

Noteworthy Decision Summary

Decision: WCAT-2006-03192 **Panel:** Andrew Waldichuk **Decision Date:** August 15, 2006

Effect of prior WCAT decision – Effect of WCAT “confirming” Review Division decision – Non-binding comments by WCAT panel – Section 253(1) of the Workers Compensation Act – Item 14.40 of the WCAT Manual of Rules of Practice and Procedure

The Workers Compensation Board operating as WorkSafeBC (Board) and the Review Division of the Board (Review Division) are not bound by comments made by a WCAT panel that are not essential to the decision being made.

The worker injured his upper back and left shoulder. The Board accepted his claim and paid him wage loss benefits for two years. The worker appealed to the former Workers' Compensation Review Board (Review Board), which allowed a further period of wage loss benefits. Although the issue of whether the worker should be assessed for a permanent disability award (PDA) was not before the Review Board panel, he recommended the Board do so. Additionally, he made a similar recommendation with respect to the worker's eligibility for vocational rehabilitation assistance although this also was not before him. On September 19, 2002, the Board informed the worker his claim would not be referred to Vocational Rehabilitation Services. The worker appealed this decision to the Review Board. On March 3, 2003, WCAT replaced the Review Board. In *WCAT Decision #2005-02462-RB*, issued on May 12, 2005, the panel confirmed the Board decision of September 19, 2002. However, the panel also commented that he did not agree with the opinion of the Review Board panel that the worker's injuries had made him unfit to return to his pre-injury duties. The panel also commented that although the Board decision of September 19, 2002 indicated the worker had been referred to the Board's Disability Awards (DA) Department, the evidence did not support such a referral.

On December 16, 2004, an officer in the Board's DA Department concluded the worker was not eligible for a PDA. The worker requested a review of this decision. On June 21, 2005, the review officer concluded that based on *WCAT Decision #2005-02462-RB*, she did not have jurisdiction to consider the worker's request for review. She concluded the worker was not entitled to an assessment for a PDA "for any reason" (upon noting that the worker's claim had recently been accepted for a permanent chronic pain condition in a June 16, 2005 decision letter). Also on June 21, 2005, the Board informed the worker it was bound by *WCAT Decision #2005-02462-RB* and was therefore unable to consider whether the worker was entitled to a PDA for chronic pain. The worker requested a review of the June 21, 2005 decision. On November 30, 2005, a review officer confirmed the Board's June 21, 2005 decision on the basis it was bound by *WCAT Decision #2005-02462-RB*. The worker appealed both Review Division decisions to WCAT.

The panel noted that the fact the previous WCAT panel did not identify the worker's referral to DA as an issue in the body of its decision, but mentioned it while deciding if the worker's claim should have been referred to Vocational Rehabilitation Services, suggested the panel did not make a finding on the worker's referral to DA. The panel noted that a WCAT panel may confirm, vary, or cancel an appealed decision, in accordance with section 253(1) of the *Workers Compensation Act*. The meanings of "confirm" and "vary" are set out in item #14.40 of WCAT's *Manual of Rules of Practice and Procedure*. In this case, given that the previous panel confirmed the September 19, 2002 decision, it would be inconsistent to conclude that the panel

had actually made a binding finding that the worker's claim should not be referred to the DA Department. Rather, the previous panel's remarks were not essential to the decision being made and had no binding effect.

The panel concluded *WCAT Decision #2005-02462-RB* did not prevent the Board from assessing the worker's entitlement to a PDA. The worker's appeal was allowed on this issue.

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Panel: Andrew Waldichuk, Vice Chair

Introduction

The worker, who is currently 45 years old, has an accepted claim with the Workers' Compensation Board (Board) for an upper back and left shoulder strain. It arose from an incident on January 13, 1998 when he was loosening a clamp on a drill, while performing his duties as a driller for a mining company.

In findings dated August 9, 2002, a panel of the former Workers' Compensation Review Board (Review Board), while in the course of deciding that the worker was entitled to further wage loss and health care benefits, acknowledged that it did not have jurisdiction to direct the Board to refer the worker's claim to its Disability Awards Department for assessment of a possible permanent functional impairment (PFI), as requested by the worker's representative; nonetheless, the Review Board panel recommended to the Board that this be done.

By decision dated September 19, 2002, a case manager at the Board implemented the Review Board findings and in so doing advised the worker that his claim would be referred to the Disability Awards Department, but not to Vocational Rehabilitation Services. This led to a December 16, 2004 decision from an officer in the Board's Disability Awards Department (DAO), which informed the worker that since he had not been left with a significant loss of function that would affect his earning capacity in the long term, no permanent partial disability (PPD) award was payable in relation to his upper back and left shoulder strain.

The worker submitted a request for review of the DAO's decision to the Board's Review Division. In a June 21, 2005 decision, which denied the worker's request for review, a review officer referred to a passage in a May 12, 2005 decision of the Workers' Compensation Appeal Tribunal (WCAT) (see *WCAT Decision #2005-02462-RB* on WCAT's website at www.wcat.bc.ca) concerning the worker's appeal of the Board's September 19, 2002 decision.

As outlined in the review officer's decision, the WCAT panel stated (under the issue of whether the worker's claim should have been referred to Vocational Rehabilitation Services) that the evidence did not support a referral to Disability Awards. In addition, the WCAT panel expressed its disagreement with the Review Board panel's recommendation in this regard.

On account of *WCAT Decision #2005-02462-RB*, the review officer decided that she did not have jurisdiction to consider the worker's request for review of the DAO's

December 16, 2004 decision and found that the worker was not entitled to an assessment of a PPD award “for any reason” (upon noting that the worker’s claim had recently been accepted for a permanent chronic pain condition in a June 16, 2005 decision letter).

The Board officer’s June 16, 2005 decision informed the worker that his claim would be re-referred to the Disability Awards Department for assessment of his chronic pain. By decision dated June 21, 2005, another DAO informed the worker that she was bound by WCAT’s decision of May 12, 2005, and therefore was unable to consider any entitlement the worker may have to a PPD award for chronic pain.

The worker submitted a request for review of the DAO’s June 21, 2005 decision to the Board’s Review Division. In a November 30, 2005 decision, a review officer referred to the Review Division’s June 21, 2005 decision, along with WCAT’s decision of May 12, 2005, and confirmed the DAO’s June 21, 2005 decision.

The worker, through his representative, Mr. MacMillan, now appeals the Review Division decisions of June 21, 2005 and November 30, 2005 to WCAT.

The employer is participating in these appeals and is represented by Ms. McMahon.

The worker requested an oral hearing only with respect to his appeal of the Review Division’s June 21, 2005 decision. By letters of September 16, 2005 and February 21, 2006, the worker was advised that his appeals would proceed by way of written submissions. That decision does not bind me if I consider that an oral hearing is necessary. I am satisfied that a fair and thorough decision may be reached on these appeals without holding an oral hearing, since there are no material facts in dispute or serious issues of credibility.

Preliminary Matter

In terms of remedy, Mr. MacMillan seeks a finding that directs the Board to consider the worker’s vocational rehabilitation assistance, depending on the outcome of this appeal. Under section 239(1) of the *Workers Compensation Act* (Act), matters respecting vocational rehabilitation are not appealable to WCAT. Therefore, I find that I have no jurisdiction to direct the Board on any matters concerning the worker’s vocational rehabilitation. Furthermore, none of the decisions before me address vocational rehabilitation.

Issue(s)

1. Does *WCAT Decision #2005-02462-RB* (May 12, 2005) prevent the Board from assessing the worker's entitlement to a PPD award?
2. Is the worker entitled to a PPD award in relation to his upper back and left shoulder strain?
3. Should the Board assess the worker for a PPD award in relation to chronic pain?

Jurisdiction

These appeals were filed with WCAT under subsection 239(1) of the Act.

Under section 250(1) of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

Section 239(2)(c) of the Act provides that a decision of the Review Division may not be appealed to WCAT where it concerns the application under section 23(1) of the Act of rating schedules compiled under section 23(2) of the Act, where the specified percentage of impairment has no range or has a range that does not exceed 5%. The Permanent Disability Evaluation Schedule (PDES), as it read on and after August 1, 2003, is a rating schedule compiled under section 23(2) of the Act. It was used in determining the worker's section 23(1) entitlement.

Impairment for loss of range of motion in the shoulder (item 6) is broken down for each plane of movement (flexion, extension, abduction, adduction, external rotation, and internal rotation), with only flexion and abduction having a range of impairment greater than 5%. I accept that an assessment of shoulder impairment considers all planes of movement. Item 6 in the PDES indicates that the impairment rating for a frozen shoulder is the sum of the impairment ratings for each plane of movement, or 35%. Accordingly, I find that I have jurisdiction over the worker's request for an award for shoulder impairment.

Impairment for loss of range of motion in the cervical spine (item 73) is broken down for each plane of movement (flexion, extension, lateral flexion, and rotation), with only flexion having a range of impairment greater than 5%. I accept that an assessment of cervical spine impairment considers all planes of movement. Item 73 in the PDES

indicates that the maximum disability rating is not to exceed 21%. Accordingly, I find that I have jurisdiction over the worker's request for an award for cervical spine impairment.

Background and Evidence

Dr. Chan, an orthopaedic surgeon, wrote in a July 5, 2001 letter to the worker's employer that the worker was interested in returning to work and there was no medical contraindication in terms of him doing so. He thought that the only limitation would be based on the worker's subjective pain, and that he was capable of heavy shovelling and overhead activity.

In accordance with the Review Board findings, the Board paid the worker wage loss benefits until July 11, 2001 in its decision of September 19, 2002. (The issue of the worker's wage loss entitlement was upheld in *WCAT Decision #2005-02462-RB*.)

An April 25, 2002 consultation report from Dr. Heard, an out-of-province orthopaedic surgeon, refers to the worker having sustained a rotator cuff tear at work several years ago, followed by reconstruction surgery in 2000. (The worker informed the Board on February 12, 2003 that no one had mentioned a rotator cuff tear to him. He also denied having the surgery.) On examination, Dr. Heard found that the worker had good range of motion in his neck, but weakness in his left rotator cuff with a positive impingement sign. Dr. Heard thought that the worker had a PPD in his left shoulder.

The worker's family physician, Dr. Haiduk, reported on June 4, 2002 that the worker had good range of motion in his neck and shoulder region, despite his problems with tenderness in his left peri-scapular area. Dr. Haiduk's subsequent report of July 4, 2002 indicates that the worker was trying to find work that was suitable for his condition. There is no medical evidence on file beyond a November 7, 2002 letter that Dr. Haiduk wrote to the Board concerning the worker's need for massage therapy and certain medication.

Dr. C, a Disability Awards medical advisor (DAMA), conducted a PFI evaluation of the worker on November 18, 2004. The worker presented with an aching discomfort in the scapular area of his left upper back, which occurred on a daily basis and was present approximately 80 to 90% of the time. As well, the worker described a sharp, shooting, searing-like pain in the same region, which occurred approximately three times a month and lasted for roughly 10 to 15 seconds. He thought that there had been no appreciable change in his symptoms in the past year. Lastly, Dr. C recorded that the worker was employed (the nature of the job is unclear from Dr. C's report) and not having any significant difficulty with his job except when he was required to lift bags of iron weighing 50 pounds.

On examination, Dr. C found no obvious muscle wasting or upper back tenderness. The worker's lower arm circumference measurements were equal bilaterally, while the circumference of his left upper arm (31 centimetres) was slightly smaller than that on the right (31.5 centimetres).

Dr. C measured the range of motion of the worker's cervical spine as follows: flexion (65 degrees), extension (35 degrees), lateral flexion (30 degrees bilaterally), and rotation (left - 70 degrees, right - 75 degrees).

In terms of the worker's shoulder range of motion, Dr. C recorded the following measurements: flexion (160 degrees bilaterally), extension (70 degrees bilaterally), abduction (170 degrees bilaterally), adduction (50 degrees bilaterally), external rotation (90 degrees bilaterally), internal rotation (50 degrees bilaterally and thumb up spine (left - T7, right - T8)).

On neuromuscular examination, Dr. C found that the worker had normal deep tendon reflexes in his upper extremities and normal muscle strength testing bilaterally. Lastly, hand grip testing produced a bell curve on the right and the left, with little difference between the worker's grip strength, except in the fifth setting which produced a much lower result on the left (32 kg) than the right (42 kg).

In concluding his report, Dr. C offered his opinion that the range of motion measurements were reliable. Additionally, he commented in a memorandum that no additional factors were evident during the examination and that the worker's presentation was not one of disproportionate pain.

As set out in her December 16, 2004 memorandum (form 24), the DAO considered Dr. C's assessment of the worker's range of motion and concluded that there was no objective measurable evidence of impairment. Furthermore, she noted the Board's policy on disproportionate non-specific chronic pain, but indicated that she could not consider it since chronic pain had not been accepted on the worker's claim as a permanent condition. Finally, the DAO mentioned how the Board's policy on "other variables" relating to the degree of physical impairment was inapplicable, given the worker's lack of impairment.

The panel in *WCAT Decision #2005-02462-RB* noted that the remedy being sought included vocational rehabilitation assistance and consideration of a loss of earnings award as part of the worker's pension assessment, which led to the panel stating:

It remains unclear how, or in what manner, the worker's adviser came to the conclusion that the worker's referral to Disability Awards is a matter before this present panel.

The panel then wrote the following under the statement of issues:

- Termination of wage loss benefits on July 11, 2001.
- Whether interest is payable on benefits paid during the period March 27, 2000 to July 11, 2001.
- Whether the worker's file should have been referred for vocational rehabilitation assistance.

The worker was informed in the decision letter of September 19, 2002 that his file was referred to the Disability Awards Department for their review of any entitlement the worker may have to a permanent functional impairment award.

In the course of deciding the issue of whether the worker's claim should have been referred to Vocational Rehabilitation Services, and after finding against the worker, the panel wrote the following passage:

Lastly, the Board decision of September 19, 2002 notes that the worker's file has been referred to the Board's Disability Awards Department. The evidence does not support a referral to Disability Awards. Neither the worker nor his representative have provided convincing evidence or argument that the injury accepted has resulted in an impairment of earning capacity; I respectfully disagree with the recommendation of the panel vice chair to refer this file to Disability Awards or a decision based, ostensibly, on the worker's submission that he was unfit to return to his pre-injury job.

The conclusion in *WCAT Decision #2005-02462-RB* indicates that the worker's appeal was denied and the Board's decision of September 19, 2002 (the reference to 2001 was in error) was confirmed.

Reasons and Findings

The worker's injury occurred well before June 30, 2002. In keeping with section 35.1 of the Act, I accept that any permanent disability the worker may have on account of objective functional impairment in his upper back and left shoulder first occurred before June 30, 2002. I reach this conclusion upon my review of the medical evidence, which shows that the worker's discomfort and pain in his left peri-scapular area, which was evident during his November 2004 PFI evaluation, began before June 30, 2002. As a result, the worker's entitlement in this case is adjudicated under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49).

WCAT panels are bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Policy relevant to this appeal is

set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), which relates to the former (pre-Bill 49) provisions of the Act, except with respect to policy item #96.30, in which case the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), applies. Policy item #96.30 of the RSCM II was amended effective July 2, 2004 and applies to all decisions, including appellate decisions, made on or after that date.

In addition, since the worker's assessment under section 23(1) of the Act was undertaken with reference to the PDES, as it read on and after August 1, 2003, the PDES in Appendix 4 and the policies concerning the application of the PDES, as found in the RSCM II, apply in this case.

1. Does WCAT Decision #2005-02462-RB (May 12, 2005) prevent the Board from assessing the worker's entitlement to a PPD award?

The review officer found that she did not have jurisdiction to consider the worker's request for review of the Board's December 16, 2004 decision because of WCAT's May 12, 2005 decision. In reaching this conclusion, the review officer referred to section 255(3) of the Act, which states that the Board must comply with a final decision of WCAT in an appeal.

On behalf of the worker, Mr. MacMillan argues that the review officer has confused a "statement of disagreement" in *WCAT Decision #2005-02462-RB* with an actual WCAT finding. As Mr. MacMillan points out, while deciding the issue of whether the worker's claim should have been referred to Vocational Rehabilitation Services, the panel noted that the worker's claim had been referred to the Disability Awards Department and merely expressed its disagreement with the Review Board panel's recommendation.

Ms. McMahon, on the other hand, submits that *WCAT Decision #2005-02462-RB* precludes the worker's claim from being referred to the Disability Awards Department for an assessment of a PPD award of any nature.

Upon my review of *WCAT Decision #2005-02462-RB*, as well as the submission that Mr. MacMillan put forth in that appeal, it is not obvious to me that the worker took issue with his referral to Disability Awards. Moreover, I infer from the panel's uncertainty as to how the worker's referral to Disability Awards was before it (this was perhaps a misinterpretation of Mr. MacMillan's submission that the worker's pension assessment should include consideration of a loss of earnings award), along with the panel's identification of the issues, that it too did not consider the worker's referral to Disability Awards to be at issue.

Additionally, the fact that the panel did not identify the worker's referral to Disability Awards as an issue in the body of its decision, but mentioned it while deciding if the worker's claim should have been referred to Vocational Rehabilitation Services, adds weight to Mr. MacMillan's argument that the panel did not make a finding on the worker's referral to Disability Awards.

In deciding an appeal, a WCAT panel may confirm, vary, or cancel the appealed decision, in accordance with section 253(1) of the Act. Item #14.40 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) sets out the meaning of "confirm" as follows:

On every issue addressed in the decision, the WCAT panel agrees with the determinations made by the prior decision-maker in the decision or order under appeal, though not necessarily for the same reasons.

On the other hand, "vary" is defined in the MRPP as follows:

On one or more issues addressed in the WCAT decision, the WCAT panel reached a conclusion which differs, in whole or in part, from the conclusion or outcome provided by the prior decision-maker and provides a changed decision.

In the case of *WCAT Decision #2005-02462-RB*, the panel's comment that the evidence did not support a referral to Disability Awards, which was followed by its disagreement with the Review Board panel's recommendation, is incongruous with the outcome of its decision, which was to confirm the Board's decision of September 19, 2002. As such, given that the panel did not vary the September 19, 2002 decision, it would be inconsistent with the meaning of the term "confirm" to conclude that the panel had actually made a binding finding that the worker's claim should not be referred to the Disability Awards Department.

I have no authority in the context of this appeal to conclude that the panel erred in *WCAT Decision #2005-02462-RB* by deciding to confirm the Board's September 19, 2002 decision. Nor do I have the authority to decide whether the WCAT panel violated the rules of natural justice by deciding a matter that had not been raised in the notice of appeal or the worker's submissions (Mr. MacMillan's submission in that appeal indicates that the worker was seeking vocational rehabilitation assistance and consideration of a loss of earnings award as part of his pension assessment) without giving appropriate notice to the worker.

I do accept, however, that the panel's remarks in *WCAT Decision #2005-02462-RB* about the lack of evidence supporting a referral to Disability Awards and the Review Board panel's recommendation in this regard were likely *obiter dicta*, which meant that they were not essential to the decision being made and had no binding effect.

Given the outcome of *WCAT Decision #2005-02462-RB*, I accept that the Board's decision of September 19, 2002 still stands and the worker's claim should have been referred to the Disability Awards Department.

In view of the above, I find that *WCAT Decision #2005-02462-RB* does not prevent the Board from assessing the worker's entitlement to a PPD award. I allow the worker's appeal on this issue.

2. *Is the worker entitled to a PPD award in relation to his upper back and left shoulder strain?*

In response to the DAO's decision of December 16, 2004, Mr. MacMillan seeks a decision on the merits. Neither his submission nor that from Ms. McMahon addresses the nature and extent of any functional impairment the worker may have.

Section 23(1) of the Act states that where PPD results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury.

Policy items #39.01 and #96.30 of the RSCM II and policy item #97.40 of the RSCM I state that in the case of a PFI evaluation, the report of an external service provider or a DAMA is expert evidence which, in the absence of other expert evidence to the contrary, should not be disregarded. Although the report of the external service provider or the DAMA is not the only medical evidence that the DAO may use, it is usually the primary input.

Judging by the medical evidence on file, which indicates that the worker's injury involved the left peri-scapular area, I accept that Dr. C's examination of the worker, including the measurement of his cervical spine and shoulder range of motion, provided an accurate assessment of any impairment that the worker may have in his left shoulder and upper back region.

Notwithstanding the extensive gap in the medical evidence leading up to the worker's PFI evaluation, I note that Dr. C's range of motion measurements were consistent with Dr. Haiduk's finding of good range of motion in the worker's neck and shoulder area on June 4, 2002. Furthermore, as the DAO pointed out in her December 16, 2004 form 24, many of the worker's range of motion measurements met or exceeded the Board's normative range of motion values, as set out in the PDES.

The Board's computerized impairment rating system will not calculate an impairment rating where there is loss of range of motion of 5 degrees or less (see also the Board's "Additional Factors Outline" (Outline), which is available on the Board's website at www.worksafe.bc.ca), which explains why no impairment was calculated with respect to the worker's cervical spine extension (the norm for extension is 40 degrees).

No medical evidence or opinion has been put forth to challenge the results of the PFI evaluation concerning the worker's reduced range of motion in his cervical spine and left shoulder.

I find no error in the assessment of the worker's range of motion and accept that it was likely reliable, based on Dr. C's comments. As the worker's cervical spine range of

motion (other than extension) met or exceeded the Board's normative range of motion values (flexion - 40 degrees, lateral flexion - 30 degrees, rotation - 60 degrees) and the worker's shoulder range of motion was the same bilaterally (internal rotation was slightly better on the left, as shown by the worker's ability to place his thumb at T7), the Board's computerized impairment rating system would not have calculated any impairment.

Policy item #39.10 of the RSCM II states that the rating schedule of percentages of disability in the PDES is a set of guidelines, not a set of fixed rules. It also allows for the application of "other variables" relating to the degree of physical impairment in arriving at a final award.

The Outline, which was initially issued in December 2003, provides guidelines for consideration of additional factors that are not formally contained in the PDES. The Board's June 2004 revision of the Outline would have been available to the DAO at the time of her December 16, 2004 decision. The Outline is not Board policy, and I am not required to follow it. However, I find guidance in it, since it sets out the practice within the Disability Awards Department.

As an example, the Outline explains how a DAMA can consider an individual's loss of upper extremity strength in certain circumstances and rate it separately if it represents an impairing factor that has not been considered adequately by other methods.

Having reviewed the worker's PFI evaluation, I accept Dr. C's finding that there were no additional factors to be considered. As a result, I find that the DAO properly applied the policy in item #39.10 of the RSCM II in assessing any impairment the worker may have.

In consideration of the above, I find that the DAO correctly decided that the worker does not have any objective functional impairment in his upper back and left shoulder that would warrant a PPD award under section 23(1) of the Act. I deny the worker's appeal on this issue.

3. Should the Board assess the worker for a PPD award in relation to chronic pain?

Mr. MacMillan submits that *WCAT Decision #2005-02462-RB* should have no effect on the referral of the worker's claim to Disability Awards for assessment of his chronic pain, since the decision to accept the worker's claim for a permanent chronic pain condition was made afterwards, that is, on June 16, 2005. The tenor of his submission suggests that the worker is ultimately seeking a loss of earnings award.

On behalf of the employer, Ms. McMahon argues that the review officer's decision of November 30, 2005 should be upheld.

Policy item #22.35 of the RSCM I addresses chronic pain. It states that in the case of permanent chronic pain, entitlement to PPD benefits under section 23(1) of the Act may be considered.

RSCM I policy item #39.01 sets out guidelines for the assessment of section 23(1) awards for workers who experience disproportionate disabling chronic pain as a compensable consequence of a physical or psychological work injury. Like policy item #22.35 of the RSCM I, this policy item is effective January 1, 2003, and applies to “new claims received and all active claims that are currently awaiting initial adjudication.”

I find that the “initial adjudication” of the worker’s pain complaints was in the Board officer’s June 16, 2005 decision. Consistent with *WCAT Decision #2004-01842* (Volume 20 of the *Workers’ Compensation Reporter* at page 73), since the “initial adjudication” of the worker’s pain complaints occurred after January 1, 2003, I find that the chronic pain policy in items #22.35 and #39.01 of the RSCM I are applicable in this case.

As set out in his November 30, 2005 decision, the review officer found that the panel in *WCAT Decision #2005-02462-RB* had made a finding in regard to the referral of the worker’s claim to the Disability Awards Department, which was binding on the Board. Recognizing that the Review Division’s decision of June 21, 2005 dealt with the issue of whether the worker’s chronic pain should have been assessed by Disability Awards, and was under appeal to WCAT, the review officer found that the DAO’s decision of June 21, 2005 was a correct statement of the law, and decided to confirm it. He added, however, that the WCAT decision of May 12, 2005 was not a “permanent bar” to the worker requesting a referral to Disability Awards based on changes in his compensable condition.

As previously found, the WCAT panel’s remarks about the referral of the worker’s claim to Disability Awards were merely *obiter dicta*, for reasons stated above. Even if I am wrong, I agree with Mr. MacMillan, and the review officer for that matter, that the scope of *WCAT Decision #2005-02462-RB* is not broad enough to preclude the Disability Awards Department from assessing the worker for accepted conditions beyond his upper back and left shoulder strain. As such, I find that the Disability Awards Department should assess the worker’s permanent chronic pain and determine if he has any entitlement to a PPD award.

The date of the first occurrence of any permanent disability the worker may have on account of chronic pain (see section 35.1 of the Act) has not been adjudicated by the Board and is therefore not before me. In any event, I leave it up to the Board to determine if the provisions of the Act that preceded Bill 49 or those as amended by Bill 49 apply to the assessment of the worker's chronic pain for a potential PPD award.

I allow the worker's appeal on this issue.

Conclusion

I vary the Review Division decisions of June 21, 2005 and November 30, 2005. I make the following findings:

1. *WCAT Decision #2005-02462-RB* (May 12, 2005) does not prevent the Board from assessing the worker's entitlement to a PPD award.
2. The worker does not have any objective functional impairment in his upper back and left shoulder that would warrant a PPD award under section 23(1) of the Act.
3. The Disability Awards Department should assess the worker's permanent chronic pain and determine if he has any entitlement to a PPD award. For reasons stated above, I leave it up to the Board to determine if the provisions of the Act that preceded Bill 49 or those as amended by Bill 49 apply to the assessment of the worker's chronic pain for a potential PPD award.

There was no request for reimbursement of expenses, and upon review of the worker's file it does not appear that any were incurred. Accordingly, I make no order regarding expenses in relation to this appeal.

Andrew Waldichuk
Vice Chair

AW/ml