Noteworthy Decision Summary

Decision: WCAT-2010-00396 Panel: L. Alcuitas-Imperial **Decision Date:** February 8, 2010

Sections 239(2)(b), 96(7), and 16 of the Workers Compensation Act – Jurisdiction – Overpayment – Vocational Rehabilitation Benefits – Fraud or Misrepresentation

The worker was receiving vocational rehabilitation benefits under section 16 of the *Workers Compensation Act* (Act). The Workers' Compensation Board, which operates as WorkSafeBC (Board), undertook surveillance of the worker. After reviewing the surveillance videotape, the Board determined the worker had misrepresented himself during the vocational rehabilitation process. Under section 96(6) of the Act, the Board set aside a previous decision to grant the worker vocational rehabilitation assistance, determined when it should have ended, and declared an overpayment that the worker was required to repay.

The worker appealed to WCAT. The panel considered whether she had jurisdiction to address the Board's decision to set aside the previous decision to grant vocational rehabilitation assistance and to declare an overpayment.

The panel noted that section 239(2)(b) of the Act resulted from a recommendation in the *Core Services Review of the Workers' Compensation Board* (Victoria: 2002) (Core Review). The Core Review recommended that decisions regarding section 16 of the Act not be appealable to WCAT for two reasons: (1) they are discretionary decisions that should not be overturned because subsequent decision-makers exercise their judgment differently; and (2) the volume of appeals to WCAT needed to be controlled. On that basis, the panel concluded that the purpose of section 239(2)(b) was to preclude appeals of vocational rehabilitation decisions to WCAT.

In considering the worker's appeal, the panel noted that the finding of fraud or misrepresentation under section 96(7) formed the basis for the Board's decision to set aside the vocational rehabilitation decision. The decision to recover the overpayment of the worker's vocational rehabilitation benefits was at the heart of his appeal. The vice chair noted that, if she took jurisdiction over the overpayment issue and restored the worker's vocational rehabilitation benefits, that would clearly be a decision respecting a matter referred to in section 16.

The effect of reversing a decision under section 96(7) regarding vocational rehabilitation benefits is to restore those benefits. Accordingly, it is a clearly a decision "respecting matters referred to in section 16".

The legislature could have signalled an intention that section 96(7) decisions related to vocational rehabilitation would be insulated from the effect of section 239(2)(b) by

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drafting section 239(2)(b) to provide that a Review Division decision respecting matters referred to in section 16, other than decisions made under 96(7), may not be appealed to WCAT. It did not do so.

The panel made no finding regarding WCAT's authority to decide appeals of decisions declaring overpayments on the basis of administrative errors such as computer, mechanical, or mathematical errors.

Reconsideration of this decision was denied (see *WCAT-2011-02670*).

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This decision was the subject of a Reconsideration. See WCAT-2011-02670, dated October 26, 2011.

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Panel: Luningning Alcuitas-Imperial, Vice Chair

Introduction

[1] In January 2007, the worker, a general clerk, injured his lower back while pulling a flat deck loaded with dairy products. The worker applied for compensation from the Workers' Compensation Board (Board), operating as WorkSafeBC. The Board accepted the worker's claim for a disc herniation and chronic pain.

[2] On April 8, 2008, a Board officer wrote in response to the worker's physician's request for a referral to a pain program. The Board officer denied the request. In reaching this conclusion, the Board officer relied upon the opinion of a Board medical advisor.

[3] The worker requested a review of the Board's April 8, 2008 decision. In *Review Decision #R0093989*, dated November 24, 2008, a review officer confirmed the Board's decision.

[4] On June 3, 2008, a Board officer wrote the worker after a June 2, 2008 meeting at which the worker reviewed surveillance video taken by the Board. The Board officer determined that the worker had misrepresented himself during the vocational rehabilitation process. The Board officer set aside a previous decision to grant the worker vocational rehabilitation assistance and determined that such assistance should have ended effective February 25, 2008, as the worker was not fully participating in the vocational rehabilitation process. The Board officer also declared an overpayment of $7,629.60.

[5] The worker requested a review of the Board's June 3, 2008 decision. In *Review Decision #R0095635*, dated January 16, 2009, a review officer confirmed the Board's decision.

[6] On June 23, 2008, a Board officer granted the worker a permanent partial disability award of 2.5% of total disability for the permanent conditions of an L4-5 disc herniation and chronic pain. The award, effective February 3, 2008, was granted on the basis of a permanent functional impairment, as the Board officer noted that an investigation about the worker's entitlement to an assessment for a projected loss of earnings award was still underway.

[7] The worker requested a review of the Board's June 23, 2008 decision. In *Review Decision #R0095638*, dated January 19, 2009, a review officer confirmed the Board's decision.

[8] The worker now appeals these three decisions of the Review Division to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

[9] The following issues arise on these appeals:

1. Is the worker entitled to further health care benefits, specifically a referral to a pain program?

2. Do I have the jurisdiction to address the Board's decision to set aside the previous Board decision to grant the worker vocational rehabilitation assistance and to declare an overpayment? If I have jurisdiction over these matters, was it appropriate for the Board to set aside the previous Board decision to grant vocational rehabilitation assistance? Was it appropriate for the Board to declare an overpayment of $7,629.60?

3. Is the worker entitled to an increased permanent partial disability award?

4. Do I have the jurisdiction to address whether the worker is entitled to an assessment for a projected loss of earnings award? If I have the jurisdiction over this matter, is the worker entitled to an assessment for a projected loss of earnings award?

[10] I note that at the oral hearing, the worker stated that he took no dispute with those aspects of the review officer's January 19, 2009 decision that dealt with the effective date of his permanent partial disability award or with the 2.5% awarded to recognize permanent chronic pain. Item #3.3.1 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) states that WCAT will generally restrict its decision to the issues raised by the appellant in the notice of appeal and the appellant's submissions to WCAT. Although item #3.3.1 goes on to state that an exception to this general rule is where the subject of an appeal is a permanent disability award, I consider that there are no circumstances that warrant an exercise of my discretion to consider the issues of the effective date of the award and the 2.5% award for chronic pain.

Jurisdiction

[11] The worker brings these appeals under section 239(1) of the *Workers Compensation Act* (Act), which permits appeals of Review Division decisions to the WCAT.

[12] Among other provisions of the Act relevant to my authority and jurisdiction, the following should be noted. Under section 254, I am authorized to inquire into, hear and determine all questions of fact, law and discretion that may arise or need to be determined in these appeals. My decision is required to be made on the merits and justice of the case. While not bound by legal precedent, I must apply policy of the Board's board of directors that is applicable to the case, except in the circumstances described in section 251. I am authorized to consider new evidence, and to substitute my decision for the decisions under appeal. The standard of proof for compensation matters is the balance of probabilities, subject to section 250(4). Section 250(4) 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.

[13] The worker requested an oral hearing into this matter. An oral hearing was held before me. At the hearing, the worker and his union representative appeared. The employer also participated in this matter and was represented by a consultant.

Background and Evidence

[14] I reviewed the worker's claim file, as well as evidence and submissions presented by the parties. I find it is unnecessary to summarize all of the evidence and submissions. I provide the following summary as it relates to these appeals.

[15] On January 11, 2007, the worker filed a report of injury with the employer. The worker indicated that he hurt his lower back on January 11, 2007. The worker said that he had been loading a flat deck with 50-pound cases of butter and cheese. He started to pull the deck when his back seized up and jolting pains started.

[16] The employer filed a report of injury with the Board on January 15, 2007. The employer did not protest acceptance of the claim, but indicated that the worker had not missed time from work.

[17] A January 31, 2007 first aid report was also filed with the Board. The first aid attendant indicated that the worker injured his low back on January 11, 2007. The worker could not bend over. He was treated with rest and ice and sent to a medical clinic.

[18] On February 26, 2007, Dr. Yokoyama, the worker's family physician, examined the worker. He filed a physician's first report with the Board, diagnosing the worker with a back injury. The worker reported that his back pain was worsening, with radiation to the right calf. The worker also said that he was unable to do heavy lifting. Dr. Yokoyama thought the worker needed physiotherapy. He also ordered a CT scan of the worker's lumbar spine and prescribed the worker Flexeril and Tramacet. Although Dr. Yokoyama thought the worker was not medically capable of working full duties, full time, he noted that the worker was at work.

[19] On March 1, 2007, the worker underwent an imaging test of his lumbar spine. Mild to moderate disc space narrowing was identified at L4-5, with slight posterior L4 on L5 spondylolisthesis. Otherwise, the vertebral body and disc space heights were aligned and normal.

[20] On March 19, 2007, the worker applied for compensation from the Board. He indicated that on January 11, 2007 after continuous lifting of boxes weighing approximately 50 pounds, his back seized up and this made it difficult to work. The worker noted that he had injured the same spot in his back about one year before.

[21] The worker consulted Dr. Yokoyama again on March 20, 2007. He reported that there was no improvement in his back pain even after four weeks of physiotherapy. Dr. Yokoyama noted the results of the imaging test and requested that the Board refer the worker to an external service provider.

[22] On April 3, 2007, the worker underwent a CT scan of his lumbar spine. After reviewing the scan, Dr. Stewart, radiologist, concluded that the worker had a small, central disc herniation at the L4-5 level, which appeared to be compressing the L5 nerve roots centrally, with a little more pronouncement on the left.

[23] As well, Dr. Stewart identified a mild broad-based left paracentral/foraminal disc herniation at the L5-S1 level, which was compressing the left S1 nerve root centrally and the exiting left L5 nerve root within the neural foramen. Dr. Stewart also noted that significant, bilateral foraminal stenoses at the L5-S1 level was compressing the exiting L5 nerve roots (again more pronounced on the left).

[24] Dr. Stewart noted that the worker's physicians should try to correlate clinically the worker's symptoms with the CT scan findings.

[25] On April 13, 2007, Dr. Yokoyama examined the worker and reviewed the CT scan results. The worker reported that his pain was worse. Dr. Yokoyama thought the Board should expedite a referral for the worker to be examined at the Board's Visiting Specialists Clinic. Dr. Yokoyama thought the worker needed modified duties, as he was unable to bear weight.

[26] By April 19, 2007, Dr. Yokoyama thought the worker was no longer able to work due to radiating pain. He prescribed Percocet and reiterated his request that the worker be examined at the Board's Visiting Specialists Clinic.

[27] At a May 11, 2007 visit, Dr. Yokoyama noted that the worker's pain was so severe that he was unable to ambulate. Dr. Yokoyama stated that the worker needed an urgent referral to a neurosurgeon and for an MRI.

[28] By May 31, 2007, the worker reported having weakness and numbness in the lower back. Dr. Yokoyama told the Board that the worker needed a nerve block, in addition to the consultation with a neurosurgeon.

[29] On June 14, 2007, Dr. Gittens, neurosurgeon, examined the worker at the Visiting Specialists Clinic. He first noted that the worker worked as a general clerk and had worked for the employer for 16 years. The worker reported a five-month history of lower back pain, difficulty bending due to sharp pains in the left lower back, throbbing in the left calf and tightness in the left lower extremity with physical activity. After reviewing the worker's tests and conducting a physical examination, Dr. Gittens concluded that:

> I believe this man's symptoms originate from the L5-S1 level where clinically he has signs and symptoms of nerve root entrapment and some S1 root signs, which I believe reflect a disc herniation. He also has mechanical lower back pain relating to degenerative changes at the L4-5 and L5-S1 segments in the spine. However, the acute symptoms I believe originate from the L5-S1 level, and I think that we had better image this area more effectively and I have requested an MRI scan. Once this has been completed I believe the next course of action would be to try to manage him without surgery, namely with a series of epidural steroids saving surgery in the event that the investigations do point and confirm the disc herniation for failure of his therapy and persistent symptoms.
>
> I would therefore like to recommend the following. An MRI scan of the lumbar spine, if it confirms a disc herniation he should be referred for epidural steroids. If this alleviates the pain, then rehabilitation and return to work would be possible. If not, he should be reviewed with a view to discussing the surgical option.

[30] The worker underwent an MRI scan of his lumbar spine on June 25, 2007. Dr. Hodges concluded that the worker had degenerative disc changes confined to the L4 and L5-S1 discs with a midline inferiorly extruded disc herniation at the L4-5 level and a central/left paracentral disc protrusion at the L5-S1 level. Dr. Hodges also noted that there was a probable, small sequestered fragment inferior to the disc space.

[31] On June 29, 2007, Dr. Adrian performed a nerve block on the worker. The worker then consulted Dr. Gittens on August 3, 2007. Dr. Gittens noted that the nerve block was quite painful and did not result in any symptomatic improvement.

[32] Dr. Gittens noted that the worker was taking Gabapentin and Percocet. The worker told him that his back pain was increasing, including ten acute episodes of pain caused by bending or getting out of a car. However, the worker admitted that there was improvement in the left lower extremity pain.

[33] On examination, Dr. Gittens found the worker had marked restrictions in lumbar spinal movements. He agreed with the interpretation of the MRI report and concluded that the worker's clinical symptoms were suggestive of a mechanical low back pain related to degenerative changes and possible facet joint symptomatology. Dr. Gittens thought the worker lacked nerve root symptomatology, but that he was significantly limited. He recommended a second nerve root block and a consultation with an orthopaedic surgeon to assess the option of spinal stabilization.

[34] On September 13, 2007, Dr. Badii (a specialist in internal medicine and rheumatology) examined the worker. He noted that he had previously seen the worker on May 8, 2007. The worker told Dr. Badii that his back pain was about the same or worse. While there was improvement in the leg pain, the worker said that he still got shooting pains in his legs, worse on the left than the right. The worker described that the left leg pain was going into the thigh and down to the calf, but not extending into the foot. Dr. Badii suggested that the worker try epidural steroid injections.

[35] On September 20, 2007, Dr. Thompson (orthopaedic surgeon) examined the worker at the Board's Visiting Specialists Clinic. He noted that the worker primarily worked in the employer's dairy department, which required repeated heavy lifting. The worker told Dr. Thompson that he had a constant ache in his back that fluctuated with activity. The worker said that his back pain was aggravated by bending and prolonged standing and sitting and he was most comfortable with frequent changes in position. Dr. Thompson noted that the worker was receiving physiotherapy treatment three days a week.

[36] On examination, Dr. Thompson noted restrictions in flexion and extension of the lumbar spine, but a normal gait, normal sensation and no signs of motor weakness.

[37] Dr. Thompson assessed that the worker had an L4-5 disc herniation. Dr. Thompson noted that if an earlier MRI had been taken, it would likely have shown a greater degree of herniation. He also noted that the worker had significant, residual back pain related to the herniation, with abnormal muscle tone and function as contributing factors.

[38] Dr. Thompson concluded that there was no role for surgery in the worker's treatment, as the worker did not have significant radicular pain or neurologic symptoms; there were no signs of nerve irritation on examination; and the MRI did not demonstrate significant nerve compression or displacement.

[39] Dr. Thompson recommended that the worker proceed with the epidural injection, continue with physiotherapy and gradually resume activity on his own.

[40] Dr. Gittens saw the worker again in follow-up on October 11, 2007. The worker reported that he continued to be symptomatic and that slight physical activity (such as gardening) caused his back pain to increase.

[41] On examination, Dr. Gittens noted a marked limitation of lumbar spinal movement and concluded that:

> I do not think there is any doubt based on the clinical presentation that this man has multilevel lumbar spondylosis with some disc pathology and herniation at the L5/S1 level and that his symptoms are primarily mechanical.

[42] Dr. Gittens stated that there were very limited treatment options for the worker. He recommended that the epidural steroid injections go ahead for purposes of pain relief; a functional capacity evaluation be conducted; and the worker undergo re-training.

[43] In an October 18, 2007 claim log entry, a Board medical advisor reviewed the worker's claim and concluded that:

> It is evident that [the worker] has disc herniations at both the L4-5 and the L5-S1 levels. It is difficult to know whether or not either one of these was caused by the work activity on Jan 11/07. It is improbable that both would have occurred simultaneously on that date. The L5-S1 correlates better with this man's presenting symptoms so on a balance of probabilities I would advise that the L5-S1 disc herniation probably was caused by the Jan 11/07 work activity but disc degeneration and L4-5 herniation are probably complicating the recovery and enhancing disability. In the absence of these other pre-existing conditions it is likely that disability related to the L5-S1 disc herniation would have resolved within 5 months.

[44] On December 6, and 7, 2007, the worker underwent a functional capacity evaluation at an external service provider. In a December 14, 2007 report, the occupational therapist first commented on the physical effort findings:

> The balance of clinical measures indicates [the worker] completed his functional capacity evaluation with reasonably high physical effort levels. Because low effort was identified during initial grip testing, [the worker] was provided with the opportunity to debrief regarding test findings and the possible implications. Following this opportunity, most measures indicated a reasonably high level of effort on [the worker's] behalf; however, his reported symptom reactivity at times constrained his effort levels e.g. during strength capacity testing. Inconsistencies were noted with sitting, sit/stand transitions and with crouching.

> Consequently, I am of the opinion that evaluation results are a reasonable measure of his current functional/physical capacities and limitations, with the exception of underestimating his strength capacity.

[45] In terms of reliability of pain and disability reports, the occupational therapist noted that:

> Testing did not suggest [the worker's] symptoms involved non-organic origins. He provided reasonably accurate estimates of his capabilities, although he underestimated his sitting and standing tolerances and his strength capacity. Objective measurements revealed discrepancies between [the worker's] reports of limitation and his demonstrated functioning (testing at times revealed lesser levels of restriction than his reports suggested).
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> Please note that the aforementioned statements are in no manner meant to imply intent. Rather, it is simply being stated that at times [the worker] is capable of greater than he perceives or states. As such, [the worker's] reports of function are not consistently accurate. It is therefore recommended that eventual guidelines regarding his physical capacity to perform work incorporate objective findings and that some degree of caution be utilized when interpreting [the worker's] subjective reports.

[46] In terms of functional findings, the occupational therapist recommended the following:

- Walking demands over the course of the workday be limited to intermittent short distances on an occasional basis.
- To facilitate his productivity, the majority of his work tasks be placed at or above waist level to maintain stooping demands to an intermittent basis.
- Low level work requiring crouching or kneeling be limited to intermittent periods at a time on an occasional basis.
- For optimal management of functional durability over the course of the day, the worker be provided the opportunity to alternate between sitting and standing at his discretion to complete tasks.

[47] The occupational therapist also rated the worker as possessing sedentary/limited strength capacity, along with select aspects of light strength capacity.

[48] In terms of interview findings, the occupational therapist noted the worker described his current symptoms and difficulties as follows:

> [The worker] indicated he experiences incapacitating, but not shooting, pain with bending motions. He also feels a strain that radiates into his buttocks and into his leg down to his knee with e.g., lifting his son. At

> the end of the day he has throbbing in his low back which lasts up to forty five minutes when he lies down on the couch. Twisting movements elicits sharp pains upon severe levels of his pain or when he is more active.

[49] The worker also told the occupational therapist that his back condition had worsened since January 2007. The worker said that he could not handle anything too strenuous and that he had been told not to overexert himself. The worker also said that he tried to be more active by doing pool exercises, but this resulted with him being on the couch for three weeks afterwards.

[50] In a January 1, 2008 claim log entry, a Board medical advisor wrote that:

> Based on the nature of the degenerative disc disease in [the worker's] lumbar spine and based on his lack of improvement over the past 10 months, I would advise that there is very little likelihood that his pain and function will improve significantly with any further treatment at this point. I would suggest that our best course of action at this point would be to work on getting [the worker] back to work that he can tolerate as soon as possible. I would suggest we get Vocational Rehabilitation involved rather than refer to a treatment program.

[51] On January 14, 2008, a Board vocational rehabilitation consultant met with the worker. The Board consultant noted that the worker walked with a slight limp. The worker reported that it hurt to sit down, because his back would seize up when he got up from a sitting position. The worker also described that he could only walk for about five minutes before his left side would seize up. While the worker said that he drove himself for 45 minutes to the meeting, his wife was present as he anticipated that he would not tolerate the drive home.

[52] After reviewing the results of the functional capacity evaluation and holding a January 22, 2008 team meeting to review the worker's claim, the Board wrote the worker on January 22, 2008 to advise that his condition was considered stabilized and that, therefore, temporary disability benefits would end on February 2, 2008. The Board also accepted that the worker had permanent, compensable chronic pain. In terms of accepted restrictions and limitations, the Board accepted the following:

- Permanent medical restrictions of no lifting over 35 pounds; avoid any lifting while stooping; avoid repetitive or prolonged or extreme stooping posture; and no lifting while twisting torso.

- Limitations due to the worker's physical injury and chronic pain of lifting over 20 pounds; sustained periods of sitting, standing or walking; and crouching, kneeling and low level work.

[53] The Board found that the worker was unable to return to his full pre-injury job as a general clerk. His file was referred to the Board's Vocational Rehabilitation Services and Disability Awards (DA) Departments.

[54] In a January 29, 2008 claim log entry, a Board vocational rehabilitation consultant noted that he spoke with the employer's return to work coordinator. The employer's coordinator stated that she spoke with the worker, who claimed that he could only push a grocery cart for five minutes and then he would have to sit down. The Board vocational rehabilitation consultant noted that the worker was pain-focused. The Board consultant and the employer's coordinator discussed the worker's limitations and what work he could do. The Board consultant noted that the plan was for the worker to start at three days per week, two hours per shift.

[55] In a February 4, 2008 claim log entry, the Board consultant noted his conversation with the employer's coordinator. The coordinator indicated that she spoke with the employer on February 1, 2008 and that the worker was apprehensive about returning to work. The worker expressed that his home life was not stable enough and that he had no quality of life. The worker said that if he worked two hours, then he would be out of commission for the rest of the day. The worker wanted to get clearance from his physician before returning to work. The employer's coordinator told the Board consultant of a temporary job opportunity as a greeter. The employer's coordinator stated that if the worker could not do such a position, there would be no other position available for him.

[56] In a February 5, 2008 claim log entry, the Board consultant noted his conversation with the worker about the return to work offer. The worker advised that his doctor told him not to drive after taking Percocet (four pills per day). The Board consultant suggested that the worker take the bus to work. The Board consultant also stated that:

> The worker said that he could only work for about 1/2 an hour, and then he needs to lay down. He says that he normally takes his son to school at 9am and picks him up at 11:30am. The drive is 10 minutes. The worker spends the day on his couch and watches TV. He does not do any house chores. Sometimes he will wash a cup for his son to use.

[57] The Board consultant explained that it would be preferable to look for an accommodated position with the employer, but he agreed to allow the worker to start working only one hour per shift. The worker was advised that if he was in pain after 30 minutes of work, he should tell his supervisor.

[58] The Board consultant then noted that he spoke with the employer's coordinator to obtain an update on the arrangement, which was to run from February 1 to 17, 2008. After that, the Board would explore increasing the worker's hours. The employer's coordinator noted that the worker's union had stated in a letter that the worker was not

cleared by his family physician to return to work. The Board consultant responded that he would seek an opinion from a Board medical advisor, but that the plan was to gradually increase the worker's hours in the greeter position to build work tolerance and then move the worker into a customer service or general office position.

[59] In a February 6, 2008 claim log entry, a Board medical advisor concluded that:

> I have reviewed the consultation reports from specialists Gittens, Thompson, and Adrian. There is no medical reason why [the worker] could not participate in the extremely conservative return to work plan that has been outlined in your Feb 5/08 log entry. He has been taking Percocet long enough to have become quite tolerant to the side effects and the only good reason for taking the Percocet in the first place is to improve his level of function. I would advise that if [the worker] is concerned about being impaired by the Percocet that he take it after he gets home from his very brief time at work. It is very important for [the worker's] health that he get back to work and it is crucial that he take advantage of the extremely cautious re-introduction being offered to him at this point.

[60] In a February 11, 2008 claim log entry, the Board consultant noted his conversation with the worker. The worker stated that he had a good one-hour shift at work, but that he was usually sore the day after work so he would rest that day. The worker agreed to start working two-hour shifts on February 13, 2008 to increase his work tolerance.

[61] In a February 11, 2008 decision letter, the Board vocational rehabilitation consultant outlined that the Board would provide the worker with vocational rehabilitation assistance, as it was considered that he was unable to return to his pre-injury grocery clerk job. The Board consultant noted that, at that time, the worker was participating in a work assessment process as a greeter. He also noted that the worker had agreed to increase his work assessment hours to two hours per shift. He outlined a schedule for the worker, which aimed at increasing the work assessment hours to four hours per day. After that, the Board vocational rehabilitation consultant noted that work as a customer service clerk or a general office clerk would be explored.

[62] In a February 18, 2008 claim log entry, the Board consultant noted the worker's voicemail message that he had to lie down on the couch for the rest of the day following a two-hour shift. The worker indicated that he was in so much pain that he could not bend or sit.

[63] In a February 19, 2008 claim log entry, the Board consultant noted that the employer had called to say that the worker did not report for work. The worker spoke with the Board consultant and stated that he had not slept at all due to pain caused by working a two-hour shift. The worker said that he could not walk, but was only able to take his

son to school. The worker expressed that he felt the pain had built up as it was greater on the previous Monday than the previous two two-hour shifts. The worker said that he would return to work after resting for the day.

[64] In a February 19, 2008 message to a Board field investigator, the Board vocational rehabilitation consultant requested that surveillance be conducted on the worker. The Board vocational rehabilitation consultant stated in the background to the request that the worker had complained of severe pain after two hours of working as a greeter (where a sit-stand stool was available). The worker reported that he had to go home and lie down on the couch after two hours of work. The Board vocational rehabilitation consultant stated that it had been expected that the worker would be able to perform more than two hours of work, as the Board medical advisor had stated that the return-to-work plan was very conservative. The Board vocational rehabilitation consultant noted that it was difficult to believe that the worker could not attend work the day after a two-hour shift due to pain complaints. The Board vocational rehabilitation consultant noted that the worker said that he spent the day on the couch watching television, except to take his son to and from school in the morning.

[65] In a February 25, 2008 progress report, Dr. Yokoyama noted that the worker had severe pain after three hours of work. Dr. Yokoyama stated that the worker needed a slower graduated return to work with a maximum of two hours per shift, three times per week.

[66] In a claim log entry of the same date, the Board vocational rehabilitation consultant noted that the worker called to say that he had completed a three-hour shift, but that this was causing him to be unable to do anything on the weekend as his soreness was persistent. The worker mentioned his visit to Dr. Yokoyama, but the Board vocational rehabilitation consultant said that they would try the schedule for one to two weeks to see how the worker would do.

[67] In a February 26, 2008 letter, the Board field investigator wrote an external service provider to give instructions about the surveillance. The Board field investigator noted that the Board wished to establish if the worker engaged in any activities not in keeping with his medical restrictions. The Board field investigator noted that the worker was actively participating in a graduated return-to-work program and that the worker's schedule would be communicated to the external service provider.

[68] In a February 26, 2008 claim log entry, the Board consultant recorded notes from a conversation with the worker. The worker said that he was still sore after working two hours the previous day. The worker said that he could not do any activities because he could not bend. The worker also reported taking pain medication in order to get up and do the dishes. The worker told the Board consultant that the employer had provided him with anti-fatigue matting and that he split his time between the greeter area and

walking around the store to help customers locate items. The worker noted that he was wearing an old pair of runners at work, as he could not afford anything else.

[69] In a February 27, 2008 claim log entry, the Board vocational rehabilitation consultant noted that the employer had called to advise that the worker's position as greeter would end in late March 2008.

[70] On March 11, 2008, the worker spoke with the Board vocational rehabilitation consultant. In a claim log entry of that date, the Board vocational rehabilitation consultant noted that the worker reported still being sore and that after two hours of work he could barely sit or stand. The worker said that he felt an electric shock in his back and that he could not sleep at night due to soreness. The worker also told the Board vocational rehabilitation consultant that it took him an hour in the morning to get mobile. On his days off, the worker said that he would just rest. The worker could not even do the dishes anymore and reported that his left leg was throbbing. The Board vocational rehabilitation consultant noted that the worker was having non-compensable liver problems. After the Board vocational rehabilitation consultant suggested increasing his hours, the worker said that he would go back to see his doctor, noting that he now felt worse since his February 25, 2008 visit to his physician.

[71] In a March 20, 2008 report, Dr. Yokoyama recommended that the worker reduce his work to two times per week. He asked that the worker be assessed at a pain clinic.

[72] The worker spoke with the Board vocational rehabilitation consultant on March 25, 2008. The worker advised the Board vocational rehabilitation consultant about Dr. Yokoyama's recommendations.

[73] On March 31, 2008, the Board vocational rehabilitation consultant spoke with the employer's coordinator. The worker apparently had not gone into work since March 25, 2008, as he was not sure about the arrangements. The employer's coordinator noted that other greeter positions for four hours per day were available at other stores.

[74] The Board consultant asked the worker if he was ready to proceed to add one more day during the week. In an April 2, 2008 claim log entry, the worker responded that he had too much pain and could not work any more hours.

[75] In an April 7, 2008 claim log entry, a Board medical advisor reviewed the worker's file. He stated that there was no objective medical evidence that the worker's condition had deteriorated. The Board medical advisor also concluded that:

> As for further treatment, my opinion remains unchanged from that expressed at our team meeting. Specifically, further treatment including pain program treatment, is unlikely to bring benefit in terms of pain or function. Inability to tolerate even a few hours per week of sedentary

> work at this time is not plausibly related to the disc herniation that occurred more than a year ago.

[76] On April 9, 2008, the worker underwent a permanent functional impairment evaluation. In a report of that same date, the DA medical advisor (DAMA) noted the worker's statement about his symptoms:

> [The worker] states that he has constant low back pain which never goes away. He is unable to do any exercise because he will pay the price for it the following day. He states that, often the left leg will go numb, especially if he stands on a cement floor. This starts after about 20 minutes. He also experiences a constant throbbing ache in the leg but he notes that the leg does not give out. The back pain increases with coughing or sneezing. There is no bowel, bladder or erectile dysfunction.
>
> The claimant is unable to run and can only walk for about 15 minutes on a flat surface before he has to sit down. He completely avoids hills or uneven ground. Standing tolerance is a maximum of 20 minutes and he states that, when standing, he is unable to lean forward. Originally, extending his back did not cause any discomfort but he states that this seems to be getting worse. Sitting tolerance is about 15 minutes and he has to keep leaning to one side or the other. He states that he avoids climbing stairs wherever possible.
>
> Sleep pattern was disturbed until recently when he started taking Topamax at night. He now takes about one-half hour to get to sleep but sleeps through the night.

[77] In terms of his activities of daily living, the worker told the DAMA that he could not wash his feet in the shower, he had difficulty putting on his shoes and he had difficulty clipping his toenails. The worker also said that he did very little around the house and found it difficult getting in and out of his car. The worker said that he had quit swimming and running.

[78] The DAMA observed that the worker was moderately pain-focused. He noticed that the worker walked with a slow, antalgic gait and that he tended to lean forward when walking. After further examination and measurements, the DAMA concluded that the worker had reduced range of motion in the lumbar spine.

[79] In an April 9, 2008 memorandum, the DAMA advised the Board DA officer that there were no additional factors to be considered.

[80] In an April 14, 2008 memorandum, the Board vocational rehabilitation consultant noted that the plan was for the worker to continue in the work assessment but to consult with a Board medical advisor about increasing the worker's work tolerances. The Board vocational rehabilitation consultant asked for a budget for a further six weeks of vocational rehabilitation assistance from March 31, 2008 to May 11, 2008.

[81] The Board vocational rehabilitation consultant spoke with the worker on April 15, 2008 to obtain an update. In a claim log entry of that date, the worker said that his condition was worsening. The worker said that he could barely walk in the morning and his condition was bad at night. The worker admitted that he was okay in the afternoon if he took his medication. When asked by the Board vocational rehabilitation consultant about moving his work hours to the afternoon, the worker expressed that he would get tired in the afternoon. The worker stated that he did not do much, but that he walked more now that the weather had improved. When the Board vocational rehabilitation consultant suggested that the worker might be able to do more work hours, the worker thought that walking was perhaps aggravating his condition. The employer had asked the worker to complete a daily log of activities that aggravated his condition, although the worker could not think of any such specific activities.

[82] However, by the time of an April 28, 2008 visit, Dr. Yokoyama told the worker not to work due to a worsening of his condition.

[83] The Board consultant spoke with the worker on May 6, 2008. In a claim log entry of that date, the Board consultant recorded the following:

> It takes him about 2 hours to straighten up in the morning after taking medication. He drives his son to school and picks him up. He walks around in the yard. He reports that he is limited to sitting and standing for about 10-15 minutes at a time. After that he has to move around (walk).
>
> I suggested to the worker that his work at a kiosk handing out flyers would allow him to change positions (sit, stand, walk). The worker thinks that the problem with work is that he has to be on concrete floors and that is what is making his condition worse. He also said that the stool at work does not have a back on it so he cannot rest his back.

[84] The last progress report on file from Dr. Yokoyama is dated May 9, 2008. He stated that the worker was completely disabled and that the worker needed to see Dr. Squire for pain control.

[85] On May 13, 2008, the Board vocational rehabilitation consultant spoke with the employer's coordinator to obtain an update. The employer indicated that the worker was no longer working due to pain. However, there was a possibility of an opening at the service desk if the worker was ready to return to work.

[86] On May 20, 2008, the worker called to say that he had fallen twice when his back seized up. He had attended a hospital emergency room on May 16, 2008 and was treated with an injection. The worker noted that he had been unable to walk or independently toilet since May 15, 2008.

[87] In a May 22, 2008 claim log entry, a Board medical advisor provided his conclusions after reviewing the surveillance footage. The Board medical advisor stated that:

> The video surveillance provides evidence of [the worker's] ability to function quite normally with respect to the activities of daily living. For example, he is able to walk and stand for substantial periods of time, carry objects including a child I would estimate to weigh at least 35 lb[s], wash a pick-up truck, and drive a vehicle. He does all of these activities without displaying any signs of discomfort or guarding. He walks with a steady even gait displaying no evidence of a limp or the need to rest at frequent intervals. His tolerance for sustained light activity appears to be normal. The discrepancy between his self-reported level of disability and his abilities recorded in the video surveillance has no plausible bio-medical basis. In my opinion, the abilities [the worker] demonstrates on video surveillance are compatible with full time employment in the service desk position at [the employer's]. A graduated return to work to this position would not be medically necessary.

[88] On May 26, 2008, the Board vocational rehabilitation consultant spoke with the worker. The worker advised that his condition was improving as he was starting to be able to walk. When told of the surveillance footage, the worker said that it was likely taken on days when he felt better after taking Percocet or consuming alcohol. The worker said that the Board probably had footage of him mowing his lawn. However, the worker said that this did not change the fact that he was still in pain and that he had to attend for hospital treatment.

[89] On June 2, 2008, the Board held a meeting with the worker to review the surveillance footage. In a claim log entry of that date, the worker's comments were noted as:

- The lumber that was loaded into his truck was for his father who was building something for the garage.
- He was looking at birdhouses in his coworker's van in the accident employer's parking lot.
- He did not remember what case of alcohol he purchased and loaded into his truck. He reported that it was not a 24 pack of beer as was suggested by the surveillance person, as he does not drink beer. He thought it might have been a 6-pack of coolers.
- He drank four or five 3.5 oz drinks in the afternoon with Percocet. This is how he was able to cope in the afternoon.

- He was only captured on video for a few days each month. He reported that those were the best days captured but he has had many bad days.
- He cannot do eight hours of work. He did not know how much work he could do.
- He was going to a pain program with Dr. Squire, which he was paying for himself at a cost of $350. He had a July 2, 2008 appointment with Dr. Squire.

[90] At the meeting, the worker also expressed disagreement with the Board medical advisor's opinion that he was capable of full-time work.

[91] A Board field investigator wrote an undated memorandum to the Board vocational rehabilitation consultant. The Board field investigator noted that the worker was in possession of a valid driver's licence and that he owned two motor vehicles. He also noted that an external service provider conducted surveillance on the worker from February 2, 2008 to May 15, 2008, resulting in five reports and four CDs. The Board field investigator noted that a June 2, 2008 meeting had taken place with the worker and his wife and that the Board vocational rehabilitation consultant was present. The worker and his wife were given an opportunity to view all of the surveillance footage.

[92] In a June 17, 2008 form 24 memorandum, a Board DA officer noted that the results of the permanent functional impairment evaluation and the surveillance were reviewed and discussed with the senior DAMA. The Board officer noted that the DAMA's expert medical opinion was that the measurements recorded at the PFI evaluation were pain-restricted and that the worker should only be granted a chronic pain award. The award was effective February 3, 2008 (the date following conclusion of wage loss benefits). The Board DA officer noted that there was a pending investigation into whether the worker met the criteria for a projected loss of earnings assessment.

[93] In a July 21, 2008 form 21 memorandum, a Board officer determined that the worker did not meet the criteria for a projected loss of earnings assessment. The Board officer noted that the worker was not precluded from engaging in vocational efforts. While the Board officer acknowledged that it would be difficult for the worker to apply his essential skills to the similar occupation of Telemarketer (NOC Code #6623), the Board officer said that it was not impossible, given the information obtained through observation of the worker in the community and given his transferable skills from previous employment. Moreover, the Board officer noted that the worker could adapt to a suitable occupation (Customer Service Clerk/General Office Clerk, NOC Code #1453) without incurring a loss of 25% in the long term.

[94] On July 23, 2008, the Board issued a decision letter that the worker was not entitled to an assessment for a projected loss of earnings award.

[95] As noted above, the worker requested reviews of the three Board decisions underlying these appeals. In a September 8, 2008 written submission to the review officer, the worker argued that it made no sense for the Board to accept chronic pain, but deny him

treatment at a chronic pain program. The worker suggested that the Board made this decision solely on the basis of the surveillance footage. The worker noted that treatment at a pain clinic might lead to improvement in his level of pain and in his functioning.

[96] The worker also disputed the Board's findings about misrepresentation and declaration of an overpayment. The worker submitted that the video evidence did not support the proposition that he could work 40 hours per week at a customer service desk. While he admitted that the video surveillance showed him capable of minimal physical activity for very short time periods on occasion, the worker said that the medical evidence of the extent of his disability could not be discounted simply on the basis of the surveillance footage.

[97] As for his pension award, the worker argued that he had an objective permanent impairment with the diagnosed disc herniation. He submitted that such an injury resulted in a reduced range of motion.

[98] The worker also submitted a detailed September 4, 2008 letter outlining his dispute with the surveillance footage. He noted that the footage captured him on good days when he had taken all his medication. He stated that he had to try to do some things for his family and that the Board should not penalize him for this. In terms of the lifting of his son, the worker stated that he was forced to do this for safety reasons. He also disputed the characterization that he was washing his truck; rather, he described it as hosing out the box of the truck (a task which only took 20 minutes). The worker noted that the footage did not show him being active for extended periods; rather it showed him walking at a slow pace and displaying facial expressions of pain. The worker noted that he was participating in a pain program on his own initiative. Finally, the worker disagreed with the Board's conclusion that he could work full-time as a service clerk, given that he found it difficult to stand on concrete for prolonged periods of time.

[99] The worker attached to his written submission to the review officer an August 8, 2008 letter from Dr. Yokoyama. Dr. Yokoyama stated his opinion that the worker would benefit from a pain program, as he was not a surgical candidate and he had not responded to nerve blocks and epidural steroid injections. Dr. Yokoyama thought a pain specialist could look at modifying his medications and add therapy to help the worker better manage his pain.

[100] The employer also filed a written submission with the review officer. In an October 17, 2008 letter, the employer submitted that the Board decisions should be upheld. He noted that the worker's reasons for not participating in the graduated return-to-work program were bogus, and that he had misled the Board about his physical capabilities. The employer argued that since the worker did not have a disability that restricted his physical activities, there was no handicap that vocational rehabilitation assistance could seek to remove or lessen. As for the worker's pension award, the employer argued that

there was no contrary evidence offered to the opinion of the DAMA. The employer argued there was little evidence to support the worker's report of his level of pain.

Oral Hearing Evidence

[101] Prior to the oral hearing, the worker submitted a May 25, 2009 letter from Dr. Yokoyama. Dr. Yokoyama reviewed the surveillance footage and stated that a proper clinical judgment about the worker's medical condition could not be obtained, particularly about his range of movement. Dr. Yokoyama reached this conclusion because the worker was only seen walking, sitting and standing. Dr. Yokoyama thought that a proper clinical evaluation of the worker's symptoms would involve an examination and testing. He noted that the video corroborated some of the worker's previous statements, particularly that he benefitted from frequent changes of position.

[102] As well, the worker submitted a series of reference letters from co-workers and other acquaintances who attested to his good character and to the impact of his disability on his physical abilities.

[103] At the oral hearing, the worker first testified that he has worked with the employer for 17 years, starting at the age of 15. At the time of his compensable injury, the worker said that he was a general clerk who worked doing dairy, produce and freezer stocking as a back-up for managers. He worked from 5:30 a.m. to 1:00 p.m. The worker then described in detail the heavy work in the dairy and freezer sections, lifting weights up to 50 pounds.

[104] The worker said that prior to his compensable injury, he was very physically active and engaged in a variety of recreational activities (such as hiking, swimming and boating). The worker also said that, prior to his compensable injury, he was able to help renovate his home. However, since suffering his compensable injury, he stopped all recreational activities and renovation work. He noted that after working for three days, he found that he was limited in his activity level and could not do too much. He noted that his wife must cut the grass due to his condition.

[105] The worker also described the mechanism of his compensable injury, that he continued to work after suffering that injury and he confirmed that he had a 2006 back claim (which resolved after two weeks off from work and physiotherapy treatment). He also confirmed that he had taken medication for his pain.

[106] The worker also described the greeter position duties. He did promotion for a program, by standing at the door in one spot. He confirmed that the employer had provided a stool, but he found it did not provide much pain relief. He stated that as the hours of work progressed, he could no longer handle it. The worker recalled one incident when

he was standing working as a greeter. He said that his back seized up due to prolonged standing. He noted that once his back seizes up, he experiences shooting pains in his leg.

[107] The worker then commented on portions of the surveillance footage taken by the Board. He noted that he carried a six-pound piece of lumbar that his wife used to make Christmas crafts. However, he denied unloading his truck, saying that a neighbour had to assist him. He also submitted that portions of the video actually supported his disability, as the footage showed him limping, that he was not carrying any items in some of the footage, and that his wife was the one carrying items when they went shopping.

[108] As for the footage showing him in his truck, the worker said that he merely hosed the dirt out of the bed of his truck. The worker added that he only attempted the hosing activity after he had taken three to four Percocet pills. He estimated that it only took him 20 minutes to hose out the truck and stated that this was his only activity for that entire day.

[109] As for the carrying of alcohol, the worker could not specifically recall what he was carrying, but he assumed that it was vodka.

[110] As for the lifting of his son, the worker did not deny that he did this, as his son was upset and they were in a busy parking lot. However, the worker said that he had to take Percocet and drink alcohol in order to cope with the pain after he lifted his son.

[111] The worker recalled that in February 2008, he was able to carry out his activities of daily living. He attributed this to the fact that he was not working at the time and he was not pushing himself too hard.

[112] The worker also referred to a journal he kept of his activities. He said that he kept this journal at the request of the Board vocational rehabilitation consultant. As he understood that it was mostly a journal about his feelings and symptoms, he did not write down every activity that he undertook or where he went. He noted that the Board vocational rehabilitation consultant encouraged him to take walks, which he tried to do when he was feeling up to it. He also noted that the journal was not made contemporaneously with events, as sometimes he would not be feeling well or he failed to write down an entry.

[113] The worker maintained that he experiences his disability differently everyday. On some days, he is unable to even get up and must take medications right away. If his pain is very intense, he might need an injection or he begins drinking. If he takes medication and he does stretching exercises, the worker said that he feels better. He also noted that the private pain management program has helped him a lot, but that his pain remains unpredictable.

[114] The worker said that he continues to consult Dr. Squire. She has kept him stabilized on pain medication, so that he no longer has to drink away the pain. Currently, he takes 80 mg of Oxycontin (four times a day); an anti-depressant in the morning and a sleeping pill in the evening. He also found that his general health overall has improved and that he is able to sleep with the sleeping pills. He noted that Dr. Squire has reduced his intake level of pain medication. He estimated that he spends about $600 per month on medication, which is paid for by his extended health benefits plan.

[115] The worker said that he was currently working on light duties three days a week for eight-hour shifts, carrying very light items.

[116] As for his functional tolerances, the worker maintained that he had good days and bad days. He estimated that he could stand for 15 to 30 minutes and that he could sit for longer than that, if he was allowed to shift his body weight. When asked how he was able to sit for the oral hearing, the worker said that he took some extra pain medication and was bearing the pain. He said that his symptoms have not changed within the last year, only that his pain medication allows him to manage that pain. He said that his pain level correlates with his level of physical activity.

[117] As for his restrictions and limitations, the worker said that he can lift 35 pounds, but he has to do it very carefully and precisely. He is afraid of re-injuring his back, so he tries to do all tasks at work with his knees on the floor and with the use of other proper body mechanics. As for his other limitations, he has noticed some improvement in his sitting tolerance, but he still cannot stand for prolonged periods. He is able to carry out low-level work, but he must lie down on the floor. He can use a stool, but finds lying down on the floor works better.

[118] Finally, the worker denied that he had ever made a fraudulent misrepresentation to the Board. He stated that he does not want the life that he has, given that he cannot do the activities he used to enjoy and that he feels that he is a burden on his family. He cited the evidence of his friends and co-workers to show that he was not misrepresenting the level of his disability.

[119] In response to questions from the employer, the worker said that he stopped working as a greeter because he could not tolerate standing in one spot for four hours.

[120] In response to questions from me, the worker said that he is six feet in height. He stated that he used to see Dr. Squire once a month, but he is now only seeing her only once every three months. He also underwent a Pilates exercise program, which he found very helpful. As for how he was able to get into the bed of his truck, the worker told me that he rolled onto the tailgate to get into and out of the truck.

Submissions

[121] At the oral hearing, both parties made oral submissions to me. The worker first referred me to the law and policy about misrepresentation, as well as various WCAT decisions dealing with misrepresentation. The worker argued that there was no evidence that he intended to make a misrepresentation to the Board. Moreover, he argued that the Board failed to consider the video footage in conjunction with the other evidence of his disability. The worker argued that the footage should also be evaluated against the criteria in *WCAT-2008-02019*. The worker also argued that it was not clear against what evidence the Board medical advisor had assessed the video footage and he asked me to rely on Dr. Yokoyama's opinion that the extent of his disability could not be accurately assessed from video footage only.

[122] The worker then made arguments about the other remedies he requested. In particular, he argued that not all of his loss of range of motion was pain-related. He cited *WCAT-2007–01520* as support for the proposition that a chronic pain award and a loss of range of motion award are not mutually exclusive. As for a projected loss of earnings assessment, the worker asked me to direct the Board to assess this, as he said that he is earning 40% less than he was before the injury.

[123] The employer argued that the Board had a basis to make the misrepresentation decision. The employer said that the worker had kept telling the Board that he could not work the following day after doing a two-hour shift as a greeter. On that basis, the Board compared the video footage with the worker's oral reports. The employer disputed the worker's contention that the misrepresentation decision was based solely on the Board medical advisor's opinion. The employer also stated that the Act did not require a fraudulent intent on the part of the worker.

[124] As for the worker's other requested remedies, the employer noted that the private pain program has not resulted in any change in the worker's condition, so the Board was justified in denying this. The employer also argued that the senior DAMA's opinion should be relied upon (noting that there was no contrary expert opinion) and that the percentage of the worker's pension award should be confirmed. As for a loss of earnings assessment, the employer argued that the WCAT decision would be premature, as the employer understood that such an assessment was underway at the Board. Finally, the employer argued that the worker's arguments were contradictory, as it appeared that he had argued that his condition had not changed, yet he was now able to work 24 hours per week. The employer reiterated that the worker was not entitled to vocational rehabilitation assistance, as his disability was not as severe as he had reported it to be.

[125] In rebuttal, the worker noted that his current job is much different than the greeter position. He argued that the Board vocational rehabilitation consultant was not expert enough to assess whether the greeter position was suitable for him and that medical input was needed into that question.

[126] After the oral hearing, WCAT wrote to the parties to request their submissions on a preliminary jurisdictional issue not raised with the parties at the oral hearing. In a July 27, 2009 letter, the parties were asked to make a submission on the following:

> Does WCAT have the jurisdiction to a) address the matter of whether the worker's vocational rehabilitation benefits should be ended and b) the appropriate end date, as a result of an alleged misrepresentation? In other words, does the WCAT panel have the jurisdiction to hear the appeal from the Board's June 3, 2008 decision, or were the matters dealt with in the Board's June 3, 2008 decision, "decisions respecting matters referred to in section 16" of the Act within the meaning of section 239(2)(b) of the Act? Section 239(2)(b) states that a decision of a review officer respecting matters referred to in section 16 may not be appealed to WCAT.

[127] The worker provided an August 10, 2009 written submission on this jurisdictional issue. He submitted that I have jurisdiction over the matters arising out of the Board's June 3, 2008 decision, as the Board's decision was taken under the authority in section 96(7) of the Act (as opposed to section 16 of the Act). He noted that if I decided that I have no jurisdiction over the matters arising from the Board's June 3, 2008 decision, he would be left with no remedy to challenge the Board's finding that he had misrepresented himself. He argued that *WCAT-2006-00752* supported his position.

[128] The employer provided an August 17, 2009 written submission on the jurisdictional issue. The employer argued that the circumstances in *WCAT-2006-00752* could be distinguished, as the worker in these appeals was not receiving income continuity benefits. The employer argued that income continuity benefits were not matters respecting section 16 of the Act. The employer also submitted that the Board's decision to terminate the worker's vocational rehabilitation assistance was made on the basis that the worker was not participating in the rehabilitation process. The employer argued that this was clearly a decision made pursuant to section 16 and, thus, WCAT had no jurisdiction over the matter. As well, the employer argued that the matter of the overpayment was also outside WCAT's jurisdiction, as it related directly to vocational rehabilitation assistance. Finally, the employer argued that the panel in *WCAT-2005-01235* made an error in analysis and that section 16 specifically mentions payments out of the accident fund.

[129] The employer also provided a September 1, 2009 written submission in response to the worker's submission. The employer reiterated the argument that the Board's June 3, 2008 decision related solely to an exercise of discretion under section 16 of the Act and not an application of section 96(7) of the Act. The employer argued that the worker had demonstrated to the Board vocational rehabilitation consultant that he did not have a disability which restricted his physical ability to the extent that he claimed; there was nothing to be done to lessen or remove a disability. Therefore, the employer argued that payment of any vocational rehabilitation assistance would have been contrary to section 16.

[130] The worker provided a September 2, 2009 letter arguing that his circumstances were similar to that of the worker whose appeal was decided in *WCAT-2006-00752*, apart from the fact that he had not refused to participate in a functional capacity evaluation. The worker reiterated that he had not quit his job as a greeter, but had stopped working in that position due to advice from his physician. The worker noted that he is in financial distress and may have to sell his home.

[131] Also after the oral hearing, WCAT wrote to the parties to request their submissions on an additional preliminary jurisdictional issue that was not raised with the parties at the oral hearing. In a December 9, 2009 letter, the parties were asked to make a submission on the following:

> At the oral hearing, both parties made submissions on the panel's jurisdiction over the worker's eligibility for a projected loss of earnings assessment. However, these submissions did not address the effect of the Board's July 23, 2008 decision letter stating that the worker is not entitled to such an assessment. The panel is of the preliminary view that, in light of the Board's July 23, 2008 decision, she has no jurisdiction to address the worker's eligibility for a projected loss of earnings assessment.

[132] In a December 16, 2009 written submission, the worker argued that I have the jurisdiction to refer the file back to the Board for a new decision on whether he is entitled to a loss of earnings assessment if the worker's appeal is allowed with respect to an increase in his permanent functional impairment award. The worker submitted that the July 23, 2008 decision letter spoke only to the worker's entitlement to a loss of earnings assessment if the award was confirmed at 2.5% of disability. The worker noted that he had not filed a request for review of the Board's July 23, 2008 decision letter because based on a 2.5% chronic pain award alone, the July 23, 2008 decision did not appear to be wrong.

[133] In a December 22, 2009 written submission, the employer agreed with my preliminary view of my jurisdiction. The employer argued that on the basis of section 239(1) of the Act, I have no jurisdiction over this matter as the Board issued another separate decision on the worker's entitlement to an assessment for a projected loss of earnings award.

[134] In a further January 4, 2010 written submission, the employer replied to the worker's submission. The employer argued that the July 23, 2008 decision remained binding, regardless of the outcome of these appeals.

[135] The worker was provided with an opportunity to reply to the employer's submissions. No further submission was received by WCAT.

Reasons and Findings

Is the worker entitled to further health care benefits, specifically a referral to a pain program?

[136] Section 21(1) of the Act grants the Board authority to provide health care benefits (including treatment) to injured workers that it may consider reasonably necessary to cure and relieve from the effects of the injury or alleviate those effects. Item #73.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) provides that health care benefits are provided on accepted claims for compensation from the date of injury. They are provided even though the worker is not disabled from earning full wages at the work at which he or she was employed.

[137] Item #78.00 of the RSCM II provides that health care furnished or provided shall at all times be subject to the direction, supervision and control of the Board. The policy item also states that it will be noticed that health care is "subject to" the direction of the Board, but not "under" the direction of the Board. As such, the Board has a choice about the circumstances in which it will give direction.

[138] Item #78.10 of the RSCM II provides that all questions as to the necessity, character and sufficiency of health care to be furnished shall be determined by the Board. The policy item notes that some of the main purposes of the control of treatment by the Board are to ensure that treatment is not overlooked and to promote recovery; but it is not intended to exclude patient choices. The policy item also notes that much of the work of the Board takes the form not of "direction" or "control" but rather suggestions and advice to the attending physician. Insofar as the Board does exercise control, it relates largely to the approval or disapproval of payment for elective surgery.

[139] Having reviewed the evidence, I find that the worker is entitled to a referral to a pain program. I consider that the evidence is evenly balanced in this case about whether a referral to a pain program is reasonably necessary to help alleviate the worker's compensable chronic pain (particularly his ability to function and cope with such chronic

pain). In such cases where the evidence is evenly balanced, I must find in favour of the worker.

[140] Both Dr. Yokoyama's opinion and the Board medical advisor's opinion have deficiencies that undermine the weight to be placed on them.

[141] While Dr. Yokoyama had the benefit of treating and examining the worker (including assessing the worker's skills of coping with pain and the effects of the various treatments underwent by the worker), he did not specifically explain about the potential benefit of a pain program referral given that the worker's chronic pain is permanent.

[142] On the other hand, while the Board medical advisor states a clear opinion that the worker would not benefit in terms of pain or function if he were to be referred to a pain program, the Board medical advisor failed to adequately explain his reasons for this. Moreover, his reasons appear to be based on his opinion that the worker's inability to participate in the vocational rehabilitation process was not reasonably related to his compensable condition. However, the Board accepted that the worker had compensable chronic pain and the Board medical advisor was bound by that adjudicative finding.

[143] As the evidence supporting different findings on this issue is evenly balanced, I allow the worker's appeal of the review officer's November 24, 2008 decision and I vary the review officer's decision. I leave it to the Board to make a determination about the specific details of the pain program, as I note that the worker testified that he has already participated in a pain program and that he wishes to have his costs for such a program reimbursed.

Do I have the jurisdiction to address the Board's decision to set aside the previous Board decision to grant the worker vocational rehabilitation assistance and to declare an overpayment? If I have jurisdiction over these matters, was it appropriate for the Board to set aside the previous Board decision to grant vocational rehabilitation assistance? Was it appropriate for the Board to declare an overpayment of $7,629.60?

[144] Section 239(2)(b) of the Act provides that WCAT cannot hear appeals from Review Division decisions "respecting matters referred to in section 16." Section 16 of the Act grants the Board the discretion to award vocational rehabilitation assistance.

[145] Section 96(7) of the Act states that the Board may at any time set aside any decision or order made by it or by an officer or employee of the Board under Part I if that decision or order resulted from fraud or misrepresentation of the facts or circumstances upon which the decision or order was based.

[146] In order to address my jurisdiction over the review officer's January 16, 2009 decision, I have referred to the "modern rule of statutory interpretation" which provides that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislative body.

[147] In analyzing the purpose of section 239(2)(b), I reviewed the legislative history of this provision, which came into effect in 2003. Prior to the 2003 legislative changes, there was no restriction on rights to appeal Board decisions about vocational rehabilitation assistance. Alan Winter, who reviewed the workers' compensation system in the Core Services Review of the Workers' Compensation Board (Victoria: 2002), recommended this restriction on appeal rights, which makes the Review Division the final arbiter of vocational rehabilitation matters. Although they are not determinative of the interpretative question, I place some weight on the views of the core reviewer about the purpose of section 239(2)(b) as the 2003 revision to the Act incorporated this specific recommendation restricting appeals regarding vocational rehabilitation assistance.

[148] The core reviewer provided two reasons for his recommendation. Firstly, he thought it was inappropriate for a discretionary decision like those made under section 16 to be overturned on the basis of a subsequent decision-maker exercising their judgment differently, rather than on the basis of a finding that the initial decision-maker had wrongly exercised their judgment. Secondly, he thought the restriction was necessary in order to reduce the volume of appeals anticipated to reach WCAT. I note that the legislative debates about this restriction on appeal rights also expressed a concern about the length of time it might take to go through two levels of appeal, which could further delay the time before a worker could benefit from vocational rehabilitation assistance.

[149] Thus, I consider that this legislative history supports an analysis that the main purpose of section 239(2)(b) was to restrict appeals on decisions involving vocational rehabilitation assistance from being heard by WCAT.

[150] The next question then arises as to the ordinary meaning of section 239(2)(b), which specifically uses the broad phrase, "matters respecting" section 16. This is critical in addressing this issue in these appeals, as the worker argues that the January 16, 2009 review officer's decision lies outside the scope of section 16, while the employer argues the opposite.

[151] In assessing the ordinary meaning of the phrase "matters respecting," I referred to the *Concise Oxford English Dictionary*, 10th edition revised (New York: Oxford University Press, 2002), which defines "matter" as broadly as "2. an affair or situation under consideration; a topic."

[152] "Respecting" is also defined broadly by the courts. The B.C. Supreme Court in *Morche* v. *British Columbia* (1982), 40 B.C.L.R. 249 stated:

> The Shorter Oxford Dictionary says "respecting" is derived from the third sense of the verb "respect" which it defines as "to be directed to," "to refer or relate to," "to deal with," or "be connected with." The word "respecting" is defined as "with reference to or regard to." Webster's New World Dictionary equates "respecting" with "concerning" and "about."
>
> The foregoing, and numerous authorities, establish that "respecting" is a word of broad general signification. Almost any provision which relates to the subject matter in question is a provision respecting that subject.

[153] Adopting these definitions, it appears that section 239(2)(b) can be read to mean that decisions made by review officers that are not appealable to WCAT include decisions broadly dealing with or related to topics referred to in section 16.

[154] Section 16(1) states that:

> To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

[155] Does a decision setting aside an injured worker's entitlement to vocational rehabilitation assistance deal with a matter referred to in section 16? In this case, although the Board did not specify the date of the original vocational rehabilitation decision that was being set aside, I have assumed that this was the February 11, 2008 decision from the Board vocational rehabilitation consultant.

[156] It would appear from the ordinary meaning of section 239(2)(b) that decisions setting aside vocational rehabilitation decisions would be included. The "ordinary meaning" of a phrase is "the natural meaning which appears when the provision is simply read through" (see Gonthier J. in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at page 735). It seems apparent that a decision setting aside a vocational rehabilitation assistance decision on the basis of fraud or misrepresentation clearly relates to vocational rehabilitation as it directly affects a worker's vocational rehabilitation assistance.

[157] However, determining the ordinary meaning of statutory language does not end the process of statutory interpretation. The ordinary meaning of a legislative text operates only as a presumption and can be rebutted by evidence that another meaning was intended or is more appropriate in the circumstances. The "modern rule of statutory

interpretation" provides that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislative body.

[158] Although I have already considered above the object of section 239(2)(b) of the Act and the intention of the legislature in formulating that provision in 2003, what remains is to consider section 239(2)(b) in the context of the scheme of the Act. More specifically, are there any reasons why section 239(2)(b) should be interpreted to exclude decisions made under section 96(7)?

[159] The worker has not specifically addressed this question in his submissions. Rather, he asserts that the review officer's January 16, 2009 decision related exclusively to an exercise of the Board's authority under section 96(7) and has nothing to do with section 16. However, this is a difficult argument to accept on closer examination. While it is true that the Board needed to invoke the authority under section 96(7) in order to make the June 3, 2008 decision underlying the January 16, 2009 review officer's decision, it is also true that the direct effect of the Board's June 3, 2008 decision impacted upon the worker's vocational rehabilitation assistance (which was granted under section 16 of the Act). The original basis for the Board's decision that the worker was entitled to such benefits was considered fatally undermined by the worker's misrepresentation. As such, the worker's benefits were terminated and an overpayment declared.

[160] In other words, while the focus of the June 3, 2008 Board decision was the critical finding that there was fraud or misrepresentation that met the criteria outlined in Board policy, those findings merely formed the basis for the decision setting aside the earlier vocational rehabilitation decision. It was not the actual decision that was made. The finding, on its own, has no entitlement consequences. The actual decision made in the June 3, 2008 letter was that the previous Board decision granting the worker's vocational rehabilitation assistance was set aside. Thus, the June 3, 2008 decision directly addresses the merits of the original February 11, 2008 vocational rehabilitation decision in question. The June 3, 2008 decision must address these merits, as section 96(7) states that in order for the Board to set aside a previous decision the misrepresentation must have formed the *basis* for the original decision.

[161] Thus, I consider that the question of fact about whether there was a misrepresentation is the same critical finding that lies at the heart of the section 96(7) analysis and at the heart of the section 16 decision. In this particular case, this finding involves whether the worker was able to participate in the work assessment process and the specific representation of the worker that he was or was not able to participate in the work assessment process due to the effects of his compensable disability and in light of the specific work activities involved in the work assessment job. If these questions were not the central facts in the Board's original vocational rehabilitation decision, then the Board would presumably not have the authority under section 96(7) to rely on a

misrepresentation of that fact to set aside the earlier vocational rehabilitation decision. Moreover, if I was to reject the Board's findings that the worker was not telling the truth about his ability to participate in the vocational rehabilitation process (in other words, reach a different conclusion about whether there had been a misrepresentation) and grant the remedy sought by the worker, the effect would be to restore the original February 11, 2008 decision granting the worker vocational rehabilitation assistance. I find that doing so would necessarily result in my making a decision "respecting" vocational rehabilitation assistance.

[162] I consider that the Board's policy on misrepresentation supports my analysis that the same question of fact lies at the heart of both the section 96(7) analysis and the section 16 decision. Item #C14-104.01 of the RSCM II provides direction that a Board officer must consider the worker's intent or acquiescence in making a statement or concealing false information. The policy item also emphasizes that the decision or order must have been made in reliance on the misrepresentation. In other words, the false statement cannot be about something that is wholly unconnected with the entitlement issue addressed in the decision that is being set aside by the Board. This makes good sense given that Board policy also states that misrepresentation under section 96(7) involves something more than an innocent misrepresentation that a worker could not have reasonably known would be relied upon by the Board in determining his or her entitlement to benefits. This approach of needing a close link between the misrepresentation and the decision to be set aside is in harmony with the Board's policy that provides guidance to Board officers that a lie may be a ground for drawing an adverse inference with regard to the facts to which it relates (see item #97.60 of the RSCM II). It restricts the potential negative impact on entitlement that a subjective interpretation of a false statement may have and provides direction to Board officers that they must closely examine what the false statement relates to. Moreover, Board officers must find that the criteria in item #C14-104.01 are met before the serious action of reversing an entitlement decision can be taken under section 96(7).

[163] I also considered other WCAT decisions on this interpretative issue about the relationship between section 96(7) and section 16 of the Act. In *WCAT-2008-03769*, the panel found that because the amount of vocational rehabilitation assistance was altered by the decision the worker was trying to appeal to WCAT, WCAT could not have jurisdiction over it. At issue was the application of a different policy to the worker's existing reopening wage rate, which was directly connected to the worker's entitlement to vocational rehabilitation assistance as it had the potential to alter their amount. The panel concluded that the decision of the Board under review was respecting a matter referred to in section 16 and WCAT had no jurisdiction to consider the issue. Although only analogous to the situation before me, and appreciating that previous WCAT decisions are not binding upon me, I consider that *WCAT-2008-03769* lends support for my analysis of the scope and interrelationship of sections 96(7) and 16.

[164] In light of the purposes and ordinary meaning of section 239(2)(b), I find that one must have very good reason to consider that it was the legislature's intention to permit WCAT to hear section 96(7) decisions relating to vocational rehabilitation matters. That section does not provide an express exception for decisions made under section 96(7). If it was in fact the legislature's intention to insulate section 96(7) decisions arising from vocational rehabilitation assistance decisions from the effect of section 239(2)(b) (or decisions arising under any other provision), it did not make that intention clear. It presumably would have been a simple matter to do so. All that would have been required would be a change in section 239(2)(b) from "decisions respecting matters referred to in section 16" to something akin to "decisions respecting matters referred to in section 16 other than decisions that are made under section 96(7)."

[165] Ultimately, in my view, if it was the legislature's intention to remove from WCAT the jurisdiction to hear appeals regarding Board vocational rehabilitation assistance decisions, it cannot have been the intention of the legislature for WCAT to have jurisdiction to change Board vocational rehabilitation decisions. Reversing a Board decision under section 96(7) that found that a worker has no entitlement to vocational rehabilitation assistance restores a vocational rehabilitation entitlement decision and therefore changes a Board vocational rehabilitation entitlement decision. To find otherwise would lead to WCAT appeal decisions that conclude that a worker is or is not entitled to vocational rehabilitation assistance. It is difficult to see how WCAT would be entitled to reach such a conclusion given that section 239(2)(b) prohibits WCAT from hearing "decision respecting matters referred to in section 16."

[166] I note that the Board decision under review also declared an overpayment. Section 15 provides that the Board may deduct from compensation money that is owing to the accident fund. Board policy in item #48.41 of the RSCM II provides that an overpayment may result from fraud or misrepresentation by the worker. Given that the overpayment decision is based on the finding of misrepresentation, I consider that a similar analysis about the purpose, ordinary meaning and scope of section 239(2)(b) and its relationship to sections 96(7) and 15 applies. For the purpose of clarity, I find that if the legislature had intended to allow WCAT to hear appeals from decisions of the Board respecting overpayments (related to vocational rehabilitation matters) declared as a result of fraud or misrepresentation by the worker, express language to that effect could have been incorporated into section 239(2)(b). I make no finding about the scope of section 239(2)(b) in relation to overpayment decisions that are declared on the basis of administrative error (for example, a Board decision declaring an overpayment of vocational rehabilitation assistance because there was a computer, mechanical, mathematical or similar error). The Board and review officer's decision under appeal do not raise this particular issue, so it is not necessary for me to address it.

[167] For the reasons above, I find that I have no jurisdiction to address the Board's decision to set aside the previous Board decision to grant the worker vocational rehabilitation assistance and to declare an overpayment on the basis of a finding that the worker made a misrepresentation.

[168] In reaching this conclusion, I am aware that there are other WCAT decisions that have made different conclusions and comments (see *WCAT-2005-01235, WCAT-2006-00752* and *WCAT-2006-00942-RB*).

[169] In *WCAT-2006-00942-RB*, the panel addressed a series of Board decisions that set aside previous decisions dealing with a variety of the worker's benefits (including vocational rehabilitation assistance). The panel concluded that the substance of the matter appealed related to section 96(7) of the Act, as the panel found it significant that the factual basis for deciding the misrepresentation and overpayment issues was not specific to the matter of vocational rehabilitation assistance. I disagree with that conclusion. While the evidence supporting the finding of misrepresentation (in most cases, the surveillance footage) can certainly be used in various decision-making processes by the Board, Board policy directs that a decision-maker must still determine whether that evidence is directly relevant and formed a basis for the original decision in order to exercise the authority under section 96(7). This was the situation in *WCAT-2008-02019a* where the WCAT panel found that the Board's finding that the worker misrepresented his subjective symptoms, activities of daily living and functional abilities could not be used as a basis for a decision to set aside a previous Board decision to accept a particular medical condition as compensable. The panel also noted that the Board had not considered the surveillance footage in conjunction with other evidence (particularly medical evidence) about the worker's condition.

[170] I have also considered the concern raised by the panel in *WCAT-2006-00752*. In that case, the panel addressed a Board decision to set aside a previous decision awarding income continuity benefits which are paid out under section 16 of the Act. The panel in *WCAT-2006-00752* commented that:

> … Misrepresentation is addressed in section 96(7) of the Act, and misrepresentation can impact upon the payment of any type of benefit. I question whether WCAT's jurisdiction should be limited when addressing the implications of a finding of misrepresentation. For example, if the Board had terminated the worker's health care benefits as well as his income continuity benefits, WCAT would be able to address the termination of health care benefits based on misrepresentation, but not the income continuity benefits based on the same misrepresentation. This seems illogical.

> … In my view, a finding of misrepresentation can be made by any Board officer, and is certainly not an issue exclusive to the decision making process concerning vocational rehabilitation matters.

[171] I disagree with the panel's comments, as I consider that if the legislature had intended to grant full appeal rights over matters in section 96(7), an express exception to the prohibition in section 239(2)(b) for matters involving misrepresentation and fraud could have been easily formulated. In the absence of such express language, I consider that section 239(2)(b) is determinative.

[172] I recognize that this may lead to situations where a finding of misrepresentation is confirmed by a review officer for the purposes of considering whether a Board decision that a worker is entitled to vocational rehabilitation assistance should be set aside, but a WCAT panel may later find that there was no misrepresentation directly material to Board decisions regarding other benefits (such as health care benefits or a pension award). However, the problem of inconsistent findings of fact already exists to some extent in the workers' compensation system and in part is a consequence of the well-founded distinction between findings of fact and entitlement decisions.

[173] I deny the worker's appeal and find that I have no jurisdiction to hear an appeal from the review officer's January 16, 2009 decision.

Is the worker entitled to an increased permanent partial disability award?

[174] Section 23(1) of the Act provides that where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury.

[175] Item #39.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) states that the percentage of disability determined for the worker's condition under section 23(1) reflects the extent to which a particular injury is likely to impair a worker's ability to earn in the future.

[176] Item #39.01 of the RSCM II provides that section 23(1) evaluations may be conducted either by a disability awards medical advisor or a Board authorized External Service Provider. Item #96.30 of the RSCM II also provides that this evaluation is not the only medical evidence that the Board may use, but it is usually the primary input.

[177] In assessing a worker's entitlement to a permanent partial disability award under section 23(1), the Board may make reference to section 23(2) of the Act. Section 23(2) of the Act provides:

[178] The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

[179] The section 23(2) rating schedule is Appendix 4 to the RSCM II and is called the Permanent Disability Evaluation Scheduled (PDES). In terms of the spine, the PDES noted that range of movement of the spine is difficult to assess on a consistent basis because the joints of the spine are small, inaccessible and not externally visible. Only movement of a region of the spine can be measured; it is not possible to measure mobility of a single vertebra. Spine movement also varies with an individual's body type, age and general health. Because of these, a judgment factor will continue to be necessary in spine assessment.

[180] Item #39.50 of the RSCM II provides that any award where the PDES is not directly or indirectly used in the assessment is a non-scheduled award. In the case of non-scheduled awards, judgment is used to arrive at a percentage of disability appropriate to the particular worker's impairment. Regard will be had to the section 23(1) evaluation, the circumstances of the worker, medical opinions of Board or non-Board doctors, and to schedules used in other jurisdictions.

[181] In this case, the Board officer did not rely on the range of motion measurements from the section 23(1) evaluation, but relied on the opinion of a senior DAMA who reviewed the surveillance footage. The Board officer then went on to grant the worker a 2.5% award for chronic pain.

[182] I reviewed the noteworthy decision cited by the worker (*WCAT #2007-01520*) and note that in that case, the section 23(1) evaluation results were explicitly found to be unreliable by the DAMA, but the Board officer went on to rely upon them. In this case, the facts are different, as the DAMA did not express that the lumbar range of motion measurements were unreliable, although he did mention that the worker was moderately pain-focused.

[183] The worker implies that the senior DAMA's opinion should be granted less weight as he gave too much significance to the surveillance footage. He provides Dr. Yokoyama's opinion that a proper clinical judgement about the worker's range of movement could not be obtained from the surveillance footage.

[184] I consider that it was reasonable for the Board officer and the senior DAMA to review the surveillance footage and draw conclusions from it. As noted by the Board in its Practice Directive #C12-7 (Surveillance and Other Evidence), the purpose of surveillance is to determine if the worker's presentation in an uncontrolled environment is consistent with his/her presentation in a controlled environment (e.g. an examination by a Board medical advisor). The surveillance footage provides evidence about the worker's presentation and abilities in that specific time period. The policy contemplates

that when making an assessment of spinal range of motion, a judgment factor comes into play. Such an exercise of judgment is also mandated by item #39.50 of the RSCM II which specifically provides that the Board officer must consider the worker's circumstances. Given this direction in policy, it was reasonable for the senior DAMA to have reviewed the surveillance footage.

[185] However, I note that the practice directive also contemplates that Board officers should exercise caution when determining the weight to be given to information revealed in surveillance footage. The activity observed under surveillance should be directly relevant to the conditions, restrictions and limitations under question.

[186] I have reviewed the surveillance footage, keeping in mind that the question before me is about the weight to be placed on the section 23(1) evaluation which measured restricted range of motion in the worker's lumbar spine. I considered Dr. Yokoyama's opinion that it is difficult to assess the worker's range of motion from the surveillance footage. However, I grant weight to the senior DAMA's opinion that the worker's motions were pain-restricted, which undermines the reliability of the section 23(1) evaluation results. While the surveillance footage alone cannot be used to assess the worker's range of motion, I agree with the senior DAMA that it shows that the worker's movements are somewhat pain-restricted. While the worker does not perform an attempt at full flexion, extension or lateral bending in the activities recorded on surveillance, I agree with the senior DAMA that the surveillance footage undermines the reliability of the measurements taken at the section 23(1) evaluation. I note that the worker testified that he believes that the surveillance footage shows that his movements are pain-restricted. Dr. Yokoyama's opinion did not address this aspect of the senior DAMA's finding (namely, whether the worker's presentation was consistent or not) so the weight of his opinion is undermined.

[187] Although he did not have the benefit of examining the worker, I consider that the senior DAMA's opinion is supported by the DAMA's documentation that the worker was moderately pain-focused and the conclusion of the functional capacity evaluators that the worker was capable of more than he demonstrated. Although I acknowledge that the functional capacity evaluators did not mean to imply a malingering intent on the part of the worker, their conclusions go to support the senior DAMA's finding about the consistency of presentation and the role of pain in the worker's movements. Moreover, I note that there is no medical opinion to the contrary. Although Dr. Gittens and Dr. Thompson noted restrictions in the worker's lumbar movements, I placed less weight on their opinions as they were rendered in August and September 2007, approximately six months before the worker's condition stabilized in February 2008 and when the surveillance footage was taken.

[188] Therefore, the weight of the evidence is that the worker's range of motion findings at the section 23(1) evaluation were not reliable. In reaching this conclusion, I make no finding on whether the worker misrepresented his lumbar range of motion. However,

given the unreliability of the section 23(1) evaluation, it was appropriate for the Board officer to exercise judgment and restrict the worker's pension award to 2.5% for chronic pain.

[189] I deny this aspect of the worker's appeal and confirm this aspect of the review officer's January 19, 2009 decision. The worker is not entitled to an increased permanent partial disability award.

Do I have the jurisdiction to address whether the worker is entitled to an assessment for a projected loss of earnings award? If I have the jurisdiction over this matter, is the worker entitled to an assessment for a projected loss of earnings award?

[190] I find that I have no jurisdiction to address whether the worker is entitled to an assessment for a projected loss of earnings award. I agree with the employer that the scope of my jurisdiction on these appeals is limited to the decisions made by the review officer and/or the Board officer in the underlying decisions. As noted by the employer and outlined in WCAT's December 9, 2009 letter, the Board's decision to deny the worker an assessment for a projected loss of earnings award is contained in the Board's July 23, 2008 letter. That July 23, 2008 decision letter does not underlie any of the Review Division decisions before me. Therefore, I cannot address the matter of the worker's entitlement to a projected loss of earnings award. In reaching this conclusion, I have applied item #3.3.1 of WCAT's MRPP (cited above) and section 239(1) of the Act. I note that the worker's submissions on this jurisdictional issue focused on the potential impact of a finding that the worker's pension award should be increased. Given that I have found that the worker's pension award should not be increased, it is not necessary for me to specifically address the worker's and employer's submissions on this point.

[191] I deny the worker's appeal on this issue and find that I have no jurisdiction over the issue of whether the worker is entitled to an assessement for a projected loss of earnings award, as that matter was not the subject of the review officer's January 19, 2009 decision.

Conclusion

[192] I partially allow the worker's appeal to the extent that I find that the worker is entitled to a referral to a pain program. On all other issues under appeal, the worker's appeals are denied on the basis of the following findings:

- I have no jurisdiction to address the Board's decision to set aside the previous Board decision to grant the worker vocational rehabilitation assistance and to declare an overpayment on the basis of a finding that the worker made a misrepresentation.

- The weight of the evidence is that the worker's range of motion findings at the section 23(1) evaluation were not reliable. In reaching this conclusion, I make no finding on whether the worker misrepresented his lumbar range of motion. However, given the unreliability of the section 23(1) evaluation, it was appropriate for the Board officer to exercise judgment and restrict the worker's pension award to 2.5% for chronic pain.

- I have no jurisdiction over the issue of whether the worker is entitled to an assessment for a projected loss of earnings award, as that matter was not the subject of the review officer's January 19, 2009 decision.

[193] The worker did not miss time from work to attend the hearing. However, he incurred an expense of $136.00 to obtain Dr. Yokoyama's May 25, 2009 report.

[194] It was reasonable for the worker to have sought Dr. Yokoyama's report in connection with these appeals. I order the Board to reimburse the worker $136.00 for the expense of Dr. Yokoyama's May 25, 2009 medical report.

Luningning Alcuitas-Imperial
Vice Chair

LA/jm

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