Noteworthy Decision Summary

Decision: WCAT-2006-02105 **Panel**: Guy Riecken **Decision Date:** May 16, 2006

WCAT jurisdiction – Findings of fact – Reviewable decision – Retirement date – Section 23.1 of the Workers Compensation Act

A letter from the Workers' Compensation Board (Board) communicating a finding of fact that will affect entitlement to benefits at a future date is not a reviewable decision that may be appealed to the Workers' Compensation Appeal Tribunal (WCAT). The Board may change such findings of fact before a decision affecting entitlement to benefits has been made. Thus a letter advising a worker, who was 65 years of age on the date of injury, that his retirement date would be two years after the injury was not a decision but, rather, a finding of fact.

The worker injured his back in 2003. He was 65 years of age at the time. The Board accepted his claim for disc herniation, chronic pain, and radiculopathy. In 2004 the Board wrote to the worker to inform him it had determined his retirement date would be two years after the date of injury. In 2005 the Board granted the worker a permanent disability award (PDA) of 7.20%. The Board determined that, as the worker was 65 years old at the date of injury, his PDA would be discontinued on June 13, 2005, two years after his date of injury, pursuant to section 23.1 of the *Workers Compensation Act*. The worker requested a review of his 7.20% PDA evaluation by the Review Division of the Board (Review Division), which confirmed the Board decision. The worker appealed to WCAT.

In addition to addressing the worker's appeal on its merits, the panel considered the issue of whether he had jurisdiction over the PDA termination date in light of the 2004 letter. The panel noted that in the 2004 letter the Board had informed the worker he could request a review of their "decision" within 90 days.

The panel concluded the 2004 letter communicated a finding of fact and did not communicate a reviewable decision. It was the 2005 Board decision that was reviewable with respect to the PDA termination date. The panel agreed with the approach taken by previous panels in *WCAT Decision #2006-01737* and *WCAT Decision #2006-01296* which concluded that such findings of fact are subject to change by the Board and do not confer or deny entitlement. In this case the 2004 letter indicated the future duration of the worker's eligibility for any entitlement to benefits would be limited to the two-year rule in section 23.1. Thus, the Board acknowledged their finding with respect to the retirement date would give rise to benefit entitlement decisions in the future, but did not make an entitlement decision in the 2004 letter. In fact, the retirement date finding was never applied to the worker's temporary disability benefits because the Board concluded he had reached a medical plateau before June 13, 2005.

The panel also concluded that WCAT had jurisdiction to address the issue of the PDA termination date, despite it not being addressed by the Review Division, as it was part of the PDA decision that was reviewed. The panel found insufficient evidence the worker would have retired more than two years after the date of injury. Thus, the presumptive retirement date under section 23.1(b) of June 13, 2005 applied.

The worker's appeal on this issue was denied. The 2004 letter communicated a finding of fact about the worker's deemed retirement date, but did not include an actual decision respecting the worker's benefit entitlement.

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Introduction

On June 13, 2003 the worker was employed as a carpenter when he injured his low back. The Workers' Compensation Board (Board) accepted his claim for a disc herniation at the L4-5 level, left L5 radiculopathy and chronic pain. On January 17, 2005 the Board granted the worker a permanent partial disability (PPD) award based on a permanent functional impairment (PFI) of 7.20% (6.00% for limited mobility of the lumbar spine and 1.20% for the age adaptability factor). The Board determined that since the worker was 65 years of age at the date of injury, the award would be payable until two years after the date of injury, June 13, 2005.

The worker appeals the July 26, 2005 decision of a review officer in the Review Division of the Board (*Review Decision #28533).* The review officer found that the worker is not entitled to an award for chronic pain, that the 7.20% PFI rating accurately estimates the impairment of the worker's earning capacity, and that the worker is not entitled to a loss of earnings assessment.

The worker was self-employed at the time of the injury and there is no other employer participating in the appeal. The worker and his representative, Neil Vannan, of the Workers' Advisers Office, attended an oral hearing on February 26, 2006.

Issue(s)

1. Whether the 7.20% PFI award accurately estimates the impairment of earning capacity due to the permanent conditions accepted under the claim. This includes consideration of the PFI rating, whether the worker should receive a chronic pain award, and the effective date of the award.

2. Whether the worker is entitled to a loss of earnings assessment.

3. Whether the Workers' Compensation Appeal Tribunal (WCAT) has jurisdiction over the termination date of the PPD payments, and if so, whether the worker is entitled to receive the payments beyond June 13, 2005.

Jurisdiction

The appeal was filed with WCAT under section 239(1) of the *Workers 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) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case. 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) of the Act.

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.

Background and Evidence

In June 2003 the worker had been back at work for approximately two months after a period of temporary total disability resulting from compensable neck, shoulder and rib injuries in December 2001 (2001 claim). The worker's June 13, 2003 low back injury (2003 claim) occurred when he was lifting a 50-pound compressor and felt sharp pain in his low back and down his right leg to his calf.

The first medical report dated June 13, 2003 from Dr. Annan, a physician in a walk-in medical clinic, indicates that the worker complained of low back pain radiating to his right buttock. The diagnosis was back pain and sciatica.

The November 4, 2003 consultation report from Dr. Brownlee, neurosurgeon, indicates that the worker reported his pain had not improved since the onset. He had been unable to work since then. The pain radiated from the right buttock all the way down the leg to the calf. On examination Dr. Brownlee noted right foot drop, normal reflexes at the knees and ankles, and subjectively diminished sensation in the right leg. The worker was able to forward flex to touch his knees with increased pain. Straight leg raising was to approximately 60 degrees on the left and 45 degrees on the right. Dr. Brownlee's impression was of an L4-5 disc herniation on the right. This would account for the foot drop. Further investigation including an expedited MRI scan was recommended.

The November 22, 2003 MRI report describes mild annular disc bulging from L1 to L5 inclusive. Mild facet joint osteoarthritis (OA) was seen in the lower lumbar spine. No specific disc herniation was seen.

In his December 16, 2003 consultation report Dr. Brownlee interpreted the MRI as not showing any significant abnormalities. He noted that there is nothing obviously compressing the L5 nerve root. He considered it was possible the worker had a disc herniation which had resolved. He felt the ongoing right leg pain and foot drop may have been related to a nerve root injury, but also noted that it may have been related to a peripheral nerve problem. He suggested nerve conduction studies.

The March 9, 2003 neurophysiological consultation report by Dr. Mosewich indicates that nerve conduction studies were normal. The findings suggested the presence of a chronic or old right L5 radiculopathy. He found this difficult to explain based on the MRI findings, but felt that there must have been some compression of the nerve root at the time of injury which was no longer present. Some of the pain was facet pain because there was some localized tenderness in that area. The nerve root pain was resolving spontaneously. He considered that conservative management was indicated and gave the worker a prescription for Naprosyn 500 milligrams twice a day.

In his March 30, 2004 report Dr. Brownlee agreed that since the nerve root compression was not seen in the MRI, surgical intervention was not warranted. The worker's symptoms continued to fluctuate, with increased activity severely aggravating the pain. The worker reported that he liked to walk, but that the more he walked the worse his symptoms became. Dr. Brownlee commented that this was a bit unusual in the absence of ongoing nerve root compression. The worker found that Naprosyn helped somewhat, but that his activities were still very limited because of pain. Dr. Brownlee gave him a prescription for Gabapentin.

The file was referred to the Board's Vocational Rehabilitation Services Department. In the initial vocational assessment dated May 10, 2004 a vocational rehabilitation consultant (VRC) indicated that the worker became a journeyman carpenter in 1968. Initially he worked in heavy construction. For the past nine years the worker had been doing finishing carpentry because he felt he was too old to be balancing on beams. Before the injury he had been bidding on jobs and working as much as he felt like. He hired other workers as needed. He reported that he always hired at least one person to do the heavy work on a job. He enjoyed his work and stated that he had every intention of working past the age of 65. At the time of his injury he was doing finishing carpentry on a new seniors' residence. The person who hired the worker for the job on the seniors' residence confirmed in the presence of the VRC that he had another job for the worker to bid on in the coming summer (2005) and the worker expressed his interest in that job.

The worker was referred to a pain program. In the May 11, 2004 intake assessment report Dr. Rieb, pain program medical consultant, had the impression of back pain related to a previous L4-5 disc herniation with some symptoms of nerve root irritation. The worker still had very subtle changes in strength and reflexes on the right, but much improved from what had been recorded earlier. Dr. Rieb commented that the worker's sleep disturbance may have been exacerbated by caffeine overuse. The worker's mood seemed good and he seemed to be handling his situation well mentally. He was a good candidate for the chronic pain program.

On June 18, 2004 the case manager wrote to the worker to inform him that under section 23.1 of the Act his retirement date was considered to be two years after the date of injury. Accordingly, the worker's eligibility to any benefits entitlement would continue to that date (June 13, 2005).

The June 25, 2004 pain program discharge report described the worker as fit to return to full-time work with limitations for light duties. The worker had limited tolerance for standing, walking, heavy lifting, stooping, bending and limited ability for above shoulder activities (the latter related to the 2001 shoulder injury).

The Board terminated the worker's temporary disability (wage loss) benefits on July 23, 2004 after determining that his condition had reached a medical plateau. The file was referred to the Board's Disability Awards Department. The case manager's August 3, 2004 referral memo identified the following permanent conditions: the L4-5 disc herniation, the L4-5 radiculopathy and chronic pain.

The VRC described the worker's pre-injury job duties in detail in the September 9, 2004 "NOC occupation code recommendation." The VRC concluded that the worker's pre-injury job was included in the National Occupational Classification (NOC) code #7215 Contractors and Supervisors - Carpentry Trades. The VRC reviewed the job demands for this occupation and concluded that they are within the worker's physical limitations if he limited his finishing carpentry to those activities that do not require extensive bending, stooping and kneeling. The VRC noted that as the owner/contractor the worker had the ability to assign those tasks to other workers. The Board agreed to support the worker in a 12-week job search.

A memo dated September 16, 2004 from a Board medical advisor identifies the following restrictions: avoid frequent bending, heavy lifting and awkward lifting. Any of these activities could lead to the adverse health effect of a recurrent disc herniation with the likely need for surgical intervention. The medical advisor also identified the following limitations: sitting limited to 20 minutes duration, standing in one spot limited to 20 minutes duration, walking limited to 30 minutes duration, limited squatting and kneeling, and limited to carrying of 20 pounds on an occasional basis. The medical advisor opined that the worker's reported consequence of exceeding these limits was pain, and that this was biologically plausible with respect to the accepted medical condition.

A memo in the claim file dated October 29, 2004 indicates that the worker informed the VRC that he had bid on two finishing carpentry jobs.

In the October 29, 2004 section 23(3.1) memo (form 21) the claims adjudicator in Disability Awards (CADA) reviewed the information provided by the VRC about the worker's vocational background, the NOC description and the limitations/restrictions identified at the September 16, 2004 team meeting. The CADA found that although the worker has limitations that impact his ability to perform his job, the occupation identified

by the VRC includes several jobs in which the worker could still perform the essential skills. The CADA concluded that the worker is not entitled to a loss of earnings assessment.

On November 5, 2004 the worker informed the VRC that he had won a bid to do the finishing carpentry on two homes and would begin the job on November 21, 2004. On November 21, 2004 the worker informed the VRC that the contractor had changed his mind and given the work to someone else.

On November 23, 2004 the worker underwent a PFI evaluation with respect to both his 2001 and 2004 claim injuries by Dr. C, a disability awards medical advisor at the Board. The worker described a constant achiness in his low back with more focused pain in his right buttock that radiated behind the right calf, which was more noticeable on bending. The worker said that he got relief by sitting on his left side. He also described occasional numbness behind his knee and stated that when walking his right leg sometimes seemed to kick into his left leg. The worker reported that his back symptoms had been stable for the past six months. The worker stated that he drove but had to make frequent stops. He had decreased walking ability. On examination of the lower spine there was no pain with palpation, both sacroiliac joints were pain-free, as were both of the sciatic notches. There were good pulses in both ankles. Dr. C recorded limitations of lumbar range of motion (ROM) for flexion, extension and left lateral flexion. Dr. C commented that he was unable to appreciate any significant foot drop in the examination and that the worker was able to walk on his heels and toes with no apparent difficulty. Dr. C stated that “No additional factors were appreciated” in the examination.

The December 14, 2004 PFI calculation equates the ROM measurements for the lumbar spine to an impairment rating of 6.00% (3.00% for limited flexion, 2.00% for limited extension, 0% for right lateral flexion and 1.00% for left lateral flexion).

In the January 5, 2005 PFI review memo (form 24) the disability awards officer (DAO) reviewed the PFI evaluation for the lumbar spine, the worker’s subjective back complaints, and the other medical evidence and concluded that the worker should receive an award for the lumbar spine based on the 6.00% PFI and that no awards for chronic pain or additional factors were warranted. The DAO noted the case manager’s earlier decision about the worker’s retirement date and that accordingly, the award would be effective from July 26, 2004, the date following the termination of wage loss benefits, and would end two years after the date of injury (June 13, 2005).

In a separate form 24 dated January 5, 2005 in the 2001 claim the DAO assessed the worker’s entitlement to a PPD award for his right shoulder injury under the former (pre-June 30, 2002) provisions of the Act. The DAO concluded that the worker is entitled to an award based on a PFI of 6.42% for the shoulder without any awards for chronic pain or additional factors. The DAO noted that under the 2001 claim the VRC had provided the worker with computer training to allow him to return to work as a

construction estimator without any loss of earnings. That determination was based on the wage rate established in the 2001 claim which was lower than the wage rate under the 2003 claim based on the worker's level of personal optional protection.

On January 10, 2005 the worker informed the VRC that he had successfully bid on a job and would begin within a week. The VRC wrote to the worker to inform him that his job search benefits were at an end.

A CT scan report from April 4, 2005 describes mild to moderate facet joint OA from L3 to S1, maximal at the L4-5 level. There was a mild annular disc bulge at the L3-4 level and moderate annular disc bulging at the L4-5 level.

At the hearing the worker testified that he had not planned to retire at 65 years of age. He enjoys what he does and takes pride in his work. He explained that he did not appeal the Board's June 18, 2004 decision that the Board considered his retirement date to be June 13, 2005 because he was in the pain program at the time and he received two letters from the Board that both had the same date. He appealed one of them. He thought they were both the same. Later he realized one of them was about the retirement date.

The worker stated that he has good and bad days with his back pain and that the PFI evaluation went well because that was a good day. On a good day he rates his pain at three or four out of ten and on a bad day it is six or seven out of ten. Unfortunately he now has more bad days than good ones. His pain limits his walking, sitting, standing, climbing stairs, and weight-carrying. He described these limitations much in the same terms as the limitations accepted by the Board and described in the claim memo from September 16, 2004.

The worker testified that he continues to work in the sense that he bids on jobs, but he has not been able to get any contracts. He attributed this to the fact that he is physically unable to do much of the finishing carpentry himself and would have to hire a finishing carpenter for any job on a day rate. This makes his bids uncompetitive.

The worker stated that he is unable to do the jobs identified by the VRC such as construction superintendent and cabinet maker. He explained that he has been a construction foreman in the past and that he is familiar with the job demands. The superintendent or foreman has to be able to get around on a job site to check on the work that is being done. This requires climbing stairs, climbing ladders, getting up on scaffolds and climbing over debris on the job site. The job does not just involve sitting in an office. He acknowledged that he has experience and the skill base involved in being a construction project manager. He has experience and skills with estimating materials and labour requirements for specific jobs, preparing and submitting bids, planning the various steps in a renovation, ordering and purchasing materials, hiring and supervising others to do part of the work, and reading and working from blueprints and construction drawings. He stated that he does not retain the ability to do the

physical part of the job which involves moving around construction sites and partly constructed buildings to troubleshoot problems, check that the work is being done according to the plans, and maintain standards. He estimated that over 50% of the construction superintendent job involves physical demands of moving around the job site and less than 50% involves working in the site office.

He explained that cabinet maker is a completely different occupation from finishing carpenter. To be a cabinet maker requires going to college and doing an apprenticeship. All the machines used by cabinet makers these days are run by computers. He has not been trained to that work and has no experience with it. He has only done installations of cabinets in buildings.

The worker agreed that he had received some computer training and bought a computer and was learning how to use it. He would like to receive more training in an estimator course so that he could get into that occupation to offset the loss of income he is experiencing since his injury.

Findings and Reasons

Submissions

The worker's representative acknowledged that the issue of the worker's retirement date may have already been decided before the PPD decision. He is seeking an award for the worker for chronic pain and a loss of earnings award.

The worker's representative referred to the pain program discharge report and the worker's evidence to support his argument that the pain has continued without change and that it results in limitations and restrictions on the worker's functioning. The worker is very limited by his pain. It is disproportionate to the nature of the back injury under the definition in the Board's chronic pain policy.

The worker's representative referred to the profile and summary of the physical demands of the carpentry supervisor occupation in the Career Handbook portion of the NOC. He submitted that these demands are fairly high and that they are essentially the same as the physical demands in the handbook for a carpenter. Based on the fact that the worker is unable to perform the physical demands of a carpenter, he is also unable to perform the demands of the carpentry supervisor occupation. Accordingly, the worker satisfies the first two criteria in policy item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). He is unable to perform the essential skills of

his occupation at the time of the injury or of a similar occupation. Because all he has ever been is a carpenter, he also meets the third test. He would be unable to adapt to another occupation without sustaining a significant loss of earnings.

In support of his submission with respect to the criteria in RSCM II item #40.00, the worker's representative referred me to *WCAT Decision #2005-05557*. In that decision the vice chair determined that the worker was no longer able to perform the essential skills of his pre-injury employment because of his physical limitations.

In addition to finding that that the worker should receive a loss of earnings award, the workers' adviser asked that I recommend the Board to provide the worker with further training to become an estimator.

Issue 1 - PFI rating

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.

Under section 23(2) of the Act, the Board has established the Permanent Disability Evaluation Schedule (PDES) which is found in Appendix 4 of RSCM II. 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. Item #76 in the PDES provides for an impairment rating of 0% to 24% for loss of mobility of the lumbar spine.

The worker's representative acknowledged that there is no medical evidence that contradicts the PFI rating of 6.00% based on limited ROM of the worker's low back and did not argue that a different rating should be applied. I do not find other medical evidence in the claim file that contradicts the findings from the PFI evaluation. I find that the ROM findings are reliable and were properly used to calculate the scheduled impairment rating.

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 worker's representative did not submit that the worker should receive an "additional factors" award under item #39.10. Based on Dr. C's comments, the other medical evidence and the worker's testimony, I find that the worker is not entitled to such an award.

I find that the 6.00% PDES rating accurately estimates the objective impairment of earning capacity due to the worker's low back injury.

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RSCM II item #39.02 sets out the Board's policy on PPD awards for chronic pain. Pain is considered to be chronic if it persists for six months after an injury and beyond the usual recovery time. The policy distinguishes between two types of chronic pain: specific chronic pain and non-specific chronic pain. Specific chronic pain has a clear medical cause, such as pain associated with the permanent disability. Non-specific pain exists without a clear medical cause and continues following the recovery from the injury. A worker may be entitled to an award under section 23(1) of the Act for specific chronic pain if it is disproportionate to the compensable injury and to the objective permanent impairment. If the worker is eligible for a chronic pain award, the policy specifies an award of 2.50%.

Having considered the medical evidence and the worker's description of the effect of his pain on his functioning, I conclude that his specific chronic pain is disproportionate to his low back injury and his objective impairment. The worker's objective scheduled impairment primarily involves his limited ability to bend his lumbar spine forward and sideways. These movements also involve pain and I consider the pain directly related to his low back movements to be consistent with the injury and the nature of the objective impairment. However, the worker has consistently reported pain that extends to his buttocks and down his right leg which is aggravated by activities such as walking, and which has limited his tolerance for that activity. I recognize that radicular symptoms may be expected from the kind of lumbar herniation that was accepted under the worker's claim. However, both Dr. Mosewich and Dr. Brownlee considered the leg symptoms and the aggravation of pain caused by walking to be unexplained by the MRI findings, which reflected a past herniation that had since resolved. The MRI and the nerve studies by Dr. Mosewich did not reveal any current herniation or nerve root impingement. Dr. Brownlee considered the worker's complaints of increased symptoms from walking to be inconsistent with the clinical and MRI findings. These findings and the worker's buttock and leg pain were part of the rationale for referring the worker to the pain program.

At conclusion of the pain program the worker reported that his pain level had not changed significantly, although he had learned to better cope with the pain through active relaxation and breathing techniques. The discharge report indicated that the worker's pain, including the leg pain, continued to be aggravated by walking and that limited walking tolerance remained a barrier to employment. At the hearing the worker confirmed ongoing leg pain that is aggravated by walking.

None of the medical reports or the pain program reports suggest that the worker was exaggerating his pain complaints or described behaviour suggesting he is not credible in his complaints. I found the worker's testimony at the hearing about his symptoms to be credible. I conclude that the worker has ongoing leg pain that is beyond what is expected from the injury as described in the MRI reports and the reports from Dr. Brownlee and Dr. Mosewich. To the extent that the leg pain limits the worker's

walking tolerance and limits his functioning, it is disproportionate to the objective low back impairment reflected in the ROM findings. I conclude that the worker is entitled to an award for chronic pain.

The worker's representative did not dispute the effective date of the award. The Board made the PPD award effective from July 26, 2004, the date following the end of wage loss benefits. This is consistent with policy item #42.10 and I find it is correct.

Policy item #39.11 provides for the modification of the percentage impairment rating 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 1.00% of the assessed PFI, up to a maximum of 20.00% age adaptability factor. The worker's age at the effective date of the award is used, not the age at the time of injury. The age adaptability factor is only applied to scheduled awards. Awards for chronic pain are not considered scheduled awards. In this case the worker was 65 years of age at the effective date of the PPD award. The Board granted 1.20% for the age adaptability factor, which the worker's representative has not disputed. I find that the worker is entitled to 1.20% for the age adaptability factor.

I find that the worker's entitlement under section 23(1) of the Act for his lumbar spine injury is based on a PFI of 9.70% (6.00% for limited ROM, 2.50% for chronic pain and 1.20% for age adaptability).

Issue 2 - Loss of earnings assessment

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.

RSCM II 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) of the Act. Policy item #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.

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.

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Sections 23(3) and 23(3.1) of the Act 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) of the Act.

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.

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 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 CADA accepted that because of his restrictions and functional limitations, the worker is unable to return to work as a finishing carpenter. I agree with that conclusion. In particular the restrictions and limitations for bending, lifting, squatting and kneeling prevent the worker from returning to work as a finishing carpenter. However, under section 23(3.2) of the Act, 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." Item #40.00 states that the determination of whether the worker can return to his pre-injury occupation or a similar occupation requires consideration of both

the worker's transferable skills and his post-injury functional abilities. The medical evidence must be considered to determine whether the work injury makes it impossible to continue in the pre-injury occupation or in a similar occupation.

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 NOC four-digit code that best encompasses the pre-injury employment is used to identify the relevant occupation. In the initial vocational assessment the VRC identified NOC code #7215, Contractors and Supervisors – Carpentry, as the occupation code which includes the worker's pre-injury job as a self-employed finishing carpenter. I agree that code #7215 is the relevant NOC occupational classification in light of his vocational experience working as a construction foreman, bidding on finish carpentry jobs, and hiring and overseeing carpenters and labourers to work on carpentry contracts.

Based on the NOC description, the CADA considered the essential skills of this occupation to include the following knowledge and skills related to the planning, supervision, co-ordination and scheduling aspects of a construction project:

- plan activities involving renovations, the installation of cabinets, fixtures and other related products;
- establish methods to meet work schedules and coordinate appropriate work activities with other workers;
- requisition materials and supplies and have them available at the appropriate work site; and
- training individuals to ensure standards for safe working conditions are observed.

I agree with this list of skills, and based on the description of code #7215 in the NOC and the related information in the Career Handbook (the career counselling component of the NOC), as well as the worker's evidence, I find that the essential skills for the occupation also include the following:

- the ability to read and interpret blueprints and construction drawing and to give appropriate instructions to other individuals working on the project and to inspect their work to ensure that work is done correctly.

Based on the worker's evidence and the assessment by the VRC, I find that the worker retains the knowledge base for all of these skills.

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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 of his occupation at the time of injury or a similar occupation. 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.

At the same time, 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 does section 23(3) nor 23(3.1) expressly make such a distinction. Moreover, consideration of ability inherently involves considering the extent of the disability. This is reflected in section 23(3.1) and item #40.00 of RSCM II which refer to the combined effect of the worker's occupation at the time of injury and the worker's disability.

I acknowledge the worker's evidence that working as a construction supervisor requires being able to move around a construction site, including at times climbing ladders and stairs and walking around and over debris on the site. At the same time, neither the NOC description nor the worker's evidence leads me to conclude that such work includes demands for lifting, carrying, bending, kneeling or crouching that are beyond the worker's restrictions and limitations. The worker's limited tolerance for walking may impact his ability to make his way around a construction site to supervise and inspect work, but I consider it likely that as a supervisor the worker would be able to alternate between different activities and to control the timing of his activities. With regard to the worker's evidence that since his back injury he would have to hire a finishing carpenter to complete parts of any contract he bids on, I note that he told the VRC that before the back injury it was his practice to hire at least one other person on every job to do the heavier work. I conclude that either as a self-employed finishing carpenter or a carpentry supervisor he would still be able to assign other workers to perform the heavier tasks. I accept as reliable the evidence of the VRC that there are jobs within NOC #7215 that are within the worker's limitations and restrictions.

I find that the medical and other evidence does not establish it is impossible for the worker to continue in his pre-injury occupation or in a similar occupation. Accordingly, he is not entitled to a loss of earnings assessment.

Issue 3 - Duration of pension

I have considered whether I have jurisdiction to decide the issue of the duration of the worker's PPD payments in light of the Board's June 18, 2004 letter. That letter informed the worker that the case manager had determined the worker's retirement date would

be two years after the date of injury, June 13, 2005. The case manager then stated the following to the worker: "We discussed on the telephone that my understanding is that any benefits you normally would be entitled to, you would have eligibility for such entitlement until June 13, 2005." The letter informed the worker of his right to request a review of this "decision" by the Review Division within 90 days. In the form 24, under the heading of the pension termination date, the DAO referred to this letter as having determined that the pension would continue until June 13, 2005. At the hearing the worker's representative acknowledged that, as a result of the June 18, 2004 letter, of which the worker did not request a review, the issue of the pension termination date may already have been decided and may not be before me in this appeal.

If the June 18, 2004 letter communicated a reviewable decision regarding entitlement to compensation, I would not have jurisdiction to address the duration of the pension in this appeal since the worker did not seek to have it reviewed in the Review Division. The review officer did not address the issue of the pension termination date in the decision that is the subject of the present appeal. The other possibility is that the June 18, 2004 letter only communicated a finding of fact, and the DAO's determination of the pension termination date in the January 17, 2005 PPD decision would be the effective decision on that issue, which gave rise to rights of review and appeal.

This issue of a finding of fact versus an entitlement decision was addressed recently in another WCAT decision regarding a Board letter that informed a worker that a case manager did not accept as valid the functional limitations described in a medical report. A review officer found that the letter did not contain a decision with respect to compensation and that the review officer did not have jurisdiction over it because of section 96.2(1) of the Act. That section provides a right to request a review of "a Board decision respecting a compensation or rehabilitation matter under Part I" of the Act. In *WCAT Decision #2006-01737* the vice chair confirmed the review officer's decision that the case manager's letter, stating that certain limitations were not accepted, had communicated a finding of fact and was not a decision respecting benefit entitlement in and of itself. The vice chair referred to the reasoning of another vice chair in *WCAT Decision #2006-01296* which found that such findings of fact are subject to change by the Board and do not confer or deny entitlement. They may be the basis for subsequent decisions on benefit entitlement. I agree with that approach and, although this case involves a finding with respect to retirement age and not functional limitations, have applied it here. In this case the June 18, 2004 letter did not confer or deny entitlement to any benefits in itself, but indicated that the future duration of the worker's eligibility for any entitlement to benefits would be limited to the two-year rule in section 23.1 of the Act. This was an acknowledgement that the finding with respect to the retirement date would give rise to benefit entitlement decisions in the future. In fact the retirement date finding was never applied to the worker's temporary disability benefits because the Board determined that he had reached a medical plateau well before the two years ended. The Board went on to provide vocational rehabilitation assistance to the worker, partly on the basis that he intended to continue working. Information gathered by the VRC after June 2004 confirmed that the worker continued to bid on contracts and that

construction contractors remained interested in hiring him. I consider this situation to be similar to the one involving functional limitations addressed in the aforementioned WCAT decisions. I conclude that the June 18, 2004 letter communicated a finding of fact about the worker's deemed retirement date, but did not include an actual decision respecting the worker's benefit entitlement. The subsequent PPD decision included a decision on the pension termination date that is subject to review and appeal. Although the review officer did not address this issue, because it was part of the PPD decision that was the subject of the review, WCAT has jurisdiction to address the issue. (See item #14.30 of the WCAT *Manual of Rules of Practice and Procedure*).

Section 23.1 of the Act provides that:

> (2) 23.1 Compensation payable under section 22 (1), 23 (1) or (3), 29 (1) or 30 (1) may be paid to a worker, only
>
> (a) if the worker is less than 63 years of age on the date of the injury, 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, and
>
> (iii) if the worker is 63 years of age or older on the date of the injury, until the later of the following:
>
> (iv) 2 years after the date of the injury;
>
> (v) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

RSCM II item #41.00 sets out the Board's policy with respect to section 23.1 and the duration of PPD payments. It provides that evidence from an independent source is required to establish that the worker would have worked past the age of 65, and if so, to establish the post-65 retirement age. The policy includes a non-exhaustive list of the kinds of evidence to be considered and notes that where evidence from an independent source is not verifiable, a determination must be made on the available evidence, including the information provided by the worker.

The worker provided to the Board a copy of an undated letter to a company referring to a conversation on April 26, 2004. The letter lists the tools that he uses as a finishing carpenter and the firms he had worked for in the past and for which he would work in the future. The letter concludes with the following statement by the worker: "I plan to

continue working in my trade well into the future." In addition to this letter the worker provided the VRC with the names of firms to which he submitted bids in late 2004, including some from which he had won contracts, although these contracts apparently fell through. At the hearing the worker asserted that he never had any plans to retire and that he planned to go on working as long as he could. `

If, as in this case, the worker was 63 or older when injured, section 23.1(b) of the Act requires the Board to determine whether the worker would have worked for more than two years after the date of injury, and if so, to determine the date of retirement. Item #41.00 of RSCM II explains that the rationale for this section is that 65 is considered the standard retirement age for workers, and refers to information from Statistics Canada that on average most workers retire at or before 65 years of age. In support of this trend, the endnotes for chapter 6 of RSCM II refer to the report "Earnings and Employment Trends, Jan/Feb 2001," B.C. Statistics, Ministry of Finance and Corporate Relations, Province of British Columbia.

This case presents a difficulty because clearly the worker would retire after reaching the age of 65, (he was injured while working at 65), and he insists that but for the injury he would have gone on working indefinitely as long as he was able. I consider it likely that many workers who, like the worker in this case are outside the general trend and are self-employed and still working at age 65, do not have a specific retirement age in mind. However, section 23.1(b) of the Act requires the Board to determine a post-65 retirement date in such cases for the purpose of establishing the duration of a PPD award. The Act does not provide for the payment of periodic PPD payments indefinitely, and the legislature chose two years after the date of injury as the presumptive retirement date unless the worker satisfies the Board of a later date.

The worker has not provided any evidence of a specific retirement date beyond June 13, 2005. His evidence about the jobs he was bidding on in late 2004 did not include information that leads me to conclude that work on those jobs would have continued beyond June 2005. He has not provided other evidence that supports a later retirement date. For example, he has not provided evidence of financial planning or evidence from independent sources that confirm a planned retirement date after June 13, 2005. I find that the worker has not presented sufficient evidence to support an identifiable retirement date more than two years after the date of injury, and that the presumptive retirement date under section 23.1(b) of the Act of June 13, 2005 applies to his PPD award.

The worker's appeal is allowed in part. He is entitled to an award for chronic pain, but all other aspects of the review officer's decision are confirmed.

Conclusion

I vary *Review Decision #28533* dated July 26, 2005 only with respect to the worker's entitlement to an award of 2.50% of total disability for chronic pain. All other aspects of the review officer's decision are confirmed.

The worker's representative requested that the worker be reimbursed for the cost of half a day of lost income incurred to attend the hearing. The worker did not incur travel expenses to attend the hearing. The representative stated that the worker had foregone $200 in income to attend the hearing. At the hearing I asked the worker what work he had to leave to attend the hearing. He informed me that he would have been at home working on a bid for a carpentry contract. Other evidence at the hearing is that although the worker continues to bid on contracts, he has not succeeded in obtaining any work since his back injury. I conclude that he did not sustain any loss of income to attend the oral hearing and I decline to make an order that he be reimbursed for any expenses related to his attendance at the hearing.

Guy Riecken
Vice Chair

GR/jm