

Noteworthy Decision Summary

Decision: WCAT-2008-01391 **Panel:** Debbie Sigurdson **Decision Date:** May 9, 2008

Jurisdiction to Decrease Permanent Partial Disability Award when Issue not Raised in Request for Review - Item #14.30 of WCAT's Manual of Rules of Practice and Procedure - Item B3.6.2 of the Review Division Practices and Procedures Manual

This decision is noteworthy because it provides an analysis of the jurisdiction of the Review Division and WCAT to decrease a permanent partial disability award where such an award is appealed, but entitlement to an award for loss of range of motion to the cervical spine is not raised in the Request for Review.

The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for a C5-6 disc herniation and for changes to her cervical spine at the C4-5 and C6-7 levels as arising from a workplace accident that occurred in January 2000. The worker received temporary total disability benefits and was granted a permanent partial disability award equal to 7.86% of total disability.

In May 2005 the worker was referred to the Disability Awards Department for a reassessment of her entitlement to a permanent partial disability award. On March 7, 2007 a Board officer concluded that the worker had not experienced a significant change in her permanent residual impairment, and was not entitled to a change to her permanent partial disability award. The worker requested a review of that decision, and specifically requested an award for permanent chronic pain.

On September 4, 2007 a review officer at the Review Division of the Board varied the Board decision. The review officer relied on two recent permanent functional impairment evaluations to conclude the worker had experienced an improvement to her cervical spine impairment, such that her permanent partial disability award ought to be reduced to 4.5% of total disability. The worker appealed that decision. She disputed that the Review Division had the jurisdiction to vary the Board decision regarding her entitlement to an award for loss of range of motion of her cervical spine, given that the extent of her request for review was to consider her entitlement to an award for chronic pain. The worker's appeal was denied.

The panel referred to the *Review Division – Practices and Procedures Manual* at item B3.6.2 which notes that it may be reasonable to include a new issue within the scope of review. The panel found that it was clear that the employer in its submissions to the Review Division raised the issue of the worker's entitlement to a scheduled award for loss of range of motion to her cervical spine. As the decision was already under review, the panel concluded that it was proper for the Review Division to continue with the request for review when the employer had identified a new issue within that decision.

Similarly, WCAT's *Manual of Rules of Practice and Procedure* (MRPP) at item #14.30 sets out the scope of a WCAT decision. This item notes that WCAT panels will normally restrict a decision to the issues raised by the appellant in the notice of appeal, but have the discretion to address issues raised by a respondent and to address issues not expressly raised by either party. Item #14.30 provides for an exception to this general rule where the subject of an appeal is regarding entitlement to a permanent partial disability award. In those appeals, the panel may

address any aspect of the permanent partial disability award decision without notice to the parties. This may on occasion adversely affect the appellant. Item #14.30 specifically notes that a panel may increase, decrease, or confirm a permanent partial disability award when a permanent partial disability award decision has been appealed. The panel concluded that this item confirmed her authority to review the worker's loss of function award including her entitlement, if any, to an award for loss of range of motion to her cervical spine.

The panel found that the worker's cervical spine residual impairment had improved between 2003 and 2007 and that the worker was entitled to a permanent partial disability award equal to 4.5% of total disability, plus any applicable age adaptability factor.

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Introduction

The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim for a C5-6 disc herniation and for changes to her cervical spine at the C4-5 and C6-7 levels as arising from a workplace accident that occurred on January 21, 2000. The worker received temporary total disability benefits from January 26, 2000 to November 18, 2001, following which she returned to work at her pre-injury employment.

On March 12, 2003 the Board provided the worker with a permanent partial disability award equal to 7.86% of total disability, calculated on a loss of function basis, effective November 19, 2001, to compensate for reduced range of motion of her cervical spine.

On May 16, 2005 a Board officer accepted that changes to the worker's cervical spine at the C4-5, C5-6, and C6-7 levels were permanent, and related to the injury accepted on the claim. The Board officer referred the worker to Disability Awards for a reassessment of her entitlement to a permanent partial disability award.

On March 7, 2007 a Board officer relied on a permanent functional impairment evaluation of February 14, 2007 to conclude the worker had not experienced a significant change to her permanent residual impairment, such that she was not entitled to a change to her permanent partial disability award. The worker requested a review of that decision, and specifically requested an award for permanent chronic pain.

On September 4, 2007 a review officer at the Review Division of the Board varied the Board decision. The review officer relied on two recent permanent functional impairment evaluations to conclude the worker had experienced an improvement to her cervical spine impairment, such that her permanent partial disability award ought to be reduced to 4.5% of total disability. The worker has appealed that decision. She disputes that the Review Division had the jurisdiction to vary the Board decision regarding her entitlement to an award for loss of range of motion of her cervical spine, given that the extent of her request for review was to consider her entitlement to an award for chronic pain.

Issue(s)

1. Has the worker experienced a significant change to her permanent compensable cervical spine impairment, such that her permanent partial disability award, calculated on a loss of function basis, ought to be adjusted?

2. Did the Review Division exceed its jurisdiction when it varied the Board decision to reduce the worker's permanent partial disability award, such that the decision of September 4, 2007 ought to be cancelled?

Jurisdiction

Section 239(1) of the *Workers Compensation Act* (Act), as amended, provides that a decision made by a review officer under section 96.2 may be appealed to the Workers' Compensation Appeal Tribunal (WCAT). Section 250(1) and section 254 of the Act allow WCAT to consider all questions of law and fact arising in an appeal, subject to section 250(2), which requires that WCAT apply the relevant Board policy, and make its decision based on the merits and justice of the case.

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). 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.

The employer was provided with notice of the appeal and is participating. The worker did not request an oral hearing and this appeal has proceeded without an oral hearing. I am satisfied that the matter can be decided without the necessity of an oral hearing based on consideration of the submissions from the worker's representative and the employer's representative to the Review Division and WCAT and a review of the evidence on the Board file.

Background and Evidence

The employer operates a healthcare business. This now 54-year-old worker has been employed as an activity coordinator since April 12, 1985.

On January 21, 2000 the worker had accompanied a group of residents from a seniors home to a restaurant for their weekly lunch outing. She went to sit down on a chair when it collapsed, causing her to strike her mid-back and head on a wooden floor. She experienced pain to the middle of her back and to the top of her neck. She sought medical treatment that day. Dr. Stevenson, the worker's attending physician, diagnosed the worker with a thoracic back strain and mild concussion.

The worker attempted to return to work but was limited by pain. On January 25, 2000 Dr. Stevenson diagnosed the worker with a myofascial strain of the peri-thoracic cervical muscles. She had full range of motion of her neck, back and shoulders, but with pain.

The worker has appealed a number of decisions relating to this claim. I will not detail the worker's claim history or medical evidence extensively in this appeal, except as relevant to the issues, as it has been set out in detail in previous appellate decisions.

An MRI of the worker's cervical spine taken September 29, 2000 revealed a large left posterolateral disc protrusion at the C5-6 level. She underwent a discectomy and fusion at the C5-6 level on May 17, 2001. Dr. Gittens, neurosurgeon, reported on September 6, 2001 that the worker experienced neck pain on movement. She had good range of motion of her neck with some tenderness. He recommended she commence a rehabilitation program.

The worker participated in a work-conditioning program from September 27, 2001 to October 26, 2001, at which time she was discharged as fit to return to work without limitations. The worker was able to return to her pre-injury employment.

The worker attended a permanent functional impairment evaluation on February 10, 2003. At that time she complained of pain to the left side of her neck, which radiated down her left arm to all fingers. She also had pain to the right upper limb. The worker took medication for control of her pain, including Percocet, Morphine, Vioxx, and Ativan. The worker's pain was aggravated by prolonged sitting, driving, and work. At times she experienced a giving away of her left arm, with intermittent tingling at the dorsal aspect of her left arm down to the fingers. The worker subjectively experienced restricted range of motion of her neck when she turned to the left. On examination, the worker was tender along the mid-cervical spine and over the left paracervical muscles. The neurological examination was normal. She had reduced range of motion of her cervical spine in all directions.

On March 6, 2003 a Board officer input the cervical spine range of motion measurements into the Board's computer software system, and calculated the worker's reduced range of motion of her cervical spine to be equal to an impairment of 7.63% of total disability. The Board officer accepted the results from the permanent functional impairment evaluation as reliable. On March 12, 2003 the Board officer provided the worker with a loss of function award of 7.86% of total disability, including an award of 0.23% for age adaptability, effective November 19, 2001 and based on the long-term wage rate of \$3,094.07 per month.

Dr. Gittens examined the worker on September 24, 2003 and reported she had tenderness at the mid-cervical area. On range of motion testing, she had limited flexion and bilateral rotation, due to pain complaints. The sensory examination was normal. He diagnosed the worker with chronic neck pain. On December 8, 2003 Dr. Gittens reviewed an MRI of the worker's cervical spine, and noted there was worsening of her cervical spondylosis, which he opined caused her neck pain.

Dr. Keyes, neurologist, examined the worker on March 29, 2004, at which time she presented with cervical neck pain and left upper limb pain, numbness, tingling, and weakness. She had reduced range of motion of her cervical spine in all directions, with diffuse tenderness. He diagnosed the worker with a left C6 and C7 nerve root abnormality. On May 7, 2004 Dr. Keyes reviewed an x-ray and CT scan of the worker's cervical spine, and provided an opinion the worker's symptoms were due to bony and disc degenerative changes at the C4-5 and C5-6 levels. On August 3, 2004 Dr. Keyes reviewed an MRI of the worker's cervical spine and diagnosed her with mechanical and neuropathic neck pain.

Dr. Gittens examined the worker on August 25, 2004, at which time the worker presented with left-sided neck pain that referred down her left arm. She had also developed right upper extremity pain. On examination the worker had restricted range of motion of her neck, diffuse tenderness of the muscles on both sides of her neck, and good upper extremity strength. Dr. Gittens provided an opinion the worker's symptoms were not consistent with the findings from the most recent MRI. He did not recommend further surgery.

The worker attended a spine clinic assessment on May 12, 2004. Dr. Boyd reported the worker moved her neck freely and without observable pain during informal assessment, but on examination she complained of pain in all directions with limited movements. There was no significant paraspinal spasm or deformity. Dr. Boyd indicated the clinical examination did not localize her symptoms to a specific level of abnormality. He reported there was a discrepancy between his informal observations and her complaints during the formal examination.

In a decision dated May 16, 2005 the Board officer accepted the worker had experienced permanent changes to her cervical spine and referred her to Disability Awards for a reassessment of her entitlement to a permanent partial disability award. The worker attended a functional capacity evaluation on May 19 and May 20, 2005. During the evaluation the worker demonstrated functional, but guarded, active range of motion of her neck in all directions. She limited her neck movements due to increased pain symptoms.

On December 7, 2006 the Board officer referred the worker to Disability Awards for a reassessment of her entitlement to a permanent partial disability award. The conditions accepted on the referral memorandum included the C5-6 disc herniation and permanent changes at the C4-5 and C6-7 levels. The worker's pre-existing degenerative changes at C3-4 and spondylosis at C3-4, C6-7, and C7-T1 were not accepted as compensable.

The worker attended a permanent functional impairment evaluation with a Board external service provider on January 16, 2007. At that time the worker reported she was "unable to do anything". She continued to take a number of medications for her

pain symptoms. The worker was not able to complete the testing due to significant pain. The clinician observed the worker sighed, groaned, facially grimaced, and cried during the testing. The clinician was able to obtain formal range of motion measurements of the worker's cervical spine with slow and hesitant movements, which were consistent with informal observations. The permanent functional impairment physician provided an opinion that the incomplete testing was not sufficient to provide an opinion on the expected reliability of the results; however, the cervical range of motion findings were consistent with the diagnosis provided.

The worker attended a second permanent functional impairment evaluation with a Board disability awards medical advisor on February 14, 2007. At that time the worker reported experiencing continuous pain from the middle of her cervical spine that radiated to her shoulders, arms, and hands, with her symptoms greater to the left side than to the right. The worker described her neck pain as sharp and burning. She reported restrictions to her neck movement. She experienced pain spontaneously, with no obvious trigger, and often developed migraine headaches. On examination the worker reported tenderness at the C5-6 level. She had full range of motion of her shoulders, with neck pain. The disability awards medical advisor obtained range of motion measurements for cervical spine flexion, extension, lateral flexion and rotation, which were consistent with the range of motion measurements obtained in January 2007. The neurological examination was normal.

On February 14, 2007 the disability awards medical advisor provided an opinion that the worker's clinical impairment was consistent with left C6 mild sensory radiculopathy. Her motor power was good bilaterally. The worker's weak and painful hand grip was likely due to a pre-existing hand pathology. The disability awards medical advisor provided an opinion the worker's reported pain with neck movement was likely unreliable.

On March 2, 2007 the Board officer input the range of motion measurements from the February 14, 2007 permanent functional impairment evaluation to the Board's computer software program, and the results indicated the worker did not have a reduction in the range of motion of her cervical spine. Based on the information from the February 2007 permanent functional impairment evaluation, the worker would be entitled to a scheduled loss of function award of 3% of total disability to compensate for the cervical disc fusion.

In a memorandum to the claim file dated March 7, 2007 the Board officer accepted the results from the February 14, 2007 permanent functional impairment evaluation as an accurate representation of the worker's current level of impairment. The Board officer noted that based on that evaluation, the worker would be entitled to an award of 4.5% of total disability to compensate for the surgical fusion and for the mild sensory loss at the C6 level. The Board officer concluded the worker's ongoing complaints were consistent with the objective findings, such that the worker was not entitled to an

additional award for other variables. The Board officer noted that it appeared the worker's cervical spine condition may have improved, based on the reduced impairment ratings in 2007 compared to the measurements obtained in 2003. The Board officer concluded the previous functional impairment remained appropriate compensation for the worker's cervical spine, such that no change to her award was warranted. On March 7, 2007 the Board officer communicated the decision set out in the memorandum to the worker, advising that her permanent partial disability award would not be changed.

On her request for review dated April 2, 2007, the worker disputed the Board decision on the following grounds:

The following excerpt from #39.02 of the claims manual has not been followed: "Where a Board officer determines that a worker is entitled to a section 23(1) award for chronic pain in the above noted situations, an award equal to 2.5% of total disability will be granted to the worker."

The outcome the worker requested was to "follow the previous wording and implement an award equal to 2.5% of total disability for chronic pain."

On May 31, 2007 the employer's representative submitted the worker is only entitled to an award of 3% to compensate for her cervical spine surgery, and perhaps an additional 1.5% for her mild sensory loss. The employer's representative disagreed with the Board officer's decision to not reduce the worker's loss of function award based on the results from the two permanent functional impairment evaluations. He submitted the worker's cervical spine residual impairment had improved since 2003.

On June 13, 2007 the worker's representative took exception to the employer's representative using the worker's request for review regarding entitlement to an award for chronic pain to further the employer's issue regarding the percentage of the disability award for loss of range of motion of the worker's cervical spine. The worker's representative submitted the employer had the opportunity to pursue that issue through the appeal system, but chose not to do so.

On September 4, 2007 the review officer identified the issue before him was whether the worker had experienced a significant change in her compensable cervical spine permanent functional impairment, such that her permanent partial disability award required adjustment. The review officer noted that chronic pain had not been accepted on the worker's claim, and therefore he had no jurisdiction to consider whether she was entitled to an award for chronic pain. He concluded that a Board assessment as to whether there had been a significant change to the worker's cervical spine condition included both deteriorations and improvements. As a result, the review officer concluded he had jurisdiction to determine whether the award of 7.86% of total disability ought to be increased or decreased based on the most recent evaluations of

her cervical spine condition. He relied on the evidence from the January 16 and February 14, 2007 permanent functional impairment evaluations to conclude the worker's cervical spine impairment had improved, such that she no longer had reduced range of motion of her cervical spine. As a result, the previous permanent partial disability award, which was based solely on the worker's reduced range of motion of her cervical spine, no longer accurately represented her permanent impairment. The review officer accepted the worker was entitled to an award for the cervical disc fusion and for the mild C6 sensory radiculopathy, for an award of 4.5% of total disability.

On November 1, 2007 a Board officer concluded the Board had already provided the worker with a decision regarding the compensability of chronic pain. The worker has requested a review of that decision.

The worker's representative provided the panel with a letter from Dr. Stevenson dated October 10, 2007. Dr. Stevenson noted the worker's problems were very complex, with multiple medical and psychological problems, including her workplace injury. Dr. Stevenson provided an opinion the permanent functional impairment evaluation was not very useful or reliable because it only represented the worker's abilities on that particular day, and not over time. He indicated that patients who undergo Board permanent functional impairment evaluations often have much lower levels of functioning after the evaluation due to the significant effort they exert for the examination. Dr. Stevenson supported the view of the Board officer that despite the results indicating an improvement to the worker's cervical range of motion, her permanent partial disability award ought to remain as assessed in 2003.

The worker's representative provided the panel with an undated statement from the worker. The worker described experiencing significant pain complaints during her participation in the permanent functional impairment evaluations. She noted the clinician during the examination on January 16, 2007 had moved her head into various positions, and, at one point, the clinician had pushed her head forward such that her neck was pushed into her chest. She reported that during the examination on February 14, 2007, the disability awards medical advisor had used a machine to take measurements as well as use a tape measure. The worker described being in constant pain and needing to use medication to control her pain symptoms both during the permanent functional impairment evaluations and on a daily basis. She noted she no longer drives due to the pain she experiences when turning her neck. The worker described other medical problems she has, including numbness to her feet, pain to her thoracic and lumbar spine, memory difficulties, and bladder and bowel problems. The worker's representative also provided the panel with an undated statement from the worker's husband. He confirmed the worker is in constant pain. He indicated he has taken over many household chores and cooking due to the worker's level of pain.

On December 20, 2007 the worker's representative submitted the worker's permanent functional impairment for the residual impairment to her cervical spine ought to remain

at 7.63% of total disability, as determined in February 2003. He submitted the Review Division had failed to follow its own procedures and identify on initial review a mismatch of documents regarding the request for review. The Review Division failed to return the request to the worker for corrective action. He requested the panel find the Review Division decision of September 4, 2007 is null and void. The worker's representative questioned the validity of the January 16 and February 14, 2007 permanent functional impairment evaluations. He submitted the evaluations were not fair and impartial and asked the panel to consider the worker's statements in that regard. He further submitted the worker's neck pain and movements are reliable and consistent. He asked the panel to rely on Dr. Stevenson's medical report in support of a finding that the worker's pain complaints are genuine. He asked the panel to refer the worker for an independent medical review and examination in accordance with the *WCAT Manual of Rules of Practice and Procedure* (MRPP) item #11.00.

On January 18, 2008 the employer's representative requested the panel consider his earlier submission to the Review Division. He submitted the worker's representative has failed to identify an error or omission in the decision under appeal. The employer's representative noted the worker had initially sought an increase to her permanent partial disability award of 7.68%, but now is arguing for reinstatement of that award when objective testing revealed an improvement to her condition. The employer's representative submitted Dr. Stevenson's report provides little objective evidence or opinion. He asked the panel to place little weight on that evidence, given the number of non-compensable problems the worker has and the difficulty Dr. Stevenson identified in separating her numerous issues. The employer's representative noted the November 1, 2007 Board decision attempted to address the chronic pain issue; however, he noted that issue is not before the panel in this appeal.

On February 2, 2008 the worker's representative reiterated his request for an independent medical assessment, based on the worker's statement that the previous examinations were not impartial and fair. The worker's representative submitted the review officer cannot reduce the worker's permanent partial disability award, as that remedy was not requested in the request for review. He noted the scope of the request for review was whether the worker was entitled to an additional award for chronic pain.

Reasons and Findings

Section 23(1) of the Act provides that if a worker sustains a permanent partial disability from a work injury, the Board must estimate the impairment of earning capacity resulting from the nature and degree of the injury. This section further requires that the Board provide compensation by periodic payment during the lifetime of the worker or in another manner the Board determines.

RSCM I item #39.00 provides guidance on assessment of a loss of function / physical impairment award. That item states in part:

The physical impairment method is the primary one used for measuring permanent disability. It is the method provided for in Section 23(1). In applying this method, the Board does not normally have regard to the individual worker's actual loss of earnings. It considers the physical and/or psychological condition of the worker. It results in a percentage of disability being allocated to the claimant's condition.

The worker's representative has requested the panel refer the worker for an independent medical examination because the two permanent functional impairment evaluations performed in January 2007 and February 2007 were not fair and impartial. I am unable to agree with this submission. The worker's representative asked the panel to consider the worker's statements regarding what occurred during the evaluations. She described the clinician moving her neck and the disability awards medical advisor taking measurements and photographs of her neck and back. She also described experiencing pain symptoms during the examination. I find there is insufficient evidence that the examinations were not fair and impartial. I would expect that the examining physician would take measurements and that the clinician would move the worker's head in different directions to assess the limitations, if any. I would also expect the worker might experience pain symptoms during this type of examination. I note that the objective range of motion measurements of the worker's cervical spine obtained at both examinations were consistent. I find the consistency between the two examinations increases the reliability of the findings and reduces the need to have the worker evaluated by another medical practitioner.

The MRPP item #4.50 provides at (c) that WCAT panels have the authority to consider whether to request medical advice under section 249 of the Act. The referral for an independent medical examination is discretionary. In the facts of this case I find it is not necessary to refer the worker for further medical examination, as she has already participated in two permanent functional impairment evaluations, which I find provides sufficient evidence to evaluate the worker's current level of cervical spine impairment.

The worker's representative suggested that the worker's past dealings with the Board make it impossible for the worker to be treated fairly and impartially by the Board. I note the first examination in January 2007 was not performed by Board staff, but by an external third-party service provider. This third-party service provider has no decision-making capacity in relation to the worker's entitlement to benefits. I further note that the examining clinicians and physicians are experts that are trained to conduct permanent functional impairment evaluations. I have reviewed the reports from the two evaluations and the worker's comments in regards to those two evaluations, and I find the evaluations were performed fairly and impartially. They provide expert medical evidence of the worker's cervical spine range of motion that ought to be relied upon in the absence of evidence to the contrary.

The parties have agreed that I do not have jurisdiction to consider the worker's entitlement to an award for chronic pain. Despite the conclusion of the Board officer in the November 1, 2007 decision that chronic pain has already been considered, I find that it has not. I agree with the review officer that the decision of March 7, 2007, and the Board referral memorandums in 2003 and 2006 did not consider whether the worker had developed chronic pain or whether she was entitled to an additional award for chronic pain. I note the November 1, 2007 decision is under review, and I make no comment other than to confirm that I do not have jurisdiction over the issue of the worker's entitlement to an award for chronic pain on this appeal, as it was not decided in the decisions under appeal.

The worker's representative has objected to the Review Division proceeding with the request for review when the issue that had been requested to be reviewed was not communicated in the decision under review. I agree that on the request for review the worker clearly indicated the extent of her request was to obtain an additional award for chronic pain. She did not request a review of the scheduled award provided for the loss of range of motion to her cervical spine. I note the employer's representative raised this issue in his submissions to the Review Division.

The *Review Division – Practices and Procedures* at item B3.6.2 addresses the situation when a new issue arises that was not identified on the request for review, and notes that it may be reasonable to include the new issue within the scope of the review. Item B3.6.2 provides examples of situations where a new issue may arise, including when one Board decision addresses several issues, and only some of those issues are placed in dispute by the person requesting the review. The policy item notes that if an employer is participating and addresses an issue that is communicated in the decision under review, but an issue that the request for review did not specifically place in question, the additional issue raised by the employer will be considered. It does not matter that the additional issue is raised outside the 90-day time period to request a review, as the decision is already under review.

It is clear that the employer in its submissions to the Review Division raised the issue of the worker's entitlement to a scheduled award for loss of range of motion to her cervical spine. As the decision was already under review, I find it was proper for the Review Division to continue with the request for review when the employer had identified a new issue within that decision.

Similar to the provisions found in the *Review Division – Practices and Procedures*, the MRPP at item #14.30 sets out the scope of a WCAT decision. This item notes that WCAT panels will normally restrict a decision to the issues raised by the appellant in the notice of appeal, but has the discretion to address issues raised by a respondent and to address issues not expressly raised by either party. I note that item #14.30 provides for an exception to this general rule where the subject of an appeal is regarding entitlement to a permanent partial disability award. In those appeals, the

panel may address any aspect of the permanent partial disability award decision without notice to the parties. This may on occasion adversely affect the appellant. Item #14.30 specifically notes that a panel may increase, decrease, or confirm a permanent partial disability award when a permanent partial disability award decision has been appealed. This item confirms my authority to review the worker's loss of function award including her entitlement, if any, to an award for loss of range of motion to her cervical spine.

I agree with the review officer that the worker's cervical spine residual impairment had improved between 2003 and 2007. As noted above, I have found the range of motion measurements of the worker's cervical spine obtained at the January 2007 and February 2007 permanent functional impairment evaluations to be reliable. I note that although the worker was not able to complete the testing during the January 16, 2007 permanent functional impairment evaluation, the assessing physician had reported the cervical spine range of motion findings were consistent with the diagnosis provided. While the worker experienced pain symptoms during the two examinations, the disability awards medical advisor in February 2007 and the assessing physician in January 2007 did not discount the range of motion measurements as being unreliable. I acknowledge Dr. Stevenson's comment that the worker's functional level would have declined in the weeks following the permanent functional impairment evaluation due to the exertion she put forth during testing. I further acknowledge his comment that a permanent functional impairment evaluation is only valid as to the worker's level of function on that particular day. I note that Dr. Stevenson's report does not discount the reliability of the results from the permanent functional impairment evaluations, but rather speaks to the fluctuations of a permanent condition. I find the fact that the worker attended two permanent functional impairment evaluations which both demonstrated an improvement to the range of motion of her cervical spine increases the reliability of those results.

I have compared the results from the three permanent functional impairment evaluations, and note that in 2007 the worker's cervical flexion had improved from 16 degrees as measured in 2003 to 49 degrees and 44 degrees as measured in January and February 2007 respectively. Additionally, the worker's ability to rotate to the left had improved from 38 degrees as measured in 2003 to 64 degrees and 70 degrees as measured in January and February 2007 respectively. These measurements demonstrate the improvement in range of motion to the worker's cervical spine. This evidence is also consistent with the medical evidence on the worker's claim file. I note that in May 2005 Dr. Boyd had observed the worker was able to move her neck freely. Additionally, in May 2005 the assessor at the functional capacity evaluation reported the worker had demonstrated functional, although guarded, active range of motion of her neck in all directions. Those reports support a finding that the worker has full range of motion of her cervical spine.

I agree with the review officer that the worker is entitled to an award equal to 3% of disability to compensate for her C5-6 disc fusion. She is also entitled to an award of 1.5% for her mild C6 sensory radiculopathy. I rely on the disability awards medical advisor's opinion as support for the additional award for the sensory loss.

Conclusion

I deny the worker's appeal and confirm the Review Division decision. The worker is entitled to a permanent partial disability award equal to 4.5% of total disability, plus any applicable age adaptability factor, as set out in the Review Division decision. I confirm the Review Division had the jurisdiction to consider the worker's entitlement to a permanent partial disability award, including whether the award ought to be reduced, within the scope of the request for review.

The worker has requested reimbursement of the expense of the report from Dr. Stevenson dated October 10, 2007. The MRPP at item #13.23 provides that WCAT will generally order reimbursement of expenses for obtaining written evidence, regardless of the result in the appeal, where the evidence was useful or helpful to the consideration of the appeal, or it was reasonable for the party to have sought the evidence. I find the worker is entitled to reimbursement of the expense of the report, given that the worker was seeking to challenge the validity of the two permanent functional impairment evaluations, and Dr. Stevenson's report specifically addresses that issue. It was reasonable for the worker to have sought the evidence. The worker has not provided a copy of the invoice from Dr. Stevenson indicating the cost of the report. In such circumstances, I find the worker is entitled to reimbursement of the expense of Dr. Stevenson's report up to the Board maximum tariff for a medical report and upon production of an invoice detailing the expense incurred to obtain the report.

Debbie Sigurdson
Vice Chair

DS/jd