

Noteworthy Decision Summary

Decision: WCAT-2011-01042

Decision Date: April 27, 2011

Three Member Panel: Cynthia Katramadakis, Anthony Stevens, Allan Tuokko

Section 21(1) of the Workers Compensation Act – Health care benefits – Personal care allowances – Independence and home maintenance allowances

This decision is noteworthy because it provides clarification of the distinction between a personal care allowance and an independence and home maintenance allowance.

Policy item #80.10 of the *Rehabilitation and Claims Services Manual, Volume I* (RSCM I) sets out five levels of personal care allowances. A worker at Level 1 has restricted mobility but can feed, partly cleanse and otherwise care for him or herself, but does need some assistance in acts of daily living. Examples are workers with visual impairments, amputations, aphasia, and hemiplegia.

Personal care allowances provided under section 21(1) of the *Workers Compensation Act* (Act) and item #80.00 of the RSCM I are not intended to provide assistance for activities that relate to a worker's inability to manage his or her interactions with the environment around them, such as meal preparation, grocery shopping, housecleaning, and laundry services. Assistance with these kinds of activities are covered by independence and home maintenance allowances provided under section 21(1) of the Act and item #81.00 of the RSCM I. Personal care allowances most reasonably relate to items solely concerned with the worker's ability to perform self-care activities, related to the worker and not the environment around him or her.

In this appeal, to which the former provisions of the Act applied (the Act before June 30, 2002), a worker was found to have a permanent disability arising from dizziness. The worker originally received a permanent disability award of 1% on a functional impairment basis and subsequently was awarded a permanent disability award of 100% on a loss of earnings basis. The worker was in receipt of an independence and home maintenance allowance.

The worker sought payment of a personal care allowance because she required assistance in activities of daily living, including personal hygiene such as bathing, washing her hair, housecleaning, laundry, and shopping. The panel considered these to be requests for assistance for the purpose of a greater level of independence in the home, thus falling within the independence and home maintenance allowance. The panel's interpretation of the kind of self-care activities intended for coverage under the personal care allowance excludes most of these types of activities. The interpretation of the kind of coverage intended by the personal care allowance, such as assistance with self-care activities like eating, grooming, toileting, dressing, and bathing is supported by policy item #80.00 in the RSCM I. The panel considered that only bathing and hair washing fell within the rubric of policy item #80.00.

In the worker's case, assistance with bathing and washing her hair had already been provided through equipment installations recommended by an occupational therapist. Based on these evaluations and the evidence as a whole, the worker did not meet the minimum qualification for even a Level 1 personal care allowance.

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Introduction

- [1] The worker appeals to the Workers' Compensation Appeal Tribunal (WCAT) two decisions of the Review Division of the Workers' Compensation Board¹. In *Review Reference #R0107337*², the review officer confirmed an April 9, 2009 decision of a Board officer with respect to the worker's entitlement to an independence and home maintenance allowance. The review officer confirmed that the worker was entitled to an independence and home maintenance allowance effective May 1, 2009. On the issue of whether the Board properly terminated general housekeeping agency services previously provided to the worker, the review officer returned the matter to the Board to consider whether the worker was entitled to receive a personal care allowance. The Board was directed to provide the worker with a new decision once it completed its further investigation.
- [2] *Review Reference #R0114635*³ addresses implementation of the Review Division's referral back to the Board and the outcome of the Board's further investigation as communicated to the worker in a December 22, 2009 decision letter. The review officer confirmed the Board officer's decision to not provide the worker with a personal care allowance.
- [3] The worker is represented by a workers' adviser. The employer has elected not to participate in the appeals although advised of the right to do so. The worker's representative provided a written submission, which we will refer to as the submission of the worker throughout this decision.
- [4] The worker requested an oral hearing. WCAT's Registry Department determined that the appeals would proceed by way of written submissions. However, we retain the right to consider the appeals through a different procedure, including an oral hearing, if we consider it necessary. We have considered the rule and the criteria set out in item #7.5 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP). It provides that WCAT will normally grant the appellant's request for an oral hearing where the appeal involves a significant issue of credibility, where there are significant factual issues in dispute, or where there are other compelling reasons for convening an oral hearing. WCAT will

¹ Now operating as WorkSafeBC.

² Dated December 2, 2009 and also referred to as the L appeal.

³ Dated June 23, 2010 and also referred to as the M appeal.

normally conduct an appeal by way of written submissions where the issues are largely medical, legal or policy-based, and credibility is not an issue. Having reviewed the evidence and the worker's submissions, we are satisfied the appeals may be decided without an oral hearing. The issues under appeal turn primarily on the application of law and policy to the facts that are not significantly in dispute. Credibility is not an issue.

- [5] Section 238(5) of the *Workers Compensation Act* (Act) provides the authority to appoint a three-person panel where the chair determines that a matter under appeal requires it. This three-member panel was appointed by the chair, although this decision does not constitute a precedent decision under section 250(3) of the Act.

Preliminary Matter

- [6] The substantive issues raised in the worker's notices of appeal and submissions are entitlement to a retroactive independence and home maintenance allowance as well as entitlement to a personal care allowance. The worker did not take issue with the review officer's decision to refer the matter of entitlement to a personal care allowance back to the Board as set out in *Review Reference #R0107337*, nor do we see any obvious reason for her to have done so. For clarity, however, we observe that even if the worker took issue with the directions of the review officer, we would not have jurisdiction to address the appropriateness of the referral back to the Board. Pursuant to section 4(d) of the *Workers Compensation Act Appeal Regulation*, a review officer's decision to refer a decision back to the Board under section 96.4(8)(b) of the Act is not appealable to WCAT. However, a WCAT panel in *WCAT-2004-03138* determined that the legislative prohibition against appeals from referrals back to the Board did not apply to "directions" provided by a review officer. In the panel's view, "directions" constitute binding decisions with respect to a party's entitlement or liability and are therefore appealable to WCAT.
- [7] The worker also did not take issue with the Board and Review Division's implementation of *Review Reference #R0107337*. We note that item #3.3.1 of WCAT's MRPP states the WCAT will generally restrict its decisions to the issues raised by the appellant in the notice of appeal and the appellant's submissions to WCAT. A panel will normally not address issues not expressly raised by the parties but has discretion to do so. A panel will give notice to the parties of its intention to address any issue that was not raised in the notice of appeal or in the submissions to WCAT. We find insufficient reason to depart from this general practice and accordingly, will only address those issues raised by the worker in her notices of appeal and submissions.

Issue(s)

- [8] The issues under appeal are:

1. Whether the worker is entitled to a personal care allowance.

2. Whether the worker is entitled to retroactive payment of her independence and home maintenance allowance.

Jurisdiction

- [9] These are appeals of Review Division decisions pursuant to subsection 239(1) of the Act.
- [10] Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear and determine all those matters and question of fact, law and discretion arising or required to be determined in an appeal before it.
- [11] These appeals are by way of rehearing. WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further evidence, although it is not obliged to do so. Evidence is weighed on the balance of probabilities. In the event that the evidence on an issue respecting the compensation of a worker is evenly weighted, subsection 250(4) of the Act directs the panel to resolve that issue in favour of the worker.
- [12] Policy item #1.03(b) of the Board's *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) explains that generally the pre-Bill 49 provisions, also referred to as the former provisions, apply to an injury that occurred before June 30, 2002. As the worker's injury occurred prior to this date, the former provisions apply. All reference to policy in this decision is in accordance with RSCM I.

Background and Evidence

- [13] The background and history of this worker's claim is set out in many different appeal decisions. We will therefore set out only the evidence that is necessary to frame the issues under appeal. The worker was employed as a noon-hour supervisor at a school. On June 1, 1992, she sustained an injury to her head when a basketball was kicked in the air, falling down on her head. The injury resulted in subjective complaints of dizziness for which the Board ultimately granted a permanent partial disability award totalling 1% effective August 29, 1994.
- [14] Subsequently, the Board granted the worker a 100% loss of earnings pension based on a December 13, 1999 finding by the former Medical Review Panel. The Medical Review Panel noted that the worker continued to complain of constant dizziness and nausea that was present even at rest and in all positions. The worker had reported to the panel of physicians that the constant dizziness and nausea were completely incapacitating for almost all activities of daily living as well as any work-related activities. Her profound postural instability made it impossible to walk without support. She reported that this

feeling of dizziness and nausea led her to fall over either to the left or backwards, at times without warning, and at other times if she attempted to look quickly to either the left or right. She further reported that in her home, in confined quarters, she was able to support herself by holding on to furniture or the walls. According to the Medical Review Panel, the worker described her situation as one in which she was markedly handicapped in her activities of daily living, mobility, and any work activity by dizziness and a feeling of instability. On the issue of residual disability, the Medical Review Panel determined that the worker's disability related to a post-traumatic sense of profound postural instability and severe disorientation that had not abated since the work injury. The Medical Review Panel felt that in the interest of justice, the worker's disability should be assessed on a loss of earnings basis rather than the functional impairment method.

- [15] The Board commenced providing the worker with housekeeping services in October 2004 following an August 30, 2004 attending physician's request. The attending physician indicated that owing to the worker's chronic vertigo it was unsafe for her to try to clean the upper cupboards in her house. Prior to commencing housekeeping services, however, a Board nurse advisor conducted a home visit on September 13, 2004 to review the worker's equipment and housekeeping needs. During the home visit, the worker indicated that her vertigo fluctuated daily and that she had no prior warning or physical symptoms to alert to increased vertigo. She indicated to the nurse advisor that at times she was able to manage daily tasks but at other times she was confined to her bed because of her vertigo and nausea. The worker lived alone and had no immediate family members residing close by; however, she had friends to assist with some housekeeping and heavier tasks.
- [16] The nurse advisor observed that the worker used a three-wheeled walker, which she used on the main living area of her home and used a four-wheeled walker on the lower level. She also kept another small fold-up walker in her vehicle. The worker maintained a driver's license and drove occasionally but only short distances and within city limits. The worker stated that she always held onto something while ambulating whether it was a wheeled walker, furniture, handrails, or solid objects.
- [17] The worker identified tasks that were increasingly problematic. These included cleaning the tops of cupboards and doorframes and doors, cleaning light fixtures, as well as any activities related to general daily household hygiene that required her to either look up or gain height by using stepping stools or ladders. The worker requested assistance from the Board with daily household tasks that involved her to stand on step stools or ladders, as well as those that involved her to look and reach up. The nurse advisor considered it would be unsafe for the worker to climb stepping stools and ladders given her chronic vertigo and therefore, agreed that the worker could not safely undertake these tasks on her own.

- [18] The nurse advisor stated that during their discussions it became evident that the worker was also experiencing some difficulties accomplishing personal hygiene. The worker stated that in order to wash her hair, she had to use the shower unit and found it necessary to forego this task due to bouts of vertigo. The nurse advisor observed that the worker's shower stall was large enough to accommodate a four-legged shower chair and wall handrail. According to the nurse advisor, the inclusion of a handrail in the shower unit as well as a shower stool would allow the worker to complete her basic hygiene needs in a safer, more comfortable manner. In addition to the shower unit equipment, the nurse advisor recommended two hours of housekeeping twice per month. Given this recommendation, the Board contracted the services of a third party provider to meet some of the worker's housekeeping needs.
- [19] The nurse advisor contacted the worker on December 13, 2005 for an update of her housekeeping needs. The worker advised that she still lived alone and found that her dizziness had become worse over the past year. Her nausea had also increased and fluctuated from day to day. She continued to drive but only during the day and only on "good" days. The worker stated that the two hours of housekeeping twice per month was very helpful and she had the cleaners help with heavier work and chores that required overhead work. She advised she was having more difficulty now with vacuuming and cleaning her car as well as with any type of strenuous housework. While she was still capable of cleaning her bathroom and changing bed linens, she requested additional assistance with heavier basic cleaning. The worker acknowledged that the installation of the shower handrail and stool enabled her to wash her own hair and feel safer showering. The nurse advisor recommended an increase in the worker's housekeeping allowance to three hours twice per month to assist with previous chores in addition to heavier housework such as vacuuming, sweeping, and mopping that required the worker to move her head. The Board authorized the recommended increase.
- [20] On January 2, 2007, the nurse advisor contacted the worker for another update of her housekeeping needs. The worker advised that she did not receive the recommended increased hours and because of her continued physical deterioration as she aged, she really needed the additional assistance. She indicated that she was now experiencing more "bad" days than "good" and there were many days when she was so disoriented that she could not drive or leave her house. The worker stated that she really needed an increase in her housekeeping hours to four hours twice per month. According to the nurse advisor, this was a reasonable amount of assistance and she therefore recommended the increase. The Board authorized an increase in housekeeping services to four hours twice a month with another third party service provider.
- [21] The nurse advisor reviewed the worker's need for ongoing housekeeping services with the case manager and vocational rehabilitation consultant in January 2009. A plan was made to have an occupational therapist help assess the worker's personal care as well as independence and home maintenance needs.

- [22] A community occupational therapist conducted a home support services assessment on February 13, 2009. The occupational therapist recorded the worker's subjective complaints of constant dizziness and nausea, being easily fatigued and needing to lie down several times a day to rest, having to apply cold cloths to the back of her neck to reduce nausea, occasionally forgetting things, driving only on "good" days, and fear of falling. The occupational therapist observed that the worker owned her vehicle and had a valid driver's license and there were no adaptations on the vehicle. The worker only used the vehicle on "good" days to travel short distances to the local stores. The worker had support from neighbours and friends who assisted with putting out the garbage and clearing the driveway of snow in the winter. None of her children lived in the vicinity though when they visited they assisted with small household repairs. Under a section of the report entitled "Activities of Daily Living – Functional Limitations", were three subsections: locomotion/movement, self-care, and home management.
- [23] The occupational therapist identified under the subsection locomotion/movement that the worker had functional limitations with transfers and stair climbing. She noted that the worker used a three-wheeled walker or held onto stair rails when moving. The worker's functional limitations were as a result of her balance disturbance and not any additional physical limitations. Under the subsection self-care, the occupational therapist did not indicate that any functional limitations applied. She described the worker as being modified independent in all self-care activities in that she held onto surfaces at all times, used a shower stool and grab-rail in the walk-in shower, climbed into the bath holding on to the bathtub sides, and held onto a small toiletry trolley or the sides of the shower when getting on and off the toilet. Under the subsection home management, the occupational therapist identified the worker had functional limitations with household chores. She noted that the worker was receiving four hours of weekly housekeeping services provided by a third party service provider. These services included vacuuming, washing floors, cleaning bathrooms, changing and washing bed linens, washing indoor (not outdoor) windows, washing curtains, dusting, making beds, taking garbage from first to ground floor, cleaning the vehicle twice per year, and watering plants. The worker's friend assisted her with grocery shopping and carrying bags, and friends and family did minor household repairs such as changing light bulbs. The worker paid a local neighbour to cut her lawn or clear the snow.
- [24] The occupational therapist concluded that the worker continued to suffer from the sequelae of vertigo with poor dynamic balance and nausea. She classified the worker as modified independent in self-care but maximum assistance was required for "IADL [Instrumental Activities of Daily Living]" tasks with the exception of meal preparation. The worker was unable to carry out household tasks that required reaching above head, reaching forward with both hands when standing, or carrying items with two hands while climbing stairs. She was unable to complete any household repairs or grounds-keeping tasks.

- [25] On the basis of these findings, the occupational therapist recommended that the worker continue to be provided with support for “IADL” tasks related to housekeeping of four hours per week as well as be provided with outside window washing services twice per year. She recommended support for home maintenance tasks and for lawn cutting service as well as general clean-up twice per month in the summer months and clearing of snow as required in the winter. Finally, she recommended installation of a versa frame for the en suite toilet.
- [26] A vocational rehabilitation consultant reviewed the occupational therapist’s report with the worker. In a March 11, 2009 claim log memorandum, the vocational rehabilitation consultant indicated that the worker was still in receipt of four hours per week of housekeeping services. The worker indicated that she had hired people to complete certain maintenance activities such as lawn work and snow removal. The worker agreed with the occupational therapist’s recommendations for service.
- [27] A Board officer conducted a review of the file in light of the occupational therapist’s recommendations. The Board officer observed that housekeeping services had been provided for activities the worker felt were unsafe to perform. From paid invoices to the third party service provider, the Board officer indicated that monthly payments had, at times, exceeded the monthly amount the Board granted for an independence and home maintenance allowance. The Board officer therefore felt it appropriate to provide an independence and home maintenance allowance instead of continuing to pay for the general housekeeping services of a third party provider. According to the Board officer, the intent of the independence and home maintenance allowance was to help offset additional costs that a seriously injured worker might incur in hiring others to carry out home maintenance activities. The Board officer determined that payment of an independence and home maintenance allowance to the worker would commence effective May 1, 2009, which would allow for sufficient time to cancel the home maintenance/housekeeping services of the third party provider.
- [28] The Board officer’s review formed the basis of the April 9, 2009 decision letter informing the worker of her entitlement to a monthly independence and home maintenance allowance of \$246.23 effective May 1, 2009 as well as the cancellation of the services of the third party provider for home maintenance/housekeeping services.
- [29] In the December 2, 2009 Review Division decision, the review officer confirmed that the worker met the criteria for an independence and home maintenance allowance set out in RSCM I, item #81.00(b). The review officer also confirmed May 1, 2009 as the effective date of the commencement of the independence and home maintenance allowance on the basis that it would be inappropriate to pay the allowance retroactively for periods prior to a date the Board determined entitlement. The review officer noted that prior to May 1, 2009, the Board had authorized payments for housekeeping services that were considered adequate in meeting the worker’s needs. On the issue of whether the Board properly terminated general housekeeping services delivered by the third party provider, the review officer referred that matter back to the Board for further

consideration. The review officer considered that the worker received some personal care services from the third party provider that were not intended to be covered by the independence and home maintenance allowance. The review officer observed that according to the September 13, 2004 memorandum from the nurse advisor, the worker was having difficulty with certain aspects of personal hygiene. This suggested, to the review officer, that at the time the Board initially arranged for the worker to receive housekeeping services, it had contemplated that an element of these services might be for personal care rather than strictly home maintenance.

- [30] A Board officer considered the worker's entitlement to a personal care allowance. In a July 13, 2009 memorandum, the Board officer noted that the worker had been assessed with a 1% permanent functional impairment, which would not normally be considered sufficient to meet the threshold for a personal care allowance. As well, the Board officer noted that a personal care allowance was not normally considered when an injured worker lived alone. According to the reasoning set out by the Board officer, when an injured worker lived alone and was unable to carry out personal care tasks as a result of the compensable disability, the Board generally considered the services be delivered by a third party provider. The Board officer requested a nurse advisor conduct an in-home personal care assessment regarding the worker's ability to carry out personal care tasks.
- [31] On July 15, 2009, a nurse advisor conducted a home care services assessment. Prior to the home visit, the nurse advisor contacted the worker to get some information on her personal care needs. The worker indicated that she was independent in bathing, toileting, and meal preparation. The nurse advisor indicated that the worker presented as very unwell on the day of the assessment and had been in bed upon her arrival. The worker stated she had several bad days where she needed to stay in bed due to lethargy and vertigo. The nurse advisor noted that the worker ambulated safely with a walker inside her home but struggled with standing for long periods or with bending over. The worker rarely went to her cupboards and could not raise her arms over her head without the onset of vertigo. The worker also suffered from alopecia and therefore chose to wear her hair long and pin it up to cover the bald spots. She struggled to raise her arms to pin up her hair and found her hair difficult to wash. The worker stated she would get nauseous in the shower and often fell over due to dizziness. The nurse advisor indicated in the report that the worker would benefit from personal care three times per week for assistance with washing her hair and showering as well as providing light housekeeping duties.
- [32] In a December 7, 2009 claim memorandum, the case manager stated he accepted that the worker was unable to carry out the personal care tasks to the degree identified by the nurse advisor. However, the Board officer concluded after reviewing the policy, that the worker did not meet the threshold for a personal care allowance given she did not sustain a major injury nor was she severely disabled. The Board officer set out this rationale in the December 22, 2009 decision letter.

- [33] Subsequently, the worker's attending physician provided a January 11, 2010 letter wherein he wrote that the worker was having difficulty with washing and combing her hair as well as bathing and showering because of dizziness and vertigo. He advised that the worker needed personal care assistance as well with cleaning her house and shopping.
- [34] In the June 23, 2010 Review Division decision, the review officer considered the severity of the worker's compensable disability in light of her 100% loss of earnings pension. The review officer acknowledged that the worker was suffering from a disability as a result of her compensable injury; yet, found the magnitude of the disability was not analogous to the severity of disabilities listed as examples in the personal care allowance policy. The review officer observed that the worker was able to complete most of the tasks of daily living so long as she did not have to climb ladders or perform certain overhead tasks. Accordingly, the review officer confirmed the Board's decision to deny the worker a personal care allowance.

Submissions

- [35] The worker provided two submissions: one dated May 3, 2010 in relation to the L appeal, and one dated November 22, 2010 in relation to the M appeal. The worker also appended hand-written letters to her submissions expressing her need for a personal care allowance as well as receipts for payments she made to hire people to perform home maintenance activities.
- [36] The worker submitted that an earlier Medial Review Panel determined that she had an ongoing compensable disability. Subsequently, the Board granted her a 100% loss of earnings pension and over the years, confirmed her eligibility for personal care benefits by providing and paying for the costs of those services through a third party provider. She argued that these services were not for independence and home maintenance allowance related activities such as painting her home, repairing her house, maintaining her yard, or other similar home maintenance activities she could not perform. Instead, the services paid by the Board assisted her with activities of daily living (ADL) and personal care, which she was no longer able to perform. Such services included: house cleaning/keeping, meal preparation, and any tasks that involved retrieving or putting things away in cupboards or closets.
- [37] The worker argued that these services fell under the personal care allowance and not the independence and home maintenance allowance. She stated that few of the duties provided through the Board related to home maintenance. She submitted she could not carry things as she walked with aids and did not have the stamina to prepare a full meal. She could not clean her house effectively, and could not do grocery shopping without help since the friend that used to help her could no longer do so because of a serious illness. The worker stated she could no longer bathe or wash her hair safely without assistance. The worker appended a May 5, 2009 report from her attending physician confirming the need for personal care since without it, the worker would have

trouble living independently. The worker also noted that the February 19, 2009 assessment report confirmed she had many personal care needs including assistance with transfers, stair climbing, household chores, shopping, laundry, and actual home maintenance needs which were provided by friends or paid labourers. The worker submitted that the Board erred in terminating the services of a third party provider, who provided some personal care assistance.

- [38] Regarding entitlement to independence and home maintenance allowance, the worker agreed that she met the criteria for this allowance but argued that she was entitled to payment prior to May 1, 2009. She argued that any home maintenance performed was done so without assistance from the Board. She pointed to the independence and home maintenance allowance policy that provided for retroactive payment if time elapsed between the dates a worker became eligible for the allowance and when eligibility was determined. The worker submitted that in her case, her eligibility for the independence and home maintenance allowance was effective with her eligibility to the loss of earnings pension as it was clear her abilities to attend to home maintenance were compromised as of the date of her pension award.

Analysis of Law and Policy

- [39] Section 21(1) of the Act authorizes the Board to furnish or provide an injured worker with health care costs that it may consider reasonably necessary to relieve or alleviate the effects of the injury. It further provides that the Board may adopt rules and regulations with respect to furnishing health care benefits to injured workers.
- [40] The Board's policy on health care is found in chapter 10 of the RSCM I. The wording of section 21(1) is discretionary, with its permissive use of the word "may". However, having set out health care policies in chapter 10 of the RSCM I, the Board is obliged to follow those policies.

Personal Care Allowance

- [41] Policy respecting payment of personal care expenses and allowances is found starting at item #80.00 of the RSCM I. It states that:

In cases of major injuries, such as spinal cord injuries, resulting in paraplegia or quadriplegia, severe head injuries, hemiplegia, aphasia, near or total blindness, multiple amputations, or severe disability as a result of occupational diseases, the Board may pay certain personal care expenses. These expenses are in addition to wage-loss or pension benefits.

Personal care expenses may be paid when a seriously disabled person, though not confined to an institution, has very limited mobility or requires assistance in toilet functions, bathing, eating, or has other problems in

caring for himself or herself, or needs assistance to a lesser or greater degree in daily living. Personal care expenses are payable at the discretion of the Board. An investigation is made of the circumstances of each case.

While aimed primarily at situations where there is severe permanent disability, in limited situations personal care expenses may also be paid in cases of severe temporary disability. Before making temporary payments, consideration is given to such factors as the worker's home and family situation, geographical location, the medical condition and other relevant difficulties.

[42] Policy item #80.10 of the RSCM I sets out the five levels of personal care allowances. They range in terms of the severity of the disability with Level 1 being the least severe and Level 5 being the most severe. For example:

Level 1: The claimant has restricted mobility but can feed, partly cleanse and otherwise care for himself or herself but does need some assistance in acts of daily living.

Examples are:

- Blindness or near blindness, multiple amputations at or above the wrist or ankle, aphasia, hemiplegia, or any permanent disability resulting in a loss of function of the limbs, but not to an extent that significantly impairs other body functions.

[43] Whereas,

Level 5: The claimant is totally immobile for all practical purposes and essentially requires assistance in all phases of personal hygiene, body functions and acts of daily living (quadriplegic, decerebrate and bedridden).

Independence and Home Maintenance Allowance

[44] Policy item #81.00 of the RSCM I discusses the intent of the independence and home maintenance allowance, which states:

Normally, most workers who are homeowners have the physical capacity to maintain their property in order to protect their investment in home and property. Such things as painting, repairing, landscaping, appliance repairs, renovations and the many other activities required to maintain the home are difficult or impossible for the disabled. The severely disabled claimant is usually required to hire tradespersons or others to carry out

these activities, thereby incurring additional costs for maintaining home and property.

Similarly, the disabled claimant may not have the physical capacity to maintain and/or drive a car or to use public transportation, and is consequently required to hire taxis or other forms of transportation to enjoy a reasonable degree of independence.

In order to assist in these and similar kinds of expenses, the Board has established a category of assistance separate and distinct from personal care allowances, called the independence and home maintenance allowance. This allowance may be paid over and above any level of personal care allowance and is in addition to any wage loss or pension benefits.

- [45] The policy lists the following criteria for the payment of the independence and home maintenance allowance:

Effective September 1, 1992, the criteria for paying the independence and home maintenance allowance are as follows:

1. The worker must have sustained a permanent compensable disability which meets one of the following criteria:
 - (a) The disability measured using the physical-impairment method of assessment is equal to 75% of total or greater.
 - (b) The disability measured using the projected-loss-of-earnings method of assessment is equal to an equivalent of 75% of total or greater and it is concluded, after obtaining the advice of the Vocational Rehabilitation Consultant, that the disability will prevent the worker from carrying out the activities covered by the allowance.
 - (c) The compensable disability is superimposed on another permanently disabling medical condition, whether compensable or not, and the combined disability meets (a) above or the Board grants a projected-loss-of-earnings award which meets (b) above. Where the pre-existing disability is non-compensable, the compensable disability must be at least half the combined disability measured using the physical-impairment method of assessment and be a significant factor in the worker's inability to do the activities covered by the allowance.

2. The worker must maintain a home or live in rented accommodation. A worker who lives in a nursing hospital or extended care facility will not be eligible. Other accommodation may be approved if it can be concluded that the worker would have contributed to its maintenance had the disability not occurred.
3. If the worker is institutionalized in a hospital, nursing care facility or extended care facility, but the spouse and children continue to maintain the family home, the allowance may be paid to the spouse.
4. The allowance commences as of the date when the worker meets the criteria set out above and will be terminated upon the death of the worker or if the worker ceases to meet the above criteria. The allowance may be paid retroactively if time elapses between the date of the worker becoming eligible for the allowance and the date eligibility is determined. With regard to any period prior to September 1, 1992, no payment can be made unless the worker meets the criteria which existed prior to that date. (22)

The independence and home maintenance allowance is payable at the discretion of the Board. The circumstances surrounding each case will be reviewed by the Rehabilitation Consultant who will provide a report and recommendations.

[46] These policies are open to a variety of interpretations due to their ambiguity. This appeal is an illustration of the interpretation difficulties that can arise with respect to non-specific delineated requests for assistance. Both the personal care allowance and independence and home maintenance allowance policies set out certain specific items, which are clearly within the ambit of their respective entitlements. For example, policy item #80.00 of the RSCM I clearly sets out personal care allowance coverage for assistance with such things as washing, personal grooming, and feeding. Policy item #81.00 of the RSCM I sets out coverage for an independence and home maintenance allowance for assistance with such things as home repairs or renovations, and painting as well as costs associated with having to take other forms of transportation. Difficulty arises, however, when the activities are not specifically set out within either of the respective policies, such as housekeeping services and meal preparation. Thus, the first task in this appeal is to analyze each of the policies and determine the scope of the coverage in each.

[47] At the outset, we recognize that other entitlement provisions need to be met for receipt of a personal care allowance or independence and home maintenance allowance. Independence and home maintenance allowance entitlement requires that in order to qualify in the first instance, a worker must have a permanent compensable disability that is either a physical impairment of 75% of total or greater or, a loss of earnings pension

that is 75% of total or greater. We observe that no specific percentage threshold has been established for the personal care allowance. However, policy item #80.00 of the RSCM I sets out examples of the types of conditions recognized as being of sufficient severity to initially qualify for this allowance. While the conditions listed in policy are examples only and not an exhaustive list, we accept that they serve to underscore the severity of the types of conditions the Board would consider sufficiently disabling in order to qualify for a personal care allowance.

- [48] As the policies are not completely clear on what is covered, the question becomes: what is the most reasonable way to interpret them? We find that the most reasonable interpretation of the assistance covered by each policy is that personal care allowance is intended to cover items specifically related to the worker's ability to manage self-care. The independence and home maintenance allowance is intended to cover items that relate to the worker's ability to manage his or her interactions with the environment around them, particularly as they relate to the home and transportation. Our reasoning for this follows.
- [49] First, we considered what the policies themselves express as their intention. Policy item #80.00 of the RSCM I relates to personal care expenses and allowances. Seemingly, this relates to the ability of the worker to care for his or her own personal needs. The items specifically set out in policy item #80.00 as well as those delineated in the examples under policy item #80.10 for the different levels of allowance, all relate to the worker's ability to perform self-care.
- [50] In contrast, policy item #81.00 of the RSCM I relating to independence and home maintenance allowance as well as policy item #84A.00 relating to homemakers services, both deal with the worker's ability to interact with the environment. In other words, they relate to the worker's capability of performing activities not related to personal care but to the home environment and transportation.
- [51] We observe, for example, that policy item #81.00 sets out painting, repairs, landscaping, and transportation, among others, as categories for consideration. All of these activities concern the worker's ability to interact with their environment, regardless of their ability to perform activities related to self-care. In a similar manner, policy item #84A.00 concerns the worker's ability to maintain household duties relating to the family, not to self-care items.
- [52] The differences between the items considered in policy item #80.00, and those in policy items #81.00 and #84A.00 are further established by the potential entitlement of the worker to these allowances or benefits when they are no longer at home, as in policy item #81.00; or they have a spouse who, owing to illness or injury, cannot care for the children living at home, as in policy item #84A.00. The allowance and benefits are potentially payable regardless of the worker's self-care capabilities.

- [53] We also considered whether there are Board practices, processes, or procedures related to the policies. We find that it would be reasonable to expect that the Board's own practices or processes would be consistent with the intent of the respective policy items. In this regard, there are no practice directives to assist with interpreting policy items #80.00 and #81.00. However, we looked at the Board's own processes, and found there are some useful comparators.
- [54] The Board contracts with providers to assist injured workers in various areas of medical and rehabilitation matters. The Board's contracts for homecare providers are generated through forms 82M12 - Home Care Services Assessment, and 82M13 - Home Care Services Care Plan⁴, which set out numerous evaluative and care criteria. The forms enumerate such evaluative and care criteria as: bowel, bladder, transfer, hygiene, cognition, skin integrity, and mobility. From our view, all these items relate to the worker's ability to perform activities of a self-care nature and comparisons can be easily drawn with the items set out in policy item #80.00.
- [55] Form 83M102, entitled "Independence and Home Maintenance Allowance", sets out a number of evaluative criteria as well. These are in two major categories: First, Home Maintenance, which includes housekeeping, painting, yard work, repairs, and minor renovations; and second Transportation. All of the evaluative criteria in this form relate to the worker's ability to interact with the environment; they are not matters related to self-care. The items are also consistent with those enumerated in policy item #81.00.
- [56] We consider that another area of comparison is how the policies compare to generally accepted medical categories of assessment. There are two categories that are relevant to the consideration of the policies in this appeal.
- [57] The first category is ADL. The definitions vary slightly from source to source but generally are limited to and inclusive of: eating, grooming, bathing, dressing, and toileting. A relevant and reliable example of this is the Vancouver Island Health Authority, Rehabilitation Standard: Self-Care (ADL)⁵. We consider this to be a relevant example as it relates to the British Columbia jurisdiction in which the worker in this appeal resides. The items set out in the ADL category are essentially analogous to those contained in policy item #80.00 and identified through the Board's processes.
- [58] The second category is IADL. Again, we observe that while the definition varies slightly from source to source, the items generally included are: preparing food, shopping, cleaning the house, managing money, laundry, public transportation, gardening, and minor home repairs. We consulted the Vancouver Island Health Authority website,

⁴ The Board's forms can be viewed at www.worksafefbc.com/forms/default.asp?showTab=health_care#health_care.

⁵ The document is publicly accessible at <http://www.viha.ca/NR/rdonlyres/5DA18743-21B4-43BB-849B-EE99CF5A3825/0/RehabilitationStandard8ActivitiesofDailyLiving.pdf>.

which furnishes a relevant example in their Rehabilitation Standard: IADL⁶. The criteria in this category relate to the person's ability to interact with their environment and are essentially analogous to those in policy item #81.00.

[59] We find that it can be reasonably concluded, based on the contents of the policies themselves, the Board's processes, and the generally accepted medical categories, that personal care allowance in policy item #80.00 and independence and home maintenance allowance in policy item #81.00 are intended for specific aspects of the effects of a permanent disability on a worker. Personal care allowance most reasonably relates to items solely concerned with the worker's ability to perform self-care activities, related to the worker, not to the environment around him or her. The independence and home maintenance allowance relates to the worker's ability to interact with the environment around them, not with self-care of the person of the worker. We consider that when policy item #81.00 refers to similar kinds of expenses in order for a worker to enjoy a reasonable degree of independence, it meant more than the independence a worker would attain from transportation services. We do not consider, based on the Board's established processes that the independence portion of the independence and home maintenance allowance should be restricted solely to the additional expenses a worker may incur through his or her transportation needs.

[60] Therefore, we find that having determined the most reasonable interpretation of the policies, an activity such as housecleaning is environmental in nature and assistance with meal preparation and laundry promotes a worker's ability to function independently. Hence, we find that these and similar activities are intended to be covered by the independence and home maintenance allowance, They are not related directly to the worker's person and therefore, we find they are not intended to be covered by a personal care allowance.

Reasons and Findings

[61] The worker seeks the payment of a personal care allowance on the basis that she requires extensive assistance in ADL including personal hygiene such as bathing and washing her hair, housecleaning, laundry, grocery and other shopping, and retrieving and putting items or goods away in upper cupboards. She submits that assistance with these activities fall under the rubric of personal care not home maintenance.

[62] There are two considerations in determining the worker's entitlement to a personal care allowance. First is whether the payment for the activities for which she seeks assistance relates to personal care. Second is whether, based on her restrictions and limitations from the compensable disability, there is a requirement for personal care to assist with those activities. The first consideration has been discussed to some extent in our analysis of the law and policy. As our analysis shows, independence and home

⁶ This document is publicly accessible at <http://www.viha.ca/NR/rdonlyres/5072D5C3-959D-4AF9-9300-2D467A957E29/0/RehabilitationStandard13InstrumentalActivitiesofDailyLiving.pdf>.

maintenance allowance encompasses payment for assistance with those activities that promote independent living and involve interaction with one's physical environment. We consider that the goal of the independence and home maintenance allowance is to promote a worker's ability to function as independently in their home environment regardless of their needs in the functional area of self-care.

- [63] Our analysis of the policy leads us to conclude that the worker's request for assistance with such activities as meal preparation, grocery shopping, housecleaning, laundry, and retrieving and putting away items in cupboards are for the purpose of promoting a greater level of independence in her home. We consider that these activities are separate and distinct from any assistance she might require in the functional area of self-care, which our analysis of the policy shows is to ensure a certain level of independence with ADL. We consider that our interpretation of the kind of self-care activities intended for coverage under the personal care allowance excludes the types of activities such as meal preparation, grocery shopping, housecleaning, and laundry for which the worker seeks a personal care allowance. We further consider that our interpretation of the kind of coverage intended by the personal care allowance such as assistance with self-care activities like eating, grooming, toileting, dressing, and bathing is supported by policy item #80.00.
- [64] Out of the self-care activities identified by the worker for which she seeks a personal care allowance, we find that only personal hygiene involving bathing and hair washing properly falls within the rubric of policy item #80.00. We recognize the worker is totally unemployable; yet, we highlight the fact that her functional limitations and restrictions as determined by the Medical Review Panel related to a post-traumatic sense of profound postural instability and severe disorientation. During the first assessment in September 2004, the worker identified tasks that related directly to her accepted limitations and restrictions. She identified that cleaning the tops of cupboards and doorframes and doors, cleaning light fixtures, and any activities related to general daily household maintenance that required her to either look up or gain height by using stepping stools or ladders were becoming increasingly problematic. Accordingly, her request and the Board's coverage involved assistance with daily household tasks that required her to stand on stepping stools or ladders, as well as those that involved her to look and reach up.
- [65] During that initial visit, it became evident to the nurse advisor that the worker was also experiencing some difficulties accomplishing personal hygiene related to washing her hair. The nurse advisor observed that the worker's shower stall was large enough to accommodate a four-legged shower chair and wall handrail, which would allow the worker to complete her basic hygiene needs in a safer, more comfortable manner.
- [66] The Board authorized the necessary installations and the worker indicated to the nurse advisor during a December 13, 2005 review that the installation of the shower handrail and stool enabled her to wash her own hair and feel safer showering. We observe that although the nurse advisor recommended an increase in the contracted third party

services at the time, this was in relation to the worker's housekeeping such as vacuuming, sweeping, and mopping. We observe that the increase in services did not involve assistance with the worker's self-care activities as those were enabled through the installation of the shower handrails and chair.

- [67] The occupational therapist described the worker as modified independent in all self-care activities. We consider that the modifiers used to describe the worker's level of self-care relate to the worker's ability to interact with her physical surroundings such as having to hold onto surfaces at all times, use a shower stool and grab-rail in the walk-in shower, climb into the bath holding on to the bathtub sides, and hold onto a small toiletry trolley or the sides of the shower when getting on and off the toilet rather than describing her ability to engage fully and satisfactorily in relevant self-care activities. The occupational therapist identified that the worker required maximum assistance with "IADL" with the exception of meal preparation. Specifically, she required assistance with vacuuming, washing floors, cleaning bathrooms, changing and washing bed linens, washing indoor (not outdoor) windows, washing curtains, dusting, making beds, taking garbage from first to ground floor, cleaning the vehicle twice per year, and watering plants. As we have identified, these activities referred to by the occupational therapist fall under the independence and home maintenance allowance.
- [68] In our view, the evidence presented by the occupational therapist is consistent with that of the nurse advisor. Both identified the worker's need for assistance was in relation to activities that we consider covered by an independence and home maintenance allowance. Although the worker submitted she required assistance with personal care, this is not borne out by the evaluations of the occupational therapist and nurse advisor. We find that any assistance she requires with bathing and washing her hair has been provided to her through equipment installations as well as additional equipment recommendations as indicated by the occupational therapist. Accordingly, we find that based on these evaluations and the evidence as a whole, the worker does not meet the minimum qualification for even a Level 1 personal care allowance.
- [69] We are mindful other WCAT decisions that have discussed these policies might be contrary to our analysis. The worker referred us to some of these decisions; however, we are not bound to follow previous WCAT decisions, except for a decision of a precedent panel appointed by the chair of WCAT under section 238(6) of the Act. Moreover, we recognize that policy items #80.00 and #81.00 of the RSCM I are ambiguous and open to various interpretations. While not free from doubt, our analysis is simply meant to provide some help when considering those policies.
- [70] The worker also asserted she was entitled to retroactive payment on her independence and home maintenance allowance. However, her entitlement to an independence and home maintenance allowance could not commence until she met all the criteria set out in policy. With respect to the first criterion, the worker's permanent disability measured under subsection 23(1) of the Act was 1% of total disability; yet, her entitlement under subsection 23(3) of the Act exceeded 75% effective August 29, 1994. The worker

submitted that entitlement for the independence and home maintenance allowance was effective August 29, 1994, the date she became entitled to 100% loss of earnings award.

- [71] On a loss of earnings basis, the demarcation line between those that meet the criterion and those that do not is 75%. Yet, that basis alone is insufficient in deciding the effective date of the independence and home maintenance allowance. We consider that policy contemplates something more restrictive than purely meeting the percentage threshold.
- [72] We examined the second criterion set out in policy for paying the independence and home maintenance allowance, using the projected loss of earnings method of assessment. The second criterion concerns obtaining advice of the vocational rehabilitation consultant that the disability will prevent the worker from carrying out the activities covered by the policy.
- [73] In this case, the Board obtained the advice of a nurse advisor, who expressed the view that the disability prevented the worker from carrying out the certain activities around the home that would be covered by an independence and home maintenance allowance. Based on the nurse advisor's recommendation, the Board started paying expenses related to assisting the worker maintain her independence in October 2004. The claim file does not explicitly state under which policy those previous expenses were being covered. We consider, for the purposes of deciding this issue, it was not necessary to resolve that question since the Board determined the effective date of the independence and home maintenance allowance was May 1, 2009.
- [74] As indicated earlier, policy item #81.00(4) of the RSCM I provides that the allowance may be paid retroactively if time elapses between the date of the worker becoming eligible for the allowance and the date eligibility is determined.
- [75] In this case, we are satisfied that the worker became eligible for the allowance as of the date both criteria for paying the independence and home maintenance allowance using the projected loss of earnings method of assessment were met. We find that, based on the initial nurse advisor's recommendation, the worker first became entitled to an independence and home maintenance allowance in October 2004. We acknowledge that the Board had already paid through a third party provider service covered by the independence and home maintenance allowance from that time to May 1, 2009. Therefore, the worker's entitlement would be the amount of the independence and home maintenance allowance set out in policy starting in October 2004, less actual expenses paid by the Board on her behalf.

Conclusion

- [76] We vary the Review Division decision dated December 2, 2009 (*Review Reference #R0107337*) and allow the worker's appeal. We find that the worker is entitled to retroactive payment of her independence and home maintenance allowance commencing October 2004, less actual expenses paid by the Board on her behalf.
- [77] We confirm the Review Division decision dated June 23, 2010 (*Review Reference #R0114635*). We find that the worker is not entitled to a personal care allowance.
- [78] There was no request for reimbursement of appeal expenses. None are apparent. Therefore, we make no order in that regard.

Cynthia J. Katramadakis
Vice Chair

Anthony F. Stevens
Vice Chair

Allan Tuokko
Vice Chair

CJK/ml