

Noteworthy Decision Summary

Decision: WCAT-2010-01298 **Panel:** S. Yeager **Decision Date:** May 11, 2010

Sections 23(1) and 23.1 of the Workers Compensation Act – Policy item #41.00 of the Rehabilitation Services and Claims Manual - Chronic pain – Additional Factors Outline - Retirement Age

This decision provides an example of when the *Additional Factors Outline* will be used, when a chronic pain award ought to be made, and when benefits ought to be paid beyond age 65.

The worker was 65 years old and self-employed as a garage door installer in March 2005 when he fell and sustained numerous injuries. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the claim for a number of conditions including left wrist traumatic carpal tunnel syndrome with axion injury to the median nerve; and, left and right shoulder tendonitis. The Board provided the worker wage loss and health care benefits until June 18, 2006. A Board officer advised the worker that his permanent partial disability award (pension) would be paid based on 26.03% of total disability. No award was provided for chronic pain as the officer concluded the worker's pain was limited to the area of injury and not disproportionate to the objective findings. The pension would be paid until the worker reached age 70. A review officer declined to take jurisdiction over the date the pension would conclude, and confirmed the remaining aspects of the pension. The review officer's decision was appealed to the WCAT.

WCAT varied the Review Division decision, finding that the worker's functional award should include an additional 11.5% for chronic pain and marked peripheral median nerve damage at the wrist, and that the worker should receive benefits until a retirement age of 75. In coming to this conclusion the panel noted that the medical evidence and worker's reports indicated that there was peripheral nerve damage to the left median nerve, which fell within the category of marked sensory loss under the Board's *Additional Factors Outline*. The panel further found that the worker was entitled to an award for chronic pain as he has some atrophy of the left shoulder muscles and he reports pain that is disproportionate to the injuries accepted on the claim, and that extends beyond the area of injury. With respect to retirement age, the panel noted that the worker continues to operate his business and is now past the age of 70, and the evidence supported a finding that he would continue operating it until he is no longer physically able to do so, which would be at age 75.

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Panel: Sherryl Yeager, Vice Chair

Introduction

- [1] The worker was 65 years old and self-employed as a garage door installer in March 2005 when he fell and sustained numerous injuries. The Workers' Compensation Board (Board), operating as WorkSafeBC, accepted the claim for the following conditions: left wrist traumatic carpal tunnel syndrome with axion injury to the median nerve; left and right shoulder tendonitis; left wrist comminuted fracture distal radius with subsequent open reduction internal fixation, hardware removal and carpal tunnel release; left jaw/chin fracture; and right shoulder interior glenoid fracture. The Board provided the worker wage loss and health care benefits until June 18, 2006.
- [2] A Board officer advised the worker by letter dated January 8, 2007 that his permanent partial disability award (pension) would be paid based on 26.03% of total disability. No award was provided for chronic pain as the officer concluded the worker's pain was limited to the area of injury and not disproportionate to the objective findings. The pension would be paid until the worker reached age 70.
- [3] The worker requested a review of this decision on the basis his pension should not conclude when he reached age 70. A review officer declined to take jurisdiction of this issue in *Review Decision #R0104280*, dated September 2, 2009. The review officer confirmed the remaining aspects of the pension.
- [4] The worker has appealed that review to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

- [5] In the matter before me, the worker disputes the termination of his pension at age 70, and his entitlement to an award for loss of strength and chronic pain. In accordance WCAT practice, I have limited my considerations to these issues only.

Jurisdiction

- [6] This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act).

Appeal Method

- [7] The worker requested the appeal proceed by way of an oral hearing on the basis he requested an opportunity to provide full insight and details into his personal situation.
- [8] I determined further information was necessary regarding the worker's employment and retirement plans, and held a teleconference hearing on April 30, 2010.
- [9] There is no respondent as the worker was self-employed at the time of his injury.

Law and Policy

- [10] Section 23(1) of the Act provides that where an injury results in an impairment in earning capacity, the worker is entitled to a pension based on 90% of the estimated loss of average earnings resulting. This is commonly referred to as the "functional award."
- [11] Section 23.1 of the Act provides the following:

Compensation payable under section 22(1), 23(1) or (3), 29(1) or 30(1) may be paid to a worker, only

(a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:

(i) the date the worker reaches 65 years of age;

(ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board

- [12] The relevant policy is contained at #41.00 of the *Rehabilitation Services and Claims Manual, Volume II*.
- [13] This policy provides, in part that age 65 is recognized as the standard retirement age for workers by a variety of agencies and statistical averages. The policy notes the Board may pay benefits under the Act if it is satisfied the worker would retire later if the worker had not been injured. However, the Board requires evidence that is verified by an independent source to confirm the worker intended to work beyond age 65. Examples of the kinds of independent verifiable evidence that may support a worker's

statement that he or she intended to work past age 65, and to establish the date of retirement, include but are not limited to the following:

- names of the employer or employers the worker intended to work for after age 65, a description of the type of employment the worker was going to perform, and the expected duration of employment
- information from the identified employer or employers to confirm that he or she intended to employ the worker after the worker reached age 65 and that employment was available
- information provided from the worker's pre-injury employer, union or professional association to confirm the normal retirement age for workers in the same pre-injury occupation
- information from the pre-injury employer about whether the worker was covered under a pension plan provided by the employer, and the terms of that plan.

Submissions

- [14] The worker provided submissions through his representative dated December 7 and December 9, 2009.
- [15] In brief, he argued the worker's retirement age should be increased to at least age 75 as the worker had continued working in June 2009 when he turned age 70. The Board had issued a decision on the worker's retirement age in the June 21, 2006 letter and therefore it was properly before WCAT to consider. The worker went on to argue that he was entitled to an additional 2.5% award for disproportionate chronic pain in his shoulders, and an additional award for loss of strength, numbness and swelling in his left hand.

Preliminary Issue

- [16] By way of history, a Board officer issued a decision letter dated June 21, 2006 in which a number of decisions pertaining to the worker's entitlement to temporary disability (wage loss) benefits were made. The case manager determined the worker was entitled to wage loss benefits until June 18, 2006. The case manager went on to determine the worker was likely to retire at age 70. These findings were required due to the worker's age at the date of injury and section 23.1 of the Act which limits temporary wage loss benefits in situations where a worker is age 63 or older on the date of injury to two years from the date of injury or the retirement date as determined by the Board.

- [17] The disability awards officer (DAO) relied on this finding in establishing the termination date of the worker's pension on December 19, 2006, which was communicated to the worker in the letter of January 8, 2007.
- [18] The worker requested a review of the DAO's findings of January 8, 2007. As indicated above, the review officer declined to take jurisdiction of the issue of the worker's retirement age, on the basis that this matter was addressed in the June 21, 2006 decision and was the subject of a pending review. The review officer offered no further analysis of the issue.
- [19] In his request for review of the June 21, 2006 decision, the worker disputed only the decision he would retire at age 70. In *Review Decision #R0104279*, dated October 5, 2009, the review officer provided a thorough analysis of the differentiation between a finding of fact; which is not reviewable as it is a conclusion about evidence and not a decision that affects a worker's entitlement to benefits, and a decision, which is reviewable because it impacts a worker's benefit entitlement. The review officer determined the case manager's finding regarding the worker's retirement age was a finding of fact. The review officer also concluded that termination date of a pension was solely within the purview of a DAO to make, not a case manager. I concur with the review officer's reasoning and findings in the October 2009 decision.
- [20] The worker appealed the October 5, 2009 Review Decision to WCAT. In *WCAT-2010-00458* dated February 15, 2010, the vice chair confirmed the review officer's decision. At paragraph 46 of his decision, the vice chair noted that while the wording of the DAO's December 19, 2007 memo implied she did not exercise her own judgement regarding the retirement date, it was also clear she issued a decision regarding the duration of the worker's entitlement to benefits. I concur with this reasoning.
- [21] The Board first made, and first communicated, a decision regarding the termination date of the worker's pension in the January 8, 2007 pension decision. The case manager's finding of fact in the June 21, 2006 letter regarding the worker's projected retirement date was in relation to the worker's entitlement to temporary wage loss benefits and is not binding on the DAO.
- [22] I consider the issue of the worker's retirement date one that properly arises from the pension decision as it is the termination point for benefit calculations, and it is therefore properly before the appellate body to consider on a pension matter.

Evidence, Reasons and Findings

- [23] The worker's medical history is significant for diabetes and non-compensable carpal tunnel syndrome in the right arm.

- [24] A neurologist assessed the worker on March 14, 2006 for complaints of neck, shoulder and arm pain. Nerve conduction studies indicated the left median distal nerve damage was worse than the right, however in the right arm the ulnar palmar nerve was slightly worse. The left median motor amplitude was reduced at 3.3 millivolts while the right was normal at 10.7 millivolts. There was normal sensory amplitude for the median and ulnar nerves on the right.
- [25] The neurologist determined the worker had moderately severe bilateral carpal tunnel syndrome. The EMG results in the left thenar eminence implied the worker either had severe carpal tunnel syndrome with axonal injury prior to his decompression surgery in September 2005, or that he had ongoing significant carpal tunnel syndrome. The pain the worker reported in his shoulder was not due to cervical nerve impingement.
- [26] The worker attended an occupational rehabilitation 2 (OR2) program in the spring of 2006. The program discharge report, dated June 20, 2006, indicated he was fit to return to work with limitations. During the discharge assessment, the worker demonstrated grip strength in the right hand of 33 kilograms, and in the left of 17 kilograms, which equated to 49% weaker than the right. This result was two standard deviations below the age and gender norms for the left hand. During the testing, the worker indicated his worst level of pain as a 4 on the 1 to 10 severity scale. He reported ongoing deep pain in the left deltoid muscle and left hand. The worker had a cortisone injection to the shoulder on June 6, 2006 which he reported had provided immediate relief. He was discharged from the program as fit to return to work with limitations.
- [27] The worker underwent a permanent functional impairment evaluation on October 18, 2006. He reported constant generalized pain in both shoulders that radiated into the upper arms, worse on the left. He had pain with any activity where his arms were extended or above shoulder level. He had persistent aching in the volar aspect of the left wrist. The worker reported significant symptoms in the right hand, and that he had similar but much milder symptoms in the left hand. He reported that numbness on the palmar aspect of the radial half of the hand including the thumb, index and long fingers. He noted that there is also a pain "like holding a handful of molten steel" associated with the numbness and added that his symptoms were worse at night, in cold conditions, and with exposure to vibration and impact. He denied any swelling in his hands. He noted that he had a lack of feel and dexterity, especially in his right hand and often dropped smaller items. He noted that his grip was weaker and he had difficulty squeezing triggers on tools. He noted that his handwriting had changed and that he had less endurance for using a keyboard and writing than prior to his injury.
- [28] At the examination the evaluator noted the worker had reduced muscle bulk in the left shoulder girdle compared to the right. The left hand was slightly darker in colouration but there was no temperature difference and no evidence of trophic skin or hair changes.

- [29] Sensation to light touch was reduced in a sleeve-like pattern in the right arm with decreased sensation in the right hand. Two point discrimination was normal in the ring and small fingers of both hands, and present at 10 millimetres separation in the thumb, index and long fingers of the left hand.
- [30] Strength of resisted abduction and external rotation was mildly reduced in both shoulders, and otherwise normal in the upper limbs. The evaluator noted there was evidence of moderate to severe right median nerve sensory impairment at the wrist, but the claim status of this was not clear.
- [31] The DAO considered the worker's pension entitlement in a memo dated December 19, 2006. In addition to the scheduled awards for range of motion in the worker's shoulders, left hand and wrist, to which devaluation and enhancement were applied, for a total award of 14.69%, the DAO provided an award of 7.0% of total disability for the worker's difficulty with his jaw alignment that affected his ability to chew. This totalled 21.69%, to which age adaptability was applied to bring the total award to 26.03%. The DAO declined to provide any further award under policy #39.10 for other variables or policy #39.02 for chronic pain.
- [32] On April 30, 2010, I conducted a teleconference hearing with the worker and his representative to obtain further evidence regarding the worker's ongoing impairment and future retirement plans and his remaining symptoms from the injury.
- [33] In brief, the worker provided evidence that he has constant pain in both shoulders, which he rated at a 7 or 8 out of 10 on the severity of pain scale. The worker required 400-milligram strength Advil at night in order to sleep. He uses a bottle of Advil every three weeks. He had a constant pins and needles sensation in his left wrist. He had no power to lift weight above his shoulder level. The worker said he can lift his impact drill up over his head, but then has no strength to pull the trigger.
- [34] The worker went on to describe that he has limited ability to feel what is in his left hand without looking at the item. He can not tell what type of bolt or nut he has picked up, or the tool, without looking at the item. The worker believed this was caused by the numbness in his fingers. He said he would also often inexplicably drop items, including his knife or fork when eating, because of this numbness. He estimated his strength in the left hand is one-third of that in the right. The worker is now taking Lyrica, a neuropathic analgesic, for his right hand carpal tunnel syndrome, and finds this eases the symptoms in his left wrist.
- [35] Regarding his retirement age, the worker said he continues to bid on jobs daily, and works long hours. He said he does not have to work for financial reasons, as he has a number of small pensions and a retirement savings plan. He was in an overpayment situation with the Canada Pension Plan (CPP) Disability Benefits, however has repaid this sum and will be eligible to collect CPP in August 2010.

- [36] The worker went on to say he has a mortgage payment of \$800 a month, which will continue into his 80s. This mortgage resulted from the worker having to refinance his home in order to repay a debt from a prior failed business venture.
- [37] The worker stated that he had tried to sell his business in the past, and this fell through. People in the industry know that he would like to sell the business, but it is not formally listed for sale. The worker said he will not close down the business as he feels an ongoing obligation and dedication to his customers. In addition to installing overhead doors, the worker provides servicing and repairs. He estimated he had 75 to 100 repeat customers, and 200 other jobs a year. He covers a wide geographical area to provide this service.
- [38] He performs most of the work himself, with the occasional bit of assistance from the customer if required, as he is not satisfied with the work ethic of those he has hired to help him in the past.
- [39] The worker suspected he would be forced to retire by the time he was age 75, as he was becoming physically weaker, but he enjoyed working and did not want to stop.
- [40] I should also note that the worker's voicemail message on his telephone line indicates the business office has been reached.
- [41] The worker's representative also provided further submissions regarding the worker's loss of strength and chronic pain, and suggested an award of 3% for loss of strength. He referenced the report of the June 2006 OR2 program in support of this request.
- [42] Regarding the worker's functional award, I refer to the Additional Factors Outline (AFO), available on the Board's website. The AFO is not published policy, however provides guidance on items that are not in the Schedule and are captured by policy #39.01.
- [43] The Board's AFO is not binding policy, but provides guidance for functional awards that are not covered by the Schedule. It is available on the Board's website. Item 2 on page 13 of the AFO, regarding upper extremity conditions, states:

Strength

In a **rare** case, if the DAMA [disability awards medical advisor] believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods, the loss of strength may be rated separately. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the DAMA judges that loss of strength should be rated separately in an extremity that presents other impairments, the

impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. Otherwise, the impairment ratings based on objective anatomic findings take precedence.

Normally, decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (i.e., thumb amputation) that prevent effective application of maximal force in the region being evaluated.

- [44] The item sets out a table and calculations for when loss of strength is provided an award. The item goes on to state:

This table is **only** to be applied on the **rare** occasion when the DAMA indicates there is strong, consistent, objective evidence of weakness not taken into account by the impairment of motion, not limited by pain and not covered by peripheral nerve ratings. There must be a **clear pathological explanation** for the weakness.

[reproduced as written]

- [45] In the matter before me, the evidence shows that the worker's restriction in range of motion and strength are a result of the degree of pain he experiences with movement of his shoulders. There was no physiological reason for the loss of strength the worker experiences of the type described by the AFO. I therefore deny the worker's request on this issue.
- [46] Regarding a chronic pain award, the worker provided evidence that he requires daily medication for the pain in his shoulders in order to sleep and to function. He is no longer using prescription medication for this by personal choice. However, his pain is affecting his ability to move his shoulders, and I note he has some atrophy of the left shoulder muscles compared to the right side. The Board has provided the worker treatment for this pain, and specialists have assessed him because of the level of pain. The worker is reporting pain that is beyond that expected of the injuries, and I find it is disproportionate to the injuries accepted on the claim, and the pain extends beyond the area of injury. I find the worker is entitled to an award of 2.5% of total for chronic pain in his left and right shoulders.
- [47] Finally, the worker provided evidence at the teleconference that he has difficulty with his left hand, differentiating what he has picked up, and that he drops small items. At the permanent functional impairment evaluation, the physician indicated the worker reported this affected his right hand. However, at the EMG testing the worker's left median nerve was more severely affected, consistent with an axion injury that was accepted on the claim. The OR2 program discharge report in June 2006 indicated the

worker had poor function of the left hand and difficulty with fine fingering activities. The worker has consistently indicated his left hand symptoms were more problematic, up until the permanent functional impairment evaluation. I can only conclude that the worker's focus on his right hand at the assessment was due to the recent onset of carpal tunnel syndrome in his right hand. I accept the medical evidence and the worker's reports of his symptoms in his left hand. I note that the permanent functional impairment physician did describe the worker having two point discrimination sensory loss of 10 millimetres in the ring, long and middle fingers of the left hand, and not measurable in the right hand. In addition, although the worker reported significant symptoms in his right hand due to carpal tunnel syndrome, he did not report the inability to touch and sense objects with that hand, only with the left. I therefore consider this to be a result of the compensable injury in the left hand.

- [48] The AFO provides guidance on disability resulting from peripheral nerve conditions at item V, which establishes that these conditions are assessed as mild, moderate, marked or complete, and differentiates between sensory and motor function loss.
- [49] The worker provided evidence that he has difficulty differentiating what an object is when he feels it with his left hand. This ability is known as stereognosis, and the AFO considers the loss of stereognosis, in addition to moderate numbness or paresthesia to constitute a marked sensory loss.
- [50] Marked sensory loss of the median nerve function at the wrist equates to 9% of total disability. The AFO notes at item II, Limb Conditions, that when there is two point discrimination loss due to a peripheral nerve injury, the section regarding peripheral nerve injury should be referred to. I therefore find that the worker is entitled to an additional 9% of total disability for the peripheral nerve damage to his left median nerve. The worker has received awards for loss of range of motion in the left shoulder and wrist, and has a non-compensable condition affecting the right hand. However, this is a non-scheduled award under the AFO, and therefore not subject to Board policies regarding devaluation and enhancement.
- [51] Regarding the worker's retirement age, given that he continues to operate his business and is now past the age of 70, I am satisfied this is not the appropriate age to terminate benefits. Although the worker is in receipt of pension benefits from various sources, he also continues to carry a mortgage, and will not collect CPP for several more months. I accept the worker's evidence regarding his business and his desire to continue operating it until he is no longer physically able to do so. I find the worker's retirement age should be increased to age 75 for pension calculation purposes.
- [52] I allow the worker's appeal as set out above.

Conclusion

- [53] I vary the Board's decision set out in *Review Decision #0104280*, dated September 2, 2009. I find the worker's functional award should include an additional 11.5% for chronic pain and marked peripheral median nerve damage at the wrist. I find the worker will retire at age 75, and his pension entitlement should be calculated accordingly. The worker's file is returned to the Board to make the calculations and provide the worker the increased award.
- [54] No expenses were requested related to the worker's participation in the appeal, and none are identified. Therefore, I make no order regarding expenses.

Sherryl Yeager
Vice Chair

SY/hb