2, 2003 the worker attended a hospital emergency room complaining of dizziness, confusion and nausea. On examination he had an unsteady gait. The attending physician diagnosed post-traumatic headache. A CT scan was recommended.

Dr. Caines, orthopaedic surgeon, saw the worker on February 3, 2003 and his February 6, 2003 report indicates that the worker complained of dizziness, posterior neck pain, right parietal pain, right upper limb pain, and that he was unable to lie on his right side. He had a history of a previous neck injury three years earlier. On examination there was reduced range of motion of the cervical spine with pain at the extremes of motion, and normal sensation, reflexes and strength. The diagnosis was neck pain and previous degenerative cervical disease.

When the worker saw Dr. Caines on February 20, 2003 he reported a slight improvement. He was not experiencing dizziness and was continuing with physiotherapy. Dr. Caines diagnosed degenerative neck disease with neck pain and recommended further physiotherapy followed by a possible return to work after four weeks.

In a memo dated February 27, 2003, Dr. L, a medical advisor at the Board, noted the reports of degenerative disc disease and the opinion from Dr. Murphy in his latest report that the worker was not capable of returning to welding work. Dr. L noted that there was no evidence of loss of consciousness or of a closed head or brain injury. Dr. L felt that the worker's dizziness and blackouts were not secondary to the compensable injury. He recommended that the worker be assisted through a medical rehabilitation program (MRP).

The March 5, 2003 MRP assessment by Dr. Purkis provides a diagnosis of a flexion/extension injury of the cervical spine, significant underlying cervical osteoarthritis, post-traumatic labyrinthitis and a significantly interrupted sleep cycle.

On May 28, 2003 the worker underwent a vestibular assessment. The June 6, 2003 report from Dr. Longridge, otolaryngologist, indicates that the worker's dizziness and the

testing were suggestive of labyrinthine concussion. He also diagnosed tinnitus and noted that the worker had pre-existing high tone hearing loss.

A report of a MRI of the worker's cervical spine from June 10, 2003 describes degenerative disc disease in the upper thoracic spine and no significant abnormality or disc problem in the cervical spine.

The July 3, 2003 report from Dr. Caines indicates that the worker complained of increased pain due to the physiotherapy activities. He had neck pain, right shoulder pain and numbness in his right hand. On examination there was decreased painful rotation of the cervical spine to the left. There was decreased range of motion of the right shoulder. The diagnosis was right shoulder tendonitis, neck pain and query right carpal tunnel syndrome.

On July 14, 2003 Dr. Caines reported a local anesthetic injection to the worker's right shoulder. The worker described increased dizziness in the previous days. On July 22, 2003 Dr. Caines reported that the worker reported no help from the anesthetic injection to the right shoulder. He complained of persistent neck pain, especially with rotation to the left. On examination there was decreased range of motion of the cervical spine.

The August 13, 2003 MRP assessment report from Dr. Purkis provided a diagnosis of lateral flexion injury to the cervical spine, a labyrinthian contusion, adhesive capsulitis of the right shoulder with a possible underlying supraspinatus rotator cuff tear. Dr. Purkis recommended an MRI to clarify the status of the right shoulder and discharged the worker from the MRP as not fit to return to work.

On August 14, 2003 Dr. R, a medical advisor at the Board, spoke to Dr. Caines and Dr. Purkis who both opined that the right shoulder injury was compatible with the original work injury.

The August 19, 2003 MRI report describes tendonitis/tendonopathy of the right shoulder, a partial tear of the infraspinatus tendon and marked AC joint degenerative change.

In a memo dated August 25, 2003 Dr. R, a medical advisor at the Board, opined that the worker's right shoulder capsulitis was not related to the claim.

On September 3, 2003 Dr. Purkis followed up with the worker and reported that there was no improvement in the worker's neck or shoulder symptoms or his complaints of vertigo.

On September 12 and October 7, 2003 Dr. Caines reported that the worker's symptoms were unchanged.

In a memo dated October 20, 2003 Dr. R agreed with the suggestion from Dr. Purkis that the worker be referred back to Dr. Longridge regarding his vertigo. He considered the chances of a successful intervention to be slim and was skeptical of the ability to return the worker to the workforce.

In reports dated November 7 and 14, 2003 Dr. Longridge opined that the worker's complaints fit more with PRV than with benign positional vertigo. There was no easy course of therapy and the rehabilitation activities that had been attempted exacerbated the symptoms.

On December 9, 2003 Dr. R opined that no further investigations or treatment for PRV were required. The worker was at maximum medical recovery and would be left with a PFI.

A bone scan from January 28, 2004 describes degenerative changes to the worker's cervical spine with facet arthropathy on the left at the C2-3 level.

On February 19, 2004 an occupational therapist from the worker's occupational rehabilitation program (ORP) conducted a job site visit. The occupational therapist concluded that the some demands of the job exceed the worker's limitations and noted that the employer was unable to accommodate the worker with modified duties.

The February 24, 2004 ORP discharge report states that the worker was not fit to return to work. The barriers to his return to work were dizziness, particularly with increased levels of activity, reduced tolerance for material handling, reduced tolerance for bending and crouching etc, and reduced tolerance for repetitive hand gripping.

In a memo dated March 8, 2004 Dr. R opined that the worker was unfit to return to his job due to dizziness. The worker has medical restrictions for driving and working at heights. The worker also has the following limitations: no lifting more than 40 pounds floor to waist, no lifting more than 15 pounds waist to shoulder, no working overhead. Dr. R also concluded that the worker has chronic pain.

A memo dated March 9, 2004 indicates that the case manager accepted a permanent aggravation of the pre-existing cervical osteoarthritis, PRV and chronic pain under the claim. The case manager also accepted restrictions for driving and working at heights and the following limitations: infrequent lifting more than 30 pounds floor to waist, infrequent lifting more than 15 pounds waist to shoulder height, no working overhead, limited walking, limited walking on uneven ground, and alternating between sitting and standing. The case manager concluded that the worker is unable to return to his pre-injury job.

A memo dated March 23, 2004 regarding a team meeting at the Board indicates that the employer had advised the Board that the worker's job does not require working at heights. The CADA stated that the worker had retained the essential skills of his



occupation and his compensable injuries do not prevent him from applying his skills to the occupation. Therefore there would be no loss of earnings assessment. The VRC stated that the worker had declined participation in VR activities and therefore no VR assistance would be provided to him.

In the April 8, 2004 section 23(3.1) determination (form 21) the CADA confirmed that there would not be a loss earnings assessment.

On May 7, 2004 the worker underwent a PFI evaluation by Dr. B, a disability awards medical advisor (DAMA) at the Board. Dr. B noted findings of reduced range of motion of the cervical spine. These calculated to a 9.17% impairment rating.

In the May 31, 2004 PFI review memo (form 24) the disability awards officer (DAO) accepted Dr. B's range of motion findings and concluded that the worker should receive a 9.17% PFI rating for the cervical spine and 2.5% for chronic pain. He considered that the worker should not receive an award for additional factors. The DAO did not address PRV in the form 24.

In the Board's June 14, 2003 PPD award 1.74% was added for the age adaptability factor, for an award based on a PFI of 13.41% of total disability.

In the December 7, 2004 decision the review officer noted that the DAO did not assess the worker's PRV in determining the PPD entitlement. The review officer referred this matter back to the Board with a direction that the Board assess the extent of the PRV disability and determine any resulting PPD entitlement.

The worker was assessed by Dr. Longridge on April 6, 2005 and his April 14, 2005 report stated that the worker's symptoms have varied over time but that they fit a disturbance of the vestibular system. He also noted that the results from the worker's multiple tests vary over time and commented that it may be worth while to undertake surveillance to demonstrate whether the worker has substantial behavioural limitations. Dr. Longridge also commented that inconsistencies between the worker's various test results make it hard to estimate his level of incapacity.

In a memo dated May 17, 2005 Dr. H stated that the worker likely has no more than a mid-range Grade 2 vestibular disorder equalling 5% of total disability. The Board granted the worker a PPD award for PRV based on a PFI of 5%. The award was confirmed by a review officer on December 30, 2005.

At the hearing the worker's representative provided the following documents: a letter dated October 31, 2003 from the employer to the worker (exhibit #1 at the hearing), and a copy of the worker's T5007 form showing the benefits received from the Board in 2004 (exhibit #2).

At the oral hearing the worker described his educational and vocational background. He completed eight years of education in the former Yugoslavia. He completed a

three-month welding course and then began to work as a welder. He worked for more than two years as welder in the former Yugoslavia before moving to Germany where he worked as a welder for over two years. He arrived in Canada in 1968. He worked as welder in Manitoba where he got a welder's ticket. He worked in Manitoba for 11 or 12 years before moving to B.C. He worked for the employer since 1981. He was never disciplined, suspended or fired from any job. He has had previous work injuries both in Manitoba and B.C.

The worker described his pre-injury job as a steel fabricator. It was an indoor job. The work was done standing and required walking. There was no sitting. He worked at metal "horses," not at a bench. He did mainly fitting steel components and some welding. He was fitting beams, columns, and frames for example. The pieces of steel were generally moved around the work site by cranes and hoists, although smaller pieces were moved by hand. The worker did not remember the weight of the steel pieces that had to be moved by hand.

The worker stated that he continues to experience pain between his shoulder blades, in his neck and in his right shoulder, as well as headaches and dizziness. He used prescription pain medications but his doctor stopped the prescription after the Board told the doctor the worker should not continue taking them. He still uses Advil for pain. He described his pain as severe and explained that it causes him problems sleeping. He cannot sleep on his back. He has a big problem with dizziness all the time, but sometimes it gets much worse. It gets worse if bends down for any reason, for example to put on his shoes. Sometimes it gets worse if he watches movement. Some days it feels like his house turns like a big wheel.

The worker stated that because of his symptoms he is unable to return work at his pre-injury job. He would be a danger to himself and to others. He spoke to Mr. A at the company about returning to work. Mr. A told him that if he can return to work they would be glad to have him, but they have no lighter jobs for him if he cannot do his old job.

The worker was asked if there are other jobs he could do in steel fabrication, welding or fitting. He answered that that all jobs in these areas are the same. They are the same everywhere. They require activities such as cutting, drilling, welding and grinding. They require bending down and standing up all the time, and lifting materials up and down all the time. He does not know of any related lighter jobs.

The worker described his conversation with the VRC at the Board. It only lasted about 10 or 12 minutes. When she pointed out that he was not even looking for a job, he explained that he could not look for a job because he could not drive. She told him he should get someone to drive him. He told her that if she found a job that he could do, he would do it. She asked him about what he could do. He explained that because of his dizziness he would be a danger to himself or others, that he could fall down and injure himself. He understands that she wrote down that he would not accept any job.

The worker confirmed that he belonged to a union while working for the employer. He did not remember if there was a clause in the collective agreement about working beyond 65 years of age. He had no plan to retire before the injury. The worker was terminated by the employer. The union did not grieve the termination. When asked whether, if he had not been injured, he would still be working today, he answered that he did not know.

The worker has applied for a pension from the Canada Pension Plan (CPP) but has not yet received it.

The worker's son (J) testified at the hearing. He lives at home with his parents. He was not present during any of the conversations his father had with Board officer's about his claim. He stated that because of his own work (refrigeration mechanic, journeyman plumber and licensed gasfitter) he has been in many metal fabrication shops and is familiar with the physical demands of his father's job. He is of the opinion that because of his dizziness and neck stiffness his father cannot do the jobs of steel fabricator or welder. He confirmed that his father sometimes complains of dizziness at home. His father has been much less active since his injury. J believes that if he had not been injured his father would not have retired at age 65. His father always told him he had to work hard in life.

With a written submission dated June 15, 2005, the worker's representative provided five pages of hospital records, including an emergency record, triage assessment and treatment room assessment dated February 2, 2003 and an emergency record from November 9, 2004.

With a written submission dated June 23, 2005 the worker's representative provided further documentary evidence: the June 22, 2005 affidavit of the worker's wife, and the December 28, 2004 "Urgent Notice to Plan Participants" from the worker's union pension plan.

In her affidavit the worker's wife states that she did not tell a Board officer that the worker would retire at age 65, but actually told the officer he would not retire before age 65.

## **Findings and Reasons**

### *Issue #1 – PFI Award*

Under section 23(1) of the Act, where a PPD results from a worker's compensable injury, the Board must estimate the impairment of the worker's earning capacity from the nature and degree of the injury and pay the worker compensation based on 90% of the estimate of the loss of average net earnings resulting from the impairment.

*Rehabilitation Services and Claims Manual, Volume II* (RSCM II) policy item #38.00 states that in all but exceptional cases, the effect of a disability on a worker will be appropriately compensated under section 23(1). Policy #39.00 states that the percentage of disability determined for the worker's condition under section 23(1) reflects the extent to which a particular injury is likely to impair his 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.

RSCM II item #39.01 describes the decision-making procedure under section 23(1) of the Act. PFI evaluations are conducted by either a disability awards medical advisor (DAMA) or a Board authorized external service provider. Under item #97.40, the report of a DAMA or external service provider is considered to be expert evidence which, in the absence of other expert evidence to the contrary, should not be disregarded.

Under policy item #96.30 the DAO must accept the decision of the case manager as to what permanent conditions have been accepted under the claim.

Under section 23(2) of the Act, the Board has established a permanent disability evaluation schedule (PDES). The PDES is a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations and is used as a guide in determining compensation payable in PPD awards under section 23(1) of the Act. The version of the PDES in Appendix 4 of the RSCM II, as amended on August 1, 2003, applies to the worker's PPD award because his section 23(1) assessment was undertaken after that date. PDES item #73 provides for an impairment rating of up to 21% for loss of range of motion of the cervical spine.

The worker's representative submits that policy item #97.40 creates a requirement that the worker provide "expert evidence to the contrary" to contradict the PFI evaluation of the DAMA, which is not consistent with the "no fault" system of compensation that does not place an onus on the worker. He requests WCAT to obtain an expert opinion with respect to the worker's ability to return to his pre-injury occupation. I agree that there is no particular burden of proof on the worker. However, as noted in policy item #97.00, the Act does contain prerequisites for compensation. There must be some evidence on which to conclude that compensation is payable. As recognized in item #97.31, decisions on matters requiring medical expertise must be preceded by a consideration of medical evidence. I do not consider item #97.40 to create a presumption in favour of the evidence from a DAMA and against the evidence provided by the worker, since it states that in the absence of medical evidence to the contrary the DAMA's report should not be disregarded. It is possible that "medical evidence to the contrary" may exist in reports received by the Board from other physicians, including specialists who have been consulted in the course of the claim. It is also open to the appellant to provide expert medical evidence during the appeal process. The decision maker, whether at the Board or WCAT, is required to assess all of the relevant evidence.

Evidence is weighted on a balance of probabilities basis, and if the evidence on an issue is evenly balanced, that issue is decided in the manner that favours the worker.

The worker's representative has not provided medical evidence to either the Review Division or WCAT that contradicts the evidence of Dr. B in his PFI evaluation report. I have considered the evidence in the claim file and I do not find there to be medical evidence that contradicts Dr. B's evidence with respect to the worker's cervical spine PFI. I consider Dr. B's evidence to be reliable and I accept his findings and opinion with respect to the impairment of the worker's cervical spine.

The Board's section 23(1) calculator specifications and calculations outline (calculator outline) is publicly available on the Board's web site ([www.worksafebc.com](http://www.worksafebc.com)). I have considered the outline which was in effect at the time the worker's PPD award was calculated.

The findings from Dr. B's PFI evaluation were properly entered into the Board's section 23(1) calculator which resulted in a 9.17% impairment rating under the PDES for loss of range of motion of the cervical spine.

RSCM II item #39.10 provides that the PDES is a set of guide rules, not a set of fixed rules. The decision-maker is free to apply other variables in arriving at a final award, provided the "other variables" relate to the degree of physical or psychological impairment, not other variables relating to social or economic factors.

The Board's Disability Awards Department has developed an additional factors outline in consultation with the Board DAMAs and Board medical specialists after a review of current medical literature and schedules from other jurisdictions. The additional factors outline is publicly available on the Board's web site. This document is not Board policy, but it provides guidelines for consideration of additional factors that are not formally contained in the PDES.

At the time of the PFI evaluation the worker stated that, in addition to reduced range of motion and pain, he noticed reduced strength. He also described reduced sensation over the distal right forearm and hand, which also becomes cooler. I have considered the additional factors outline items that address loss of strength of the upper extremities and loss of sensation. The outline indicates that in rare cases where the DAMA considers the worker's reported loss of strength is an impairing factor that has not been adequately considered by other methods, it may be rated separately. The outline states that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of body parts due to amputation. The outline includes a table of impairment for two-point discrimination sensory loss.

In his May 7, 2004 memo to the CADA, Dr. B stated that no additional factors were identified that would enhance the worker's impairment. I am not persuaded by the

information in the claim file or the worker's evidence that there are additional factors that warrant an award for additional factors under policy item #39.10.

I find that the 9.17% impairment rating accurately reflects the objective impairment due to the permanent aggravation of the worker's degenerative condition of the cervical spine.

RSCM II item #39.02 provides guidelines for the assessment of awards under section 23(1) for disproportionate disabling chronic pain as a result of a compensable injury. Where a worker satisfies the criteria under item #39.02, the policy provides for an award of 2.5%. The DAO determined that the worker is entitled to an award of 2.5% because he had been experiencing pain beyond six months of the expected recovery date that was not in keeping with the diagnosed condition.

The worker's representative submits that the award of 2.5% for chronic pain and the Board policy on which it based is unlawful. He submits that limiting the award for chronic pain to 2.5% is contrary to common law and statutory rules requiring every decision to be based on the "merits and justice" of the case. In his written submission dated June 13, 2005 the worker's representative noted that the WCAT chair was considering the legality of the Board's chronic pain policy pursuant to a referral from another vice chair under section 251 of the Act. Since then the chair has rendered her decision. In *Decision #2005-06524* (available on the WCAT web site: [www.wcat.bc.ca](http://www.wcat.bc.ca)) the WCAT chair determined that Board's policy on PPD awards for chronic pain can be rationally supported by the legislation and is not patently unreasonable. While that decision dealt with the chronic pain policy in item #39.01 in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), the substance is the same as policy item #39.02 in RSCM II which applies to the present case. Accordingly I do not agree with the representative's argument with respect to the unlawfulness of the chronic pain policy.

I find that the medical evidence and the worker's evidence support an award of 2.5% for disproportionate specific chronic pain under policy item #39.02 in relation to the worker's cervical spine injury.

The worker's representative did not address the effective date of the award in any detail in his submissions. The Board made the PPD award effective March 29, 2004, the date following the end of wage loss benefits. This is consistent with policy item #42.10 and I find it to be correct.

Policy item #39.11 provides for the modification of the percentage impairment rate under the PDES based on the worker's age. For each year that the worker is over the age of 45 the impairment rating is increased by 1% of the assessed PFI, up to a maximum of 20% age adaptability factor. The age adaptability factor is not applied to non-scheduled awards. The worker's age at the effective date of the award is used, not the age at the time of injury. In this case the worker was 64 years of age at the

effective date of the PPD award. The chronic pain award is not assessed using the PDES and so the age adaptability factor was applied only to the 9.17% scheduled award. The Board granted 1.74% for the age adaptability factor, which I find to be correct.

I find that the worker's entitlement under section 23(1) for his cervical spine injury is correctly reflected in the June 14, 2004 PFI award of 13.41% (9.17% for reduced mobility of the cervical spine, 2.5% for chronic pain and 1.74% for the age adaptability factor).

The worker's appeal with respect to the PFI assessment under section 23(1) for his cervical spine injury and chronic pain is denied.

### *Issue 2 – Loss of earnings assessment*

The review officer found that the medical evidence did not establish that it would be impossible for the worker to continue working his pre-injury occupation and that he is able to perform the essential skills of that occupation. The review officer concluded that the worker is not entitled to an assessment on a loss of earnings basis.

The worker's representative submits that the Board applied an illegal test ("not impossible") in assessing the worker's entitlement to a loss of earnings assessment. Mr. Paterson argues that the only lawful test is a "probability test" and that the worker was not under an onus to establish that it was impossible for him to return to his pre-injury occupation.

Mr. Patterson notes that there is no statutory definition of "so exceptional" and submits that there is no comprehensive written policy.

Mr. Paterson states that the worker has suffered at least 12 work injuries in BC dating back to 1992 and at least three work injuries in Manitoba. He refers me to the Board claim numbers for the B.C claims, and urges me to contact the Manitoba Board for information on the claims there. He points out that seven of the 12 injuries in B.C. involved the head and neck and two involved the neck. There was one hearing loss injury and there were three eye injuries. He notes that no adjudicator of any level of the compensation system has evaluated the cumulative impact of these multiple injuries on the worker's ability to regularly perform a substantially gainful occupation. He submits that the number of head injuries suffered by the worker satisfies any reasonable application of the "so exceptional" test. He also submits that vestibular disturbance is an exceptional disability.

Mr. Paterson submits that the worker is not capable of returning to work as a steel fabricator, or adapting to another suitable occupation. The worker's representative also submits that the worker worked for the same employer as a steel fabricator for almost

25 years. It is not reasonable to expect him to adapt to another occupation given his age, disabilities, language limitations and limited skills and experience.

The worker's representative submits that the worker is entitled to a 100% pension retroactive pension continuing beyond age 65 under section 22, 23(1) or section 23(3) or (3.1) of the Act. Mr. Paterson also submits that the worker is entitled to reimbursement of his legal fees, disbursements and taxes.

Under sections 23(3), (3.1) and (3.2) of the Act the worker is only entitled to a loss of earnings pension if the combined effect of the worker's occupation at the time of the injury and his disability resulting from the injury is so exceptional that the amount determined under section 23(1) does not appropriately compensate the worker for the injury. In undertaking that consideration, the Board must also consider the ability of the worker to continue in the pre-injury employment or to adapt to another suitable occupation.

As noted in policy item #38.00, the section 23(1) functional assessment is mandatory, whereas the section 23(3) loss of earnings assessment is discretionary and only undertaken in exceptional cases.

The Board's policy with respect to sections 23(3) and 23(3.1) assessments discusses the "so exceptional" test in detail. Item #40.00 of the RSCM II includes the following 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.

Sections 23(3) and 23(3.1) and policy items #40.00 and #40.01 contemplate a two-step process. The first step involves consideration of whether the worker meets the "so exceptional" threshold. If the worker meets that threshold, the second step involves a loss of earnings assessment, including an employability assessment, to determine whether the worker is entitled to an award on a loss of earnings basis under section 23(3).



The Board has in place a number of practice directives which are not Board policy but provide guidance to Board officers in relation to the adjudication of specific matters. Although it is not binding on WCAT, I have considered the analysis in Practice Directive #46, which provides useful guidance on the approach to be taken in determining whether a worker meets the threshold for a loss of earnings assessment.

In the present case the Board accepted that as a result of the medical restrictions and limitations accepted in his claim the worker is unable to return to his pre-injury job. Nothing in the claim file or the worker's evidence at the oral hearing leads me to a different conclusion and I find that the worker's restrictions and limitations render him unable to return to his pre-injury job.

However, under section 23(3.2) it is necessary to consider not only whether the worker is able to return to his job, but whether he is able to continue in his occupation or to adapt to another suitable occupation. Under policy item #40.00 "occupation" is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills. Skills are defined as the "learned application of knowledge and abilities."

The first consideration under item #40.00 is whether the worker's pre-injury occupation requires specific skills which are essential to that occupation or to an occupation of a similar type or nature. The National Occupational Classification (NOC) four digit occupation code that best encompasses the pre-injury employment is used to identify the relevant occupation. The CADA referred to NOC #7263 Structural Metal and Platework Fabricators and Fitters and a copy of it is found in the claim file. Examples of job titles included in this classification are metal fabricator, steel fabricator and structural steel fabricator. This is the relevant NOC classification because it includes the worker's occupational title at the time of the injury.

The NOC includes the following in the list of duties for fabricators in this classification:

- Study engineering drawings and blueprints, determine the materials required to plan the sequence of tasks to cut metal most efficiently.
- Construct patterns and templates as guides for layouts.
- Lay out reference points and patterns on heavy metal according to specifications.
- Assemble and fit metal sections and plates to form complete units or subunits using tack welding, bolting, riveting or other methods.
- Set up and operate various heavy-duty metalworking machines such as brake presses, shears, cutting torches, grinders and drills to bend, cut, form, punch, drill or otherwise form heavy-metal components.
- Install fabricated components in final product.

The CADA considered the most important essential skills of this occupation to be document use, numeracy and problem solving. He noted that the essential skills analysis from the NOC had been scanned into the claim file, and I have considered it. I have also referred to the Career Handbook item for NOC #7263, which includes the following aptitudes, interests and worker functions as they relate to the worker's occupation:

- General learning ability - to understand the physical properties of structural metal and methods of assembly and to carry out procedures for fabrication.
- Spatial and form perception – to read and interpret engineering drawings and blueprints, to plan sequence of tasks, and to lay out reference points and patterns on heavy metal according to component specifications.
- Motor co-ordination and finger and manual dexterity – to assemble and fit metal sections and plates to form complete units and subunits using tack welding, bolting, riveting and other methods, and to rig, hoist and move materials within a worksite and to storage areas.
- Objective interest in setting up and operating heavy-duty metalworking machines.
- Methodical interest in forming heavy metal components using metalworking machines.
- Innovative interest in compiling information to determine materials required and to construct patterns and templates as guides for layouts.

I conclude that the worker's occupation at the time of injury required specific skills which are essential to that occupation. Based on the NOC, the Career Handbook and the worker's evidence I consider the essential skills are more extensive than those listed by the CADA and include: spatial and form perception; the ability to read and interpret blueprints and structural plans; knowledge and understanding of the relevant properties of steel and other metals that are fabricated; the ability to problem solve including the ability to plan out the processes of fabrication; motor, finger and hand dexterity in relation to operation of metal fabrication tools such as grinders, drills, and welding equipment, as well as knowledge of the operation of such equipment.

Under policy item #40.00 the next question is whether, as a result of the compensable disability, the worker is no longer able to apply the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature.

According to Practice Directive #46, skills are not to be confused with the physical demands of an occupation, since the impact of physical limitations on physical demands may be mitigated by workplace modifications.

Other WCAT panels have commented on the difficulty, in some cases, of separating physical demands from skill attributes as provided in Practice Directive #46 (See for example *WCAT Decisions #2004-06402 and #2005-03022*, available on the WCAT web site). In *WCAT Decision #2004-06402*, a case involving a construction labourer who suffered a compression fracture of the L1 vertebra and was no longer able to perform the physical demands of his pre-injury job, the vice chair concluded that, although in most cases heavy physical labour is not a “skill,” in the sense of the “learned application of knowledge and abilities,” in the circumstances of that case, where the vast majority of jobs in the NOC classification require heavy physical labour, it must be considered a “skill.”

In *WCAT Decision #2005-03022* the vice chair dealt with the appeal of a worker in a train repair/maintenance shop with an occupational bilateral pleural disease. One of the issues considered was whether the appellant retained the essential skills of his occupation. In considering the distinction in the practice directive between skills and physical demands, the vice chair stated:

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, since 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 a situation, which is unfortunate, because job site modification is not always an available or viable option. That seems to be the case in the worker’s claim, considering that the employer agrees that the worker is unable to return to his previous duties.

The vice chair in *WCAT Decision #2005-03022* concluded that the essential skills required in the occupation of train shop supervisor include the ability to have sufficient respiratory capacity to be able to evaluate the necessary repairs, to monitor the repairs in progress and to assess completed repairs, including the ability to climb in and out of freight cars and locomotives.

Recognizing that the two aforementioned WCAT decisions were largely dependant on factual findings in those cases, I agree with the analysis underlying those decisions with respect to the relationship between skills and physical demands. While the aforementioned decisions are not policy and are not binding on me, I find them useful in considering that issue in the present case.

To the analysis in the aforementioned decisions, I would add that, in considering the relationship between the essential skills of an occupation and its physical demands, it is important to bear in mind the requirements of section 23(3.2) of the Act. That section states that the Board, in making a determination under section 23(3.1), “must consider the ability of the worker to continue in the worker’s occupation at the time of the injury or

to adapt to another suitable occupation.” The language in this section makes consideration of “ability” mandatory in a section 23(3.1) determination. In referring to “ability,” section 23(3.2) does not make a distinction between the skills and the physical demands of an occupation. Neither do sections 23(3) or 23(3.1) expressly make such a distinction. Moreover, consideration of the worker’s ability to continue in the same occupation or to adapt to a different occupation inherently involves consideration of the worker’s disability.

In determining, under item #40.00, whether the worker is still able to apply the essential skills needed for his occupation, I consider it appropriate to consider his physical abilities to handle the materials and equipment needed to apply the other skills of the occupation. I have considered the description of the job demands on the job site visit report from the occupational therapist, the worker’s evidence, the evidence gathered by the VRC and the CADA, and the medical evidence regarding the worker’s cervical injury, chronic pain and PRV.

In the form 21 the CADA referred to both the worker’s restrictions and the limitations, but appeared to base his analysis only on the medical restrictions for working at heights. He found that the worker’s occupation does not require working at heights and concluded that he is not precluded from returning to work in his pre-injury occupation. The review officer took the same approach.

I note that sections 23(3), (3.1) and (3.2) of the Act and policy item #40.00 make no reference to restrictions or limitations. I do not find a basis on which to consider restrictions but not limitations in determining whether the worker has the ability to continue in his occupation or in another suitable occupation.

From the context of the medical evidence in the claim file and how the terms are used by Dr. R and the case manager I understand these terms to refer to following:

- A medical restriction refers to an activity the worker has been medically advised not participate in because of the risk of harm he may do to himself or others.
- A physical limitation refers to capacity or ability and is used to describe a situation where the worker is unable to perform a particular activity.

I recognize that limitations are often self-reported by a worker and difficult to medically verify in absolute terms. At the same time, identification of limitations by a medical advisor at the Board must involve more than stating the limitations as reported by the worker. I consider the identification of the worker’s limitations by Dr. R in giving advice to the case manager to involve an opinion that these limitations, which have been identified by the worker and to some extent in the medical reports and occupational therapist reports on file, are biologically plausible. I conclude that in determining the worker’s ability to continue in his occupation or a similar occupation it is suitable to

consider both the medical restrictions and the limitations identified by the Board medical advisor and accepted by the Board.

The Career Handbook states that NOC #7263, Structural Metal and Platework Fabricators and Fitters, requires strength at the “heavy” level in the handling of loads such as pulling, pushing, lifting and/or moving objects. “Heavy” is defined as work activities involving handling of loads of more than 20 kilograms (44 pounds). The Career Handbook states that this occupation classification requires (in addition to sitting, standing and walking) body postures that include bending, stooping, kneeling and crouching.

The report of a job site visit on February 19, 2004 by an occupational therapist involved in the worker’s ORP describes the worker’s job as a as follows:

As a journeyman fabricator, he is involved in the process of assembling and fitting sections and plates (to form complete units or subunits) for the construction of buildings (e.g. warehouses, schools), bridges and other similar structures. Primary job duties include: reading blueprints and specifications to lay out work and measure/mark steel according to drawings and templates; tack welding; operate a welding torch; and grinding. Most of the work is performed between waist and chest height (height of horse benches ~ 34 inches), however, he may be required to assume awkward positions between ground and overhead levels as the structure is assembled. Large steel components are moved to the workstation via overhead cranes (worker may be required to guide the structure as it is being moved). Mr. [A] advised that workers lift and carry steel plates weighing between a few pounds to ~ 50 lbs from between ground to waist levels (workers not expected to lift greater than 40 – 50 pounds if unable). A jig crane is available to hoist and suspend larger components while the worker tack welds them to form large units. Mr. [A] indicated an average of 20 – 25% is spent performing tack welding and 10% is spent performing grinding intermittently throughout the day. The worker is frequently required to perform work tasks in a stooped (trunk fixed) posture.

Mr. [A] indicated that once the components or structure is assembled, it is moved to another area for welding. He indicated that [the worker] does not weld, as he does not have a welding ticket.

The occupational therapist concluded that the barriers to returning to work included the worker’s reports of dizziness with increased activity (including bending down), his reduced tolerance for material handling (lifting, carrying, pushing, pulling) and reduced tolerance for bending, crouching or other non-neutral positioning.

Based on the worker's evidence, the occupational therapist's job site visit report and the NOC and Career Handbook information, I conclude that the material handling and equipment operation aspects of the worker's pre-injury occupation (NOC #7263) require essential skills that the worker is no longer able to apply because of his physical limitations.

As described in Practice Directive #46, I have also considered similar occupations by referring to NOC groups that have the same three-digit code as the worker's occupation. The occupations with the same first three digits in the code are: NOC #7261 Sheet Metal Workers, #7262 Boilermakers, #7264 Ironworkers, #7265 Welders and Related Machine Operators and #7266 Blacksmiths and Die Setters. The vast majority of the job titles within these occupations involve the same requirements for positions (standing) and material handling (heavy strength) that are found in the description of the worker's occupation, NOC #7263 Structural Metal and Platework Fabricators and Fitters. Using the practice directive as a guide and referring to the NOC and Career Handbook information, as well as the evidence of the worker's physical limitations, I conclude that he is unable to continue working in an occupation similar to his pre-injury occupation. I find that he does not retain the ability to apply the essential skills for material handling and equipment operation of similar occupations.

I acknowledge that the rationale in the practice directive for distinguishing between the physical demands of an occupation and the essential skills is that the inability to meet the former may be mitigated through work site modifications. In this case there is no indication in the information in the claim file that was gathered by the VRC before deciding not to provide VR assistance to the worker of any work site modifications or other VR measures that may have mitigated the physical demands of the occupation had the worker proceeded with the VR process.

The VRC decision not to provide VR assistance was confirmed on September 7, 2005, in *Review Decision #21179*. The review officer found on the evidence as a whole that the worker had not demonstrated an interest in or commitment to the VR process and under the applicable Board policies is not entitled to VR assistance. Under section 239(2)(b) a decision of a review officer respecting a VR matter cannot be appealed to WCAT. The review officer's September 7, 2005 decision is not before me in this appeal. It must be considered a final decision with respect to the worker's entitlement to VR assistance from the Board. Although the VR decision is not before me as an issue in this appeal, I have considered the information recorded by the VRC in the claim file.

From the available evidence, including the worker's evidence at the hearing that all fabricating, welding and similar occupations have similar physical requirements for handling materials, operating equipment and standing, I conclude that the worker does not retain the ability to continue in his pre-injury occupation or a similar occupation.

The next question under section 23(3.2) and policy item #40.00 is whether the worker is able to adapt to another occupation without sustaining a significant loss of earnings. There is no evidence in the claim file of other suitable occupations to which the worker

is able to adapt. The evidence from worker is that because of the dizziness from his PRV, his limited lifting ability and limited standing tolerance, he would not be able to return to full time employment. I note from the initial vocational assessment he acknowledged to the VRC that he may be able to work half days on some days, but other days would not be able to work. Accordingly, I consider the worker to have acknowledged the ability to engage in some level of employment. I do not accept as fact that his ability to do so would necessarily be limited to partial days. I find that he is able to participate in some form of employment.

Before his injury the worker was a relatively high wage earner. The long-term wage rate accepted in the claim was \$1,124.52 per week, based on his one-year pre-injury earnings of \$58,635.89.

I place significant weight on the fact that at the effective date of PPD award the worker was 64 years of age and had been working in the same occupation for the same employer for over twenty years. I also place significant weight on the fact that he has only eight years of formal education, which took place in another country and in another language.

Considering the worker's occupation at the time of his injury, his wage rate in that occupation, the injuries accepted in the claim, his restrictions and limitations, his age, and limited education and vocational experience, I find it unlikely that he is capable of adapting to another suitable occupation without experiencing a loss of earnings that could not have been anticipated by the 23(1) method of estimating loss of earning capacity. I find that the worker's circumstances meet the "so exceptional" test in section 23(3.1) of the Act. Accordingly, under policy item #40.01, the worker is entitled to a loss of earnings assessment to determine his possible entitlement to an award under section 23(3) of the Act.

The worker's appeal with respect to a loss of earnings award is allowed in part. I do not find, as his representative submitted, that the worker is unemployable and entitled to a 100% permanent disability award. The worker is entitled to a loss of earnings assessment to determine his possible entitlement to an award under section 23(3) of the Act.

### *Issue 3 – Duration of PPD Award*

The worker's representative submits that the worker's PPD award should be payable beyond the age of 65 years.

Section 23.1(a) of the Act provides that if the worker is under the age of 63 on the date of injury compensation under sections 23(1) or 23(3) may be paid to the worker only until the later of the following:

- (i) the date the worker reaches 65 years of age;

- (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board.

Policy item #41.00 explains that section 23.1 recognizes age 65 as the standard retirement age, but permits the Board to continue to pay benefits where the Board is satisfied that the worker would retire after the age of 65. The policy states that the Board requires evidence that is verified by an independent source to confirm the worker's subjective statement regarding his or her intent to work past age 65. If it is determined that a worker would work past age 65, evidence is also required to establish the new retirement date for the purpose of concluding PPD payments. If the worker's statement is not independently verifiable, the determination must be made on the available evidence, including information provided by the worker.

The worker's representative submits that the requirement that the worker's intention be verified from independent sources places an unlawful onus on the worker. I do not agree with this submission since the policy clearly states that where the worker's intention with respect to retirement is not independently verifiable, the determination is made on the available evidence, including evidence from the worker.

In this case there is no independent verification that, but for his injury, the worker intended to work past the age of 65. There is no indication, for example, that other employees of the employer were aware of the worker's intention or that the employer or another employer intended to employ the worker past the age of 65. Nor is there information from the worker's union or his union pension plan to confirm the normal retirement age at the worker's work place or whether the worker had stated his intention to continue working past the age of 65.

The absence of this kind of information from the claim file may be due to the absence of inquiries undertaken by the Board. In some cases it may be appropriate to request the Board to undertake such inquiries to ensure a full hearing of this issue. However, in this case the information from the worker and his wife is at best equivocal and falls short of showing a clear statement of intention on his part. At the hearing he testified that his father worked into his eighties on his farm, but did not state that it was his intention to work as long as his father. He also stated that he could not remember if there was a provision in the collective agreement about a retirement age. I do not fault the worker for not remembering the contents of the collective agreement, but I consider his evidence to be consistent with a lack of intention to work past age 65. When asked by his representative about working past age 65 he said he would have worked if the employer asked him to work and would not have worked if the employer did not ask him. He did not suggest that the employer had asked him to work past 65 or that he had ever inquired of the employer about continuing to work past age 65. He stated that he was not aware of others at his work place who had worked past the age of 65. In her affidavit the worker's wife stated that she did not tell the Board officer that the worker would retire at age 65, but that she said her husband would not retire before age



65. Again this falls short of evidence that the worker intended to work past the age of 65.

On the whole the evidence does not support the conclusion that the worker intended to work past age 65, and I find that he is not entitled to payment of a PPD award past age 65.

The worker's appeal with respect to the duration of PPD payments is denied.

#### *Issue #4 – Costs and expenses*

Under section 6 of the *Workers Compensation Act Appeal Regulation* (Regulation) WCAT may award costs related to an appeal only in certain circumstances that are set out in sections 6(a), (b) and (c). I have considered the submissions of the worker's representative with respect to payment of the worker's legal costs. I am not persuaded that any of the criteria in section 6 exist in this case. There is no evidence that the employer caused the worker to incur any costs in this appeal, or caused costs to be wasted. There is no evidence the employer's conduct has been vexatious, frivolous or abusive. There are no exceptional circumstances that make it unjust to deprive the worker of his costs.

I have also considered section 7 of the Regulation. The worker's representative has not identified any expenses in relation to this appeal for which the worker should be reimbursed under section 7. I am not aware of any such expenses.

I decline to make an order for payment or reimbursement of costs or expenses in relation to this appeal.

#### **Conclusion**

I vary *Review Decision #19842* only with respect to the issue of a loss of earnings assessment.

Guy Riecken  
Vice Chair

GR/dw/mm