Noteworthy Decision Summary

Decision: WCAT-2009-00644 **Panel:** D. Van Blarcom **Decision Date:** March 2, 2009

Sections 5(5) of the Workers Compensation Act - Policy Item #44.10 of the Rehabilitation Services and Claims Manual, Volume I – Proportionate entitlement

This decision is noteworthy as it considers proportionate entitlement under section 5(5) of the *Workers Compensation Act* (Act) where a worker's psychological disability is superimposed on a pre-existing psychological disability that had previously impaired his earning capacity.

The worker was employed as a roofer, when hot tar splashed on his left arm and face in 2001. He was 18 years old at the time. He required surgery on his arm and was left with scarring, for which he received a disfigurement award from the Workers' Compensation Board, operating as WorkSafeBC (Board). The Board also found that the worker's psychological disorder was permanently aggravated by the burn incident and subsequent treatment. The Board applied the proportionate entitlement provisions of section 5(5) of the Act and item #44.10 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) to find that the impairment from the burn incident had been superimposed on an already existing disability. His psychological impairment was found to be 40% of total disability, of which 25%, or one-quarter, was due to the compensable injury. Thus, he was awarded 10% for his psychological disability. The worker appealed the proportionate entitlement decision, and also appealed the pension wage rate on the basis that it should be different from the eight-week wage rate, to WCAT.

The WCAT panel allowed the appeal. The panel found that the worker did have a pre-existing disability that had impaired his earning capacity although it was in remission at the time of the accident. The panel applied section 5(5) of the Act and item #44.10 of the RSCM I, and found that, although the worker's accident was severe physically, it would not have resulted in his psychological disability in any event. The worker had a previously reduced capacity to work as a result of his pre-existing psychological disability and he was receiving medical treatment for it. The panel agreed that it was reasonable to assess the worker's psychological impairment was 40%, but concluded that the worker's level of functioning was higher prior to the accident. After applying proportionate entitlement, the panel found the worker's permanent disability was 30%.

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Panel: David Van Blarcom, Vice Chair

Introduction

[1] The worker was 18 years old on July 12, 2001, and employed as a roofer, when hot tar splashed on his left arm and face. The burn to his face healed well, but he required surgery on his arm and was left with scarring, for which he received a lump sum disfigurement award.

[2] However, the burns, and the subsequent surgeries and drugs, caused a relapse of a psychological condition that has been diagnosed as Schizoaffective Disorder, Bipolar Type. The worker had episodes of that condition earlier, but had been in remission at the time of the injury.

[3] The Workers' Compensation Board (the Board, which operates as WorkSafeBC) at first found the Schizoaffective Disorder was temporary, but the Workers' Compensation Appeal Tribunal (WCAT) found in *WCAT Decision #2004-05204* that the worker had not returned to his pre-injury state and that his psychological condition must be assessed to determine if the worker had sustained an injury related to psychological impairment, and if his injury had plateaued.

[4] In implementing that decision, the Board found that, as of April 24, 2005, the burn injury was not a significant factor in the worker's ongoing Schizoaffective Disorder; however, a review officer found on December 14, 2005 that the Schizoaffective Disorder was permanently aggravated by the burn incident and subsequent treatment.

[5] In a decision letter dated December 19, 2007, a disability awards claims adjudicator informed the worker that his permanent disability award was determined according to the former provisions of the *Workers Compensation Act* (Act) and Board policy. The disability awards claims adjudicator considered the worker was entitled to both a loss of function award and a loss of earnings award. She also determined the worker's wage rate for pension purposes, which she based on the long-term wage rate established by a case manager on February 19, 2004.

[6] The worker's psychological permanent functional impairment was assessed as 40% of total, but only 10% of the permanent impairment was due to the compensable injury; that is, the Board applied the proportionate entitlement provisions of section 5(5) of the Act to find that the impairment from the burn incident had been superimposed on an already existing disability. The worker's submissions in this appeal include that he was

not disabled from the Schizoaffective Disorder at the time of the injury, so the disability that followed could not be said to be superimposed on an already existing disability.

[7] The disability awards claims adjudicator found the worker was entitled to a permanent disability award based on a partial loss of earnings, which was equal to 100% of the difference between his permanent partial disability wage rate and earnings in suitable employment.

Issue(s)

[8] Should proportionate entitlement, as provided in section 5(5) of the Act, have been applied to the worker's loss of function pension?

[9] Is the worker's pension wage rate correct?

[10] The review officer confirmed the loss of earnings award, and particularly noted that proportionate entitlement had not been applied to it. The worker does not take issue with the loss of earnings award, and only asks that I confirm the decision of the review officer that proportionate entitlement does not apply to the loss of earnings award. I do not find I should exercise jurisdiction to confirm a decision that is not really put in issue by the appellant, as provided in item #14.30 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP).

Jurisdiction

[11] The worker appeals the decision of a review officer pursuant to section 239(1) of the Act.

[12] The worker is represented by an adviser from the Workers' Advisers Office.

[13] The employer was given notice of this appeal, but replied that it would not be participating.

[14] In his notice of appeal, the worker said the appeal could be decided either by oral hearing or by a "read and review" of submissions and the evidence on file. The registry determined, on a preliminary basis, that the appeal should proceed as a read and review, and the worker has provided a comprehensive submission.

[15] I have reviewed the evidence and submissions, and agree that this matter may be decided without an oral hearing. In accordance with the rule in item #8.90 in the MRPP, I find the issues in this appeal are largely medical, legal, and policy based, and credibility is not a very significant issue; therefore, an oral hearing is not required.

[16] The standard of proof is the balance of probabilities, subject to section 250(4) of the Act. Section 250(4) of the Act states that, on an appeal respecting the compensation of a worker, if the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in favour of the worker.

[17] The worker's injury occurred before June 30, 2002 and the first indication of permanent disability also occurred before that date (as discussed below). In accordance with the transitional rules now set out in section 35.1 of the Act, and policy item #1.03, I find the former provisions of the Act and policy apply. References to policy items are therefore to the *Rehabilitation Services and Claims Manual, Volume I*, unless otherwise specifically noted.

Background

[18] Dr. Gunn, a psychiatrist with a special interest in adolescent psychiatry, provided a consultation letter on June 30, 2000, about a year before the compensable accident. At that time, the worker was 17 years old, and working on grade 11 through correspondence.

[19] He had left high school two months earlier because of symptoms of paranoia, which were causing him social difficulties. The worker had difficulties between the ages of 12 and 15 with temper. He began heavy marijuana use in grade 7, and came to the attention of police through theft and break and enter. The worker was diagnosed with Obsessive-Compulsive Disorder in January 1998.

[20] Dr. Gunn said that diagnosis of the worker's psychosis was unclear, but strong possibilities included Schizophreniform Disorder, Schizophrenia, and possibly Schizoaffective Disorder; there was no evidence at that time of Bipolar Disorder. He started the worker on Risperidone, a drug approved for treatment of schizophrenia.

[21] The worker was subsequently seen in a schizophrenia program, but was discharged from the program for non-compliance. According to the discharge report prepared on August 27, 2001, the worker was adjusting his medication without prior authorization of Dr. Gunn and was frequently missing appointments with Dr. Gunn and his case manager.

[22] However, the clinical notes of Dr. Gunn and the case manager from about January 31, 2001 indicate the worker was doing quite well, and that he was missing appointments because he did not want to take time from his employment. The worker cut back on the Risperidone in January 2001 after consultation with his general physician, but then stopped it in early April 2001 completely. He continued with Paxil. The case worker expressed concern about this on April 9, 2001, when the worker called to cancel his appointment for April 11, 2001.

[23] Unfortunately, by about April 9, 2001 the worker had got into some kind of trouble and his father had grounded him. By April 25, 2001, he had missed more appointments. He had been staying with friends, but kicked out because of stealing from them. The worker was still off medications, but, according to his own report, was "doing well." Dr. Gunn directed on April 25, 2001 that the worker be discharged from the schizophrenia program.

[24] A follow-up note on June 24, 2001 records that the worker's mother said he was doing well in the community. The next note is dated September 18, 2001, after the accident.

[25] The worker had been employed as a roofer for three days when he was injured on July 12, 2001. He was carrying two buckets of hot tar when his foot got stuck in tar and he lost his balance. He was splashed with hot tar on the left forearm, shoulder, and lip. The worker was hospitalized. The lip and shoulder burns healed with conservative treatment, but the second degree burns on his arm were deep and, on July 18, 2001, a skin graft was performed with skin harvested from his left thigh. He was given morphine for pain.

[26] Dr. Gunn wrote on October 22, 2001 that the worker's psychological condition had deteriorated after the accident. The worker's parents told Dr. Gunn that the worker had been completely asymptomatic in the months after his discharge from the schizophrenia clinic (May and June 2001) and returned to a full level of function. Dr. Gunn understood the worker had got an "A" in Math and Communications, but I note the worker's mother clarified in her March 16, 2007 response to the employability assessment that he was still trying to complete Math 10, and had been trying to do so for seven years. The worker had worked at several short-lived jobs during that period.

[27] Dr. Gunn said the worker became psychotic and developed delusions after the skin graft. The worker became extremely "hyper," appearing quite happy, but not eating or sleeping. The worker was again smoking marijuana. As the worker's agitation and delusions escalated, he was brought to the Emergency Room, and admitted on August 17, 2001. The worker was discharged on September 17, 2001, with a diagnosis of Bipolar Type 1, although another psychiatrist provided a second opinion of Schizoaffective Disorder. On discharge, he displayed only mild, resolving hypomania, but there was a recommendation he seek treatment for a marijuana addiction.

[28] On May 7, 2002, Dr. Gunn wrote the worker's Board case manager. At that time, the worker's diagnosis was Schizoaffective Disorder, Bipolar Type. He said the worker's manic and psychotic episode following the accident was a direct result of narcotics he received, possibly in combination with the stress of the entire incident, pain, and subsequent sleep deprivation.

[29] Dr. Gunn said the worker continued to be quite ill after his discharge for several months, rarely leaving his house, and for that reason was unable to return to school. He said this episode was much worse than the worker's first episode of the illness. Dr. Gunn said this was clearly related to the accident, and he had no other reason to expect the worker to have had a relapse at that time.

[30] The worker underwent a permanent functional impairment examination, and on October 18, 2002 a disability awards officer advised that the worker did not have permanent functional impairment of his left elbow, and that his "subjective symptoms" would not permanently impair his earning capacity; therefore, he would not receive a permanent disability award.

[31] On January 22, 2003, Dr. Gunn provided the disability awards officer with his opinion that the worker's symptoms were not "subjective", but very real, based on psychiatric assessment and prolonged observation. He said the worker had not returned to his pre-injury status, and had not recovered to the point that he could consistently function at a level that would allow him to return to work.

[32] Dr. Gunn responded to an opinion by a Board psychiatric consultant. Dr. Gunn agreed that the worker had a pre-existing condition of Schizoaffective Disorder, Bipolar Type, although the manic aspect was only manifested after the injury. Dr. Gunn also agreed that the worker's condition was in remission by February 28, 2001. The worker was then working at a dishwashing job about 25 hours per week and taking four courses. He was playing soccer and had a girlfriend. He had no psychotic symptoms or mood swings. Dr. Gunn said the worker had never returned to anything close to that level of function. The Board psychiatric consultant and Dr. Gunn agreed that the worker appeared to be completely well until the accident, and there was no evidence the worker's substance abuse was significant before the accident.

[33] Dr. Gunn did not believe this was a temporary flare-up, as the worker's condition had still not completely resolved. The manic symptoms were episodic, but the negative and cognitive impairments had persisted. These included impaired motivation, social withdrawal, and impaired cognition. He said the Board psychiatric consultant had misunderstood his comments that the worker was doing "very well" in January 16, 2002. Dr. Gunn said this referred to the psychotic and mood symptoms, not to the persistent negative and cognitive impairments.

[34] The worker came under the care of another psychiatrist, Dr. Atkins, who first saw him on August 12, 2002. Dr. Atkins wrote the Board on May 1, 2003 that, in August, the worker weighed 210 pounds, but had no specific psychiatric concerns. (The worker gave his weight on the claim form as 140 pounds; he had previously been an excellent soccer player.) In November 2002, the worker developed increased paranoia. He was

doing somewhat better by early 2003, but his affect was "odd" and restricted and his motivation was low. He was not overtly psychotic, but his thinking was slowed.

[35] Dr. Atkins said the worker had generally been well, in the sense that he had not required hospitalization. He functioned minimally in the community but, although he tolerated part-time school work, he was not ready for the workplace.

[36] Another psychiatrist, Dr. Murray, wrote on May 13, 2004 that he shared the opinion of Dr. Gunn that the injury was a factor in the worker's psychiatric presentation. He said he had been able to significantly reduce the worker's medication, and the worker had continued to do very well. He said this indicated an induced psychosis from an external insult, rather than a genetically determined illness, such as schizophrenia.

[37] Dr. Murray provided another letter, dated July 5, 2004, in which he reiterated that he thought the worker's condition was temporary, but he declined to comment on whether the condition could be permanent.

[38] Those opinions were considered in *WCAT Decision #2004-05204*, dated September 30, 2004, which considered the appeal from the October 18, 2002 decision of the disability awards claims adjudicator. The vice chair found the worker had not returned to his pre-injury status on January 26, 2002, but remained temporarily disabled as of that date. She found the worker's psychological condition must be assessed to determine if it was plateaued with a permanent psychological impairment.

[39] Another psychiatrist, Dr. Shrikhande, provided a consultation note on September 17, 2004. At that time, the worker did not have a thought disorder or hallucinations. He had good insight into his problems and normal affect, and his primary mental functions were within normal limits. Dr. Shrikhande thought the worker might have had a drug-induced psychosis, but thought the worker would do well if he stayed away from street drugs. (The WCAT panel did not have that opinion before it.)

[40] However, the worker was hospitalized voluntarily from January 20, 2005 until March 9, 2005, and Dr. Shrikhande wrote the discharge report. The worker was experiencing thought disorder, paranoid delusions, and hallucinations. He was discharged with diagnoses of Paranoid Schizophrenia and Schizoaffective Psychosis.

[41] To implement the WCAT decision, the Board arranged for an Independent Medical Examination by a psychiatrist, Dr. Semrau. In his letter dated March 28, 2005, Dr. Semrau reviewed the medical history thoroughly and described his interview with the worker.

[42] Dr. Semrau said the worker could clearly be described as very seriously ill at the time of his interview. He diagnosed Schizoaffective Disorder – Bipolar Type. (He also diagnosed Cannabis and Cocaine abuse as in remission.) Dr. Semrau noted that

various diagnoses had been given, and it was not possible to be absolutely certain of the correctness of any diagnosis, but causation, disability, and prognosis issues did not differ a great deal between Schizophrenia and Schizoaffective Disorder.

[43] Dr. Semrau said the natural history of Schizoaffective Disorder is to continue chronically and episodically, and to recur spontaneously, even in the absence of specific identifiable factors maintaining the disorder. He said it was certainly clear the disorder had its onset well prior to the work injury of July 2001. Following a period of treatment, there had been a reduction in symptoms, but some symptoms certainly continued into late 2000, including paranoia, depression, and general psychological dysfunction; apparently, marijuana abuse was an aggravating factor.

[44] Dr. Semrau said the worker appeared to be doing well before the accident, but relapsed promptly after it. He agreed that the relapse was likely precipitated by the stress and trauma of the injury itself, and the necessary use of medications, including narcotic analgesics. He said marijuana and cocaine abuse were a possible factor in initiating and maintaining the summer 2001 relapse. Dr. Semrau said he would expect the aggravating effect of the accident to be temporary, with a maximum duration of one year, and not significant in terms of his current disability.

[45] However, Dr. Semrau said there was a longer term impact of any aggravating and relapse-inducing factor, such that it makes future relapses more likely, more severe, and more difficult to treat. He said it was not possible to say with any confidence exactly what would have occurred in the absence of the injury. Dr. Semrau said the worker would probably be enjoying better mental health at present, if the burn injury had not occurred.

[46] However, it is not at all clear the worker would be employable, since the combination of the natural history of Schizoaffective Disorder, aggravated by factors such as drug abuse and treatment non-compliance, could have resulted in sufficient deterioration to make him unemployable.

[47] The case manager relied on that opinion in her decision letter of April 29, 2005. She found that, while the burn injury played a role in the ongoing nature of the worker's condition, it was not necessarily "the most significant factor." She understood Dr. Semrau to have said the aggravating effects of the burn injury were temporary, with a maximum duration of one year.

[48] She found the burn injury was "no longer a significant factor," and only a temporary, not a permanent, aggravation of a pre-existing Schizoaffective Disorder. She therefore terminated the worker's benefits, effective April 24, 2005.

[49] A review officer allowed an appeal from that decision in *Review Reference #R0053263*, dated December 14, 2005. The worker did not dispute that a number of factors contributed to the psychological condition, but cited *Appeal Division Decision #2002-0146* to the effect that, so long as the cause was not trivial, it must be regarded as causally significant.

[50] The review officer agreed that the Act and policy did not require the work activity be the sole, or even predominant, cause, but cited policy item #15.10 (Worker Has Pre-Existing Deteriorating Condition), as providing the employment situation must have causative significance in producing the disability.

[51] In any case, she found the medical evidence, including Dr. Semrau's report, consistent that the worker's condition was permanently worsened by the accident and subsequent treatment. She found as fact that, prior to the injury the worker had a single-episode Schizoaffective Disorder, but had been asymptomatic for six months prior to the accident. He was taking anti-depressant medication only, with no anti-psychotic medications, and with no reported symptoms. She found his pre-injury condition had allowed him to attend school, earn good grades, and work part time. However, she found no evidence that the worker had returned to his pre-injury condition since the injury.

[52] Accordingly, she found the accident had resulted in a permanent aggravation of his pre-existing Schizoaffective Disorder. He was therefore entitled to be referred to the Disability Awards Department for assessment of his psychological permanent functional impairment.

[53] Dr. Semrau conducted a further assessment of the worker, which he reported in a letter dated October 25, 2006. The worker had been vomiting, between two and ten times a day since February 2005, apparently due to anxiety related to his paranoia; this was interfering with his efforts to retain employment. Dr. Semrau's opinion was essentially unchanged.

[54] The Psychological Disability Award Committee (PDAC) met on November 8, 2006. They found the worker's functional psychological impairment was 40% of total disability. However, the PDAC found the worker had a significant pre-existing disability. They found the work incident was significant to severe, but found it contributed in a minor way to the aggravation of the worker's psychological condition.

[55] The PDAC applied section 5(5) of the Act, which provides for proportionate entitlement, and found that 25% of the 40% impairment was compensable; this resulted in a compensable impairment rating of 10%.

[56] With regard to the loss of earnings pension, the Disability Awards Committee said, in a log entry dated November 29, 2007:

> The Disability Awards Committee has reviewed the recommendation for a partial loss of earnings award. It is noted that the claim has ultimately been accepted for a permanent aggravation of schizoaffective disorder, as directed by a Review Officer. The client sustained a burn injury to his elbow for which he received a cosmetic award. He is in the age range where the symptoms of his psychological condition would normally manifest in a pre-disposed individual.
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> The worker had what would be considered a relatively marginal attachment to the work force prior to his injury. This is well documented and borne out in his pre-injury annual earnings and minimal wage rate. The Committee agrees that, based on the accepted conditions, that the worker maintains capacity for part-time, sporadic employment, and that only a very understanding employer would likely accommodate a more permanent job opportunity for the worker. It is likely that his disease, if not well controlled, would lead to the same pattern, regardless of the injury and aggravation. That being said, the permanent aggravation has been accepted and the award is authorized as a reasonable expectation of the worker's future employability over the long term....

[57] The disability awards claims adjudicator advised in her letter of December 19, 2007 that his pension would be awarded as recommended by those committees.

[58] In his appeal of that decision to the Review Division, the worker submitted that, while the worker had a pre-existing medical condition, it was not disabling; therefore, proportionate entitlement should not have been applied.

[59] In her decision of June 17, 2008, the review officer cited section 5(5) of the Act and policy item #44.00. She also cited policy item #44.10, and found the worker's psychological condition was an "already existing disability": she found there was evidence of a previously reduced capacity to work and that the worker had undergone previous medical attention for his condition. She therefore confirmed the assessment of the worker's compensable psychological permanent functional impairment at 10%.

[60] In this appeal, the worker referred to his mother's March 16, 2007 letter in response to the employability assessment. That corrected a persisting error in the evidence; namely, that the worker had been trying to complete grade 10 Math, not grade 12 Math. He had been trying to complete Math 10 for seven years, and had finally completed it as a result of the school's compassion and allowances for his learning speed. The worker's mother said she accepted that the worker had not been destined for a career

in the professions, but that he should have been able to find good-paying work in construction.

[61] The worker did not provide additional medical evidence, but submitted that the existing evidence did not support that the worker had a significant pre-existing psychological disability.

[62] The worker submits that, prior to the accident he was just 18 years old and working in a full-time summer job. Previously, he had been a full-time student, earning good grades, and working on a part-time basis. As such, he submits the evidence does not support a previously reduced earning capacity. He notes that Dr. Semrau found he was much improved before the injury. He also notes the finding of fact of the review officer in the December 14, 2005 decision that he had been asymptomatic in the six months before the accident, but had not returned to his pre-injury status since.

[63] The worker submitted there was not a pre-existing disability onto which the subsequent injury was "superimposed". The worker reviewed the three situations discussed in policy item #44.10 and noted that the PDAC considered the work incident "significant to severe", rather than the "minor or moderate" significance discussed in the policy. He submits that if there was a pre-existing disability, it was over-ridden by the severity of the injury.

Reasons and Decision

Proportionate Entitlement

[64] I find the worker did have a pre-existing disability that had impaired his earning capacity, upon which the effects of the injury were superimposed. Although the worker's condition was in remission at the time of the accident, the basis for the worker's permanent disability award is that the injury had aggravated the pre-existing condition; that entails there was a pre-existing condition to be aggravated.

[65] I accept the opinion of Dr. Semrau that the worker had Schizoaffective Disorder before the injury, and that the nature of the worker's disorder was that it was episodic. Therefore, even though the disorder was in remission at the time of the injury, it continued to subsist, so that it could be aggravated by the accident, and there would probably have been further episodes, even without the accident.

[66] I find the pre-existing Schizoaffective Disorder had impaired the worker's earning capacity. I am not able to characterize the worker's pre-injury condition as positively as the worker does. I find the worker had trouble in school before the injury – although he had earned two A's, his marks were generally in the "C" range. The effects of the pre-existing Schizoaffective Disorder had required the worker to drop out of the regular school setting, and his part-time jobs had been generally short-lived. I find the inability

to function socially in a formal setting, as required by school, indicates an impairment of earning capacity, even if the worker was not earning income by attending school.

[67] Section 5(5) of the Act provides that the measure of disability attributable to the personal injury must be the difference between the worker's disability before the injury and the disability after. Policy item #44.10 is titled "Meaning of Already Existing Disability." It emphasizes that the mere existence of a condition before the injury is not enough to bring proportionate entitlement into operation; rather, the pre-existing condition must have amounted to a disability, and the injury must be "superimposed" on the already existing disability.

[68] The policy does not clearly define "disability", but sets out three "situations," which it also refers to as "rules," as follows:

> 1. In cases where it has been decided that the precipitating event or activity, and its immediate consequences, were so severe that the full disability presently suffered by the claimant would have resulted in any event, regardless of any pre-existing disability, Section 5(5) should not be applied.
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> 2. In cases where the precipitating event or activity, and its immediate consequences, were of a moderate or minor significance, and where there is only x-ray evidence and nothing else showing a moderate or advanced pre-existing condition or disease, Proportionate Entitlement should not be applied. These cases should not be classified as a disability where there are no indications of a previously reduced capacity to work and/or where there are no indications that prior ongoing medical treatment had been requested and rendered for that apparent disability. In determining whether there has been ongoing treatment, regard will be had to the frequency of past treatments and how long before the injury they occurred.
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> 3. Where the precipitating event or activity, and its immediate consequences, were of moderate or minor significance, but x-ray or other medical evidence shows a moderate to advanced pre-existing condition or disease, and there is also evidence of a previously reduced capacity to work and/or evidence of a request for and rendering of medical attention for that disability, Section 5(5) should be applied.

[69] I do not find that the first situation applies. Although the burn accident was severe, I do not find that Schizoaffective Disorder would have resulted from the burn incident in any event, regardless of the pre-existing disability; that is, one would have expected a serious burn to result, but not Schizoaffective Disorder.

[70] The second situation speaks in terms of "only x-ray evidence" showing a moderate or advanced disease, which I take as illustrating a situation in which, although the pre-existing condition is advanced, it has not been symptomatic; that is not the case here: the worker's Schizoaffective Disorder had been symptomatic, to the extent that it had required him to drop out of the regular school setting.

[71] The second situation is unfortunately written in "double negatives" ("cases should not be classified as a disability where there are no indications"), but the effect is to say that a prior disability should be found if there are indications of a previously reduced capacity to work and/or indications that prior ongoing medical treatment has been requested and rendered. In determining whether there has been ongoing treatment, regard will be had to the frequency of past treatments and how long before the injury they occurred.

[72] This is made more clear in the third situation, which says that proportionate entitlement will be applied where there is a previously reduced capacity to work and/or evidence of a request for and rendering of medical attention for that disability.

[73] As noted above, I find this is a case in which there were indications of a previously reduced capacity to work. Also, there was previous medical treatment for the condition, with Risperidone and counselling up until April 2001, and with Paxil until the time of the injury. The worker was to have been receiving Risperidone and medical treatment up until the time of the injury, but he had been compliant with doctor's orders in those regards.

[74] Although he was in remission at the time of the injury, Dr. Semrau is clear that the nature of Schizoaffective Disorder is that it is episodic, so the worker probably would have had further episodes, even if he had not had the injury.

[75] I also find the burn incident should be regarded as having "minor" or "moderate" significance for the purposes of determining proportionate entitlement. I recognize that the PDAC characterized the incident as "significant to severe", but they also discuss the difficulties of using such terms in the absence of common definitions. It is unfortunate that the PDAC did not refer to Board policy in making their decision, so they did not consider the terms in that context. However, in the policy the terms "minor", "moderate", and "severe" refer to the "precipitating event or activity, and its immediate consequences." While the accident was significant and severe in terms of producing a burn injury, I find it was minor or moderate in terms of precipitating a psychotic reaction; indeed, it would have virtually no significance, except where there was a pre-existing condition.

[76] Having found that proportionate entitlement should be applied, it is still open to me to consider whether the assessment of 40% for psychological impairment after the injury was appropriate, and whether the adjustment for proportionate entitlement was

appropriate. At the outset, it is not clear that the PDAC has complied with section 5(5) of the Act: section 5(5) requires that the award be the difference between the disability before the injury and the disability after, but the PDAC has not shown such an analysis. The PDAC has instead found that the injury "contributed in a minor way to the aggravation of the worker's psychological condition, resulting in a compensable impairment rating of 10%...."

[77] I refer to the tables for assessing psychological disability in the Permanent Disability Evaluation Schedule that is Appendix 4 to the *Rehabilitation Services and Claims Manual, Volume II*, as I am undertaking this assessment after August 1, 2003. However, I also find it useful to refer to the PDAC guidelines that were published on July 19, 2004, to the extent that they are consistent with the guidelines set out in policy, as they are somewhat more detailed (those guidelines may be found on the Board's website).

[78] I find the assessment of 40% is reasonable; that is, on the basis of Dr. Semrau's opinion, I find the worker has moderate residual symptoms and is capable of competitive work if provided significant support, his adaptation to his impairment is inadequate, significant accommodation is required, and he is at a high increased risk of decompensation under normal stress.

[79] The PDAC did not provide an assessment of the worker's level of function before his injury, but they imply that it would have been rated at 30%, which, according to their schedule, means he had moderate residual symptoms, was capable of competitive work, but inadequately adapted to impairment with or without accommodation and had a moderate increased risk of decompensation under normal stress.

[80] I find the worker's level of function before the injury was higher than that, and would more appropriately be rated as 10%; that is: before the accident he had minor residual symptoms, some increased risk of decompensation under stressful situations, accommodation would not completely attenuate psychological impairments, and only sporadic continuing treatment was likely.

[81] It follows that, according to section 5(5) of the Act, the worker's permanent functional impairment should be rated at the difference between 40% and 10%, which is 30%. The decision of the review officer is varied accordingly.

Pension Wage Rate

[82] The former policy provided in policy item #67.20 that a long-term wage rate would be established eight weeks after the date of the injury. Where a permanent functional impairment was anticipated, the case manager would consult with the disability awards claims adjudicator at the time of the eight-week review in order to provide consistency between the rate selected for wage-loss purposes and for pension purposes.

Circumstances in an individual claim might require the selection of two different rates; where that occurred, the reasons were to be clearly recorded on the claim file.

[83] Policy item #68.00 provided that permanent disability pensions were normally based on the eight-week wage rate; however, a different wage rate could be used if there were valid reasons for it.

[84] The original long-term wage rate was determined on September 7, 2001, and found to be $1,919.00 on the basis of three jobs between February 22, 2001 and the accident date. This was re-determined on February 19, 2004, upon direction of the Review Division. Income in 2000 was found to be $1,146.01 from work in two jobs, and $1,994.73 in 2001 from work in four jobs. The total for the 12 months preceding the accident was found to be $3,140.74, which resulted in a gross weekly rate of $60.23 and a daily rate of $8.60.

[85] The worker sought to appeal that wage rate too, but, as a result of jurisdictional complications arising from changes in legislation, the appeal did not proceed.

[86] The worker now appeals the wage rate on the basis that the pension wage rate should be different from the eight-week wage rate established on February 19, 2004.

[87] I do not accept the worker's submission that he was not in any way disabled by the Schizoaffective Disorder before his injury, as it had required him to drop out of formal education. I also do not find it would be speculative to find the worker would likely have further episodes of Schizoaffective Disorder, regardless of the injury; I accept the opinion of Dr. Semrau that the natural course of the disorder is to have episodic relapses. However, I also accept the opinion of Dr. Semrau that the worker's history since the injury is worse than it would have been without the injury, in that the episodes are more frequent and impairing.

[88] I also note that, at the time the long-term wage rate was established in February 2004, the Board had not accepted that the worker would have a permanent functional impairment, so it is reasonable to consider a pension wage rate that is different from the long-term wage rate, as permitted by the former provisions.

[89] In that regard, I find the worker had been persistent in looking for work, as well as persistent in pursuing his education. He was only 18 years old, and I do not find that the work history in the year before his injury, when he took low-paying jobs that were compatible with pursuing an education, likely represents his earning capacity once he had stopped pursuing an education. As set out in the former provisions of the Act, section 33(1) required a wage rate to best represent the actual loss of earnings suffered by the worker by reason of the injury, and could include the probable yearly earning capacity of the worker.

[90] Section 33(3) of the former provisions provided that, where the average earnings of the worker at the time of injury, by reason of the worker's age, do not truly represent the worker's earning capacity, in the case of permanent disability the award may be calculated by taking into account the probable increase in average earnings.

[91] As discussed in policy item #67.10, I find that, but for the injury, the worker's earnings would have increased. He had embarked in construction work, instead of kitchen work, and could have expected an income consistent with such employment.

[92] In accordance with policy item #67.21 and section 33(1) of the Act, I find that, due to the shortness of time during which the worker was in the employment of the employer, or in any employment, regard should be had to the earnings of a person in a similar class of employment.

[93] The worker had only been employed as a roofer for three days at the time of the injury, and he had taken the job on the basis that it would be full-time summer employment until his return to school. However, as I have found the worker's academic performance before the injury was not very strong, I find the worker would not likely have pursued education very far.

[94] In her reply to the employability assessment, the worker's mother said she hoped the worker would have completed a college program to learn a trade. I am not persuaded this is likely, given the worker's educational difficulties and difficulty with formal education before the injury. On the basis of Dr. Semrau's opinion, the worker would likely have had further episodes that would have interfered with formal education, including in the skilled, apprenticed trades.

[95] However, the worker had moved beyond basic food services work such as washing dishes, and had obtained a construction labouring job as a roofer. The worker was an athletic young man, and despite his episodic difficulties, that trade is not especially structured, and I find he could have been regularly employed in it, albeit with episodic interruptions.

[96] The worker has submitted that his wage rate should be based on the class average for full-time, full-year roofers, or for general construction work, or for the average industrial wage. Policy item #67.21 states that a number of averages are available, but the one generally used is the average for all workers in the class. Given the probability of episodic interruptions in employment, even without the injury, I am not persuaded there is a basis to depart from the general practice.

Conclusion

[97] The worker's appeal is allowed. The decision of the review officer is varied as follows:

1) The worker's permanent functional impairment, after applying proportionate entitlement, is 30% of total impairment.

2) The worker's pension wage rate will be based on the class average for all workers in the class of roofers.

[98] The Board will accordingly make new decisions as to the worker's permanent disability award.

Expenses

[99] The worker has not requested reimbursement of appeal expenses, and I make no order in that regard.

David Van Blarcom
Vice Chair

DVB/hb