Noteworthy Decision Summary

Decision: WCAT-2012-00718 **Panel**: Debbie Sigurdson **Decision Date:** March 15, 2012
Beatrice Anderson
Guy Riecken

Section 23(1) of the *Workers Compensation Act* – Partial permanent disability awards – Loss of function awards – Use of Discretion – Range of motion – Spine – Specific chronic pain – Permanent functional impairment evaluations

This decision is noteworthy for the approach taken by the panel to determine the amount of the worker's permanent partial disability award under section 23(1) of the *Workers Compensation Act* ("loss of function award" or "permanent functional impairment award") where the worker's presentation during a permanent functional impairment (PFI) evaluation is compounded by chronic pain.

Generally, a loss of function award is calculated based on the permanent disability evaluation schedule (PDES) set out in Appendix 4 of the *Rehabilitation Services and Claims Manual*, Volume II (RSCM II). This calculation results in a "scheduled" loss of function award. For the spine, the schedule sets out percentages of impairment based on the range of motion in the affected region. The range of motion is measured during a PFI evaluation. In the alternative, or in combination, a worker may be entitled to a "non-scheduled" loss of function award, such as an award for chronic pain. Chronic pain awards are fixed by Board policy at 2.5% of total disability.

The worker, a steel fabricator, was pulling a steel plate that weighed 60 to 70 kilograms when he suffered a L5 disc herniation and pain that referred to his left leg. The issue of whether the worker is entitled to a loss of function award was originally considered in *WCAT-2006-02312.* The panel in that decision denied the worker a scheduled award under section 23(1) for the loss of range of motion the worker displayed at the PFI evaluation and granted the worker a chronic pain award of 2.5%. In *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal),* 2011 BCSC 329, Madam Justice Bruce determined that this conclusion was patently unreasonable to the extent that it concluded that a worker is precluded from receiving a loss of function award on the basis of a loss of range of motion in cases where the loss of range of motion is due to chronic pain. The court set the decision aside and remitted the matter back to WCAT.

A three person panel considered the loss of function award issue again in this decision. The panel accepted that the worker's chronic pain was genuine and influenced his ability to accurately complete the PFI evaluation, which had measured his reduction of range of motion impairment at 9.5%. The panel determined that a scheduled award cannot be based on measurements that do not accurately estimate the degree of impairment. Considering the court's conclusion, the panel reviewed approaches taken in other WCAT decisions where PFI evaluations were affected by pain and considered several options, including:

- Exercising its discretion under section 246(2)(d) of the Act to request the Board conduct a second permanent functional impairment evaluation of the worker;
- Using the existing range of motion measurements obtained by the Board Medical Advisor during the PFI evaluation;

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- Referring the worker to an independent health professional pursuant to section 249 of the Act to assess the residual impairment to his lumbar spine;
- Seeking an opinion from a Board Disability Awards medical advisor, pursuant to section 246(2)(d) of the Act, as to what the expected loss of range of motion would be given the worker's injury and the available medical evidence;
- Assessing the worker's functional impairment pursuant to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides); or
- Using medical evidence from other treating professionals regarding the worker's lumbar spine range of motion to assess his entitlement to a scheduled award.

The panel found that in this case there was sufficient evidence available to assess the worker's percentage of disability and therefore it was not necessary to refer the worker for further evaluations. This evidence showed that the worker had a "moderate reduction in range of motion". The panel was not prepared to conclude that the PFI evaluation was invalidated by the fact that the results were influenced by the worker's pain but stated that they must take this into account when considering the appropriate award. The panel emphasized that the PDES was a guide only and that determination of a permanent functional impairment is not an exact science and requires the decision maker to consider all of the evidence to estimate the impairment.

The worker argued that he was entitled to both a 9.5% award for his loss of range of motion as well as a 2.5% award for chronic pain. The panel disagreed, finding that doing so would over-compensate the worker. However, the panel also concluded that providing the worker with only a chronic pain award may undercompensate the worker and that it was inappropriate to follow the approach taken in *WCAT-2012-00139,* where the worker was provided the full scheduled award for loss of range of motion and no award for chronic pain, because there is nothing that prohibits a worker from receiving awards for both chronic pain and for loss of range of motion due to chronic pain.

The panel determined that the worker's chronic pain was specific chronic pain, as opposed to non-specific chronic pain, as those terms are defined in item #39.02 of the RSCM II. The panel also determined that the specific chronic pain was disproportionate to the objective physical impairment. Based on the finding that the worker's range of motion was reduced because of disproportionate specific chronic pain, the panel relied on RSCM II item #97.40, which provides the panel discretion to decide whether a worker's disability is greater or less than the percentage of impairment calculated from the PFI evaluation. Given that the worker's loss of range of motion was described as "moderate" at the time of medical plateau and that the maximum impairment for all five levels of lumbar spine is 24% of total disability, the panel reasoned that a 6.0% impairment rating is appropriate. Thus, the panel awarded the worker 6.0% of total disability for the loss of range of motion in his lumbar spine and 2.5% of total disability for specific and disproportionate low back chronic pain, for a total award of 8.5%.

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Introduction

[1] The Workers' Compensation Board[1] (Board) accepted the worker's claim for a low back injury as arising out of and in the course of his employment on February 19, 2004. The worker received temporary disability benefits to October 24, 2004, following which his low back condition, including an L5-S1 disc protrusion and chronic pain, was deemed to have stabilized as a permanent impairment.

[2] On March 14, 2005 a Board officer concluded the worker was entitled to a permanent partial disability award, calculated on a loss of function basis, equal to 2.5% of total disability to compensate for his non-specific low back chronic pain. The Board officer declined to provide the worker with an award for loss of range of motion to his lumbar spine. The worker requested a review of that decision.

[3] On November 1, 2005 a review officer at the Review Division of the Board concluded the worker had specific chronic pain that was disproportionate to the impairment, and confirmed the decision to provide an award of 2.5% of total disability for his low back impairment[2]. The worker has appealed that decision. He seeks an increase to his permanent partial disability award on a loss of function basis.

Issue(s)

[4] What is the worker's entitlement to a permanent partial disability award, calculated on a loss of function basis?

Jurisdiction

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

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1 Operating as WorkSafeBC.
2 See *Review Reference #R0051587*.

[6] The standard of proof in compensation matters is the balance of probabilities, subject to the provisions of section 250(4) of the Act. Section 250(4) provides that when the evidence on an issue is evenly weighted, the matter is resolved in favour of the worker.

[7] The WCAT chair has appointed a three-member non-precedent panel to decide this appeal pursuant to section 238(5) of the Act.

[8] The worker's appeal was originally considered by a WCAT panel in *WCAT-2006-02312*. That decision was the subject of a request for reconsideration, which was denied on common law grounds[3]. The worker requested a judicial review of the two WCAT decisions.

[9] In *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 329, (the judicial review decision) Madam Justice Bruce declared the two WCAT decisions to be patently unreasonable as they relate to the calculation of the worker's functional impairment award under section 23(1) of the Act. She set aside the two WCAT decisions and remitted the matter back to WCAT to reconsider the worker's entitlement under section 23(1) of the Act. This decision considers that issue.

[10] The decisions that form the basis of this appeal also considered the worker's entitlement to a permanent partial disability award on a loss of earnings basis pursuant to section 23(3) of the Act. In the judicial review decision, Madam Justice Bruce found the WCAT decisions to be patently unreasonable in relation to the assessment of the worker's entitlement pursuant to section 23(3) of the Act, and remitted that issue back to WCAT. The Board and the worker have appealed that aspect of the judicial review decision to the British Columbia Court of Appeal (BCCA).

[11] We have specifically not considered the worker's entitlement pursuant to section 23(3) of the Act in this decision, given that the matter is presently being considered by the BCCA. We retain jurisdiction over that issue, subject to any finding to the contrary by the BCCA or subject to any further appeals. We will issue a separate decision regarding the worker's entitlement pursuant to section 23(3) and section 23(3.1) of the Act after completion of the appeal by the BCCA.

[12] The employer was provided with notice of the appeal but is not participating. The worker is represented by the Workers' Advisers Office. The worker through his representative has provided written submissions regarding the issue in this appeal.

[3] See *WCAT-2009-02631.*

Background and Evidence

[13] The employer operates a manufacturing business where the worker was employed as a steel fabricator at the time of his injury.

[14] On February 19, 2004 the worker was pulling a steel plate that weighed 60 to 70 kilograms when he experienced pain in his low back that referred to his left leg.

[15] A CT scan of the worker's lumbar spine taken on March 26, 2004 revealed a broad based disc bulge and left posterolateral disc herniation at the L5-S1 level that compromised the traversing left S1 nerve root.

[16] Dr. Mutat, orthopaedic surgeon, examined the worker on April 22, 2004, at which time he presented with low back and left leg pain that referred to the posterolateral aspect of his thigh to the calf and side of his foot. The worker experienced parasthesia and numbness. On examination the worker had slightly decreased range of motion of the lumbosacral segment which was restricted by pain. Sensory and motor examinations were normal. The worker had slightly depressed left ankle jerk reflex, and straight leg raising tests were positive at 70 degrees on the left. The worker was observed to walk with a limp favouring his left leg.

[17] Dr. Mutat provided the worker with an epidural injection; however, the worker did not experience significant improvement to his symptoms. On August 16, 2004 Dr. Mutat reported the worker continued to experience low back and left leg pain. His neurological examination was unchanged from previous assessments. The worker did not wish to proceed with an L5-S1 discectomy for other medical reasons.

[18] The worker commenced an occupational rehabilitation program on August 30, 2004, at which time he reported experiencing constant central low back pain, greater to the left side than the right side, with radiation to the left buttock and down the posterior aspect to the left knee. He experienced occasional numbness to his left leg and foot. The worker's active lumbar spine range of motion appeared to be moderately limited in all directions secondary to increased pain.

[19] On September 27, 2004 the occupational therapist commented that the worker had demonstrated good effort in the program. On examination, there was minimal change with regard to the worker's active lumbar spine range of motion. Movements continued to be significantly limited in all directions secondary to increased pain.

[20] On October 12, 2004 the worker was discharged from the occupational rehabilitation program as fit to return to work with limitations, including alternate duties and modified hours. The occupational therapist reported the worker had participated actively in all aspects of the program and his effort was consistent. The worker's lumbar spine range of motion continued to be moderately limited in all directions. He could demonstrate a one-quarter squat, and straight leg raising measured 60 degrees on the right and

45 degrees on the left. He had decreased tolerance for pushing, pulling, lifting, sitting, sustained standing, walking, and forward flexion.

[21] On December 6, 2004 Dr. Hyrman, psychiatrist, diagnosed the worker with moderate depression, secondary to pain and stress. The worker was prescribed a sedating anti-depressant medication.

[22] The worker attended a permanent functional impairment evaluation on December 15, 2004. At that time the worker complained of continuous low back pain that radiated to both buttocks and to the dorsum of his left thigh. He described the pain as a sharp or aching pain. His pain was spontaneously aggravated, even when sleeping.

[23] Dr. Ragheb, Board Disability Awards medical advisor, examined the worker and reported that lumbosacral spine active movement was accompanied by severe back pain and with voluntary protective guarding. Straight leg raising was 60 degrees on the right and 50 degrees on the left with reported back pain. Range of motion measurements of the lumbosacral spine were 30 degrees flexion, 10 degrees extension, and 20 degrees for right and left lateral flexion and for right and left rotation. Sensation was reported to be intact. Dr. Ragheb summarized his findings from the examination as including restrictions in active range of motion with reported pain, non-pathological collapsing weakness in all the muscles of both lower extremities, and positive axial loading, simulated rotation and hip flexion tests.

[24] In a memorandum to the claim file dated December 15, 2004 Dr. Ragheb provided an opinion that the worker's permanent functional impairment assessment was dominated by the presence of multiple non-organic signs including exaggeration, verbalization, axial loading, simulated rotation, hip flexion, distraction, and regional inconsistencies. Dr. Ragheb indicated the clinical findings were not consistent with mechanical restriction, motor radiculopathy, sensory radiculopathy or nerve root tension, but rather more consistent with chronic pain.

[25] In a memorandum dated February 25, 2005 the Board officer considered the worker's entitlement to a permanent functional impairment award and, based on the opinion of Dr. Ragheb, concluded that through either voluntary or involuntary protective guarding the worker had "self-limited" during range of motion testing of his lumbar spine. The Board officer concluded she was unable to calculate impairment with the Permanent Disability Evaluation Schedule as range of motion of the lumbar spine was not a true reflection of the worker's abilities or functional impairment. The Board officer concluded the worker was entitled to an award of 2.5% of total disability to compensate for non-specific chronic pain that was disproportionate to the impairment. Those conclusions were communicated to the worker in the decision of March 14, 2005.

[26] In a claim log entry dated March 21, 2005 the Board officer clarified that the range-of-motion measurements of the lumbar spine documented at the permanent functional impairment evaluation were not indicative of the worker's best effort and did

not factor into her decision. She granted no award for the lumbar spine. The clinical findings were more consistent with chronic pain, and for that reason she provided the worker with the award of 2.5% for non-specific chronic pain.

[27] The worker attended a psychological assessment and on May 1, 2005, Dr. Bubber, psychologist, reported that the worker had demonstrated pain behaviours during the interview, including verbal complaints, bracing his back, facial grimacing, shifting in his chair, standing on occasion, and walking about slightly. The worker experienced persistent pain to his low back that radiated down his left leg to the knee. He used medication to manage his pain. Dr. Bubber provided an opinion that during her assessment the worker presented himself in an open and honest manner. His reports of pain and psychological difficulties were consistent with the claim file information. Dr. Bubber stated that rather than exaggerate his presentation, the worker had presented in a stoic manner. She opined that there was no evidence the worker had exaggerated or malingered. Dr. Bubber diagnosed the worker with major depressive disorder, single episode, moderate symptoms.

[28] Dr. Hill, orthopaedic surgeon, examined the worker on July 21, 2005. The worker complained of back and left lower extremity pain which was aggravated after walking, bending or lifting objects. On occasion he experienced numbness to his left leg. On examination the worker did not walk with a noticeable limp. Dr. Hill described the worker's restricted range of motion as "to about 10% of normal in all directions". Sensation was intact, and he had positive straight leg raising. Dr. Hill diagnosed the worker with a recurrent herniated lumbosacral disc protrusion. Objective findings were consistent with a first sacral nerve root deficit on the left.

[29] In the decision dated November 1, 2005, the review officer concluded the worker had specific chronic pain that was disproportionate to his impairment, with the medical reason for the pain being the impingement of the first sacral nerve root. She concluded the worker's permanent functional impairment was ill defined and difficult to measure due to his pain complaints. The review officer concluded that the worker's impairment must be measurable in order to receive an impairment rating under the Permanent Disability Evaluation Schedule. As his permanent functional impairment could not be measured objectively, he was not entitled to an award pursuant to the Permanent Disability Evaluation Schedule. She considered whether the worker would be entitled to an award of 2.0%, representing the surgical value of an L5-S1 disc herniation, but concluded that as the worker did not undergo surgery, he did not qualify for that award. The review officer confirmed the worker's entitlement to a permanent partial disability award on a loss of function basis was the 2.5% award provided for specific disproportionate chronic pain.

[30] Dr. Hill assessed the worker on February 8, 2006, at which time the worker was described to have "incapacitating pain" in his back that extended to his left lower extremity. He had significant restrictions in range of motion of his lumbar spine, including forward flexion at 10 to 15 degrees, extension at about 5 to 10 degrees, and

significant restrictions to rotation and lateral bending. The worker did not appear to have any significant reflex or sensory changes.

[31] As noted above, a previous WCAT panel had found that the worker's restrictions in lumbar range of motion were due to his pain and fear of re-injury. He confirmed the decision to provide the worker with an award of 2.5% of total disability for chronic pain. A WCAT reconsideration panel found no basis to disturb that decision.

[32] In the judicial review decision, the court set aside the two WCAT decisions and ordered WCAT to reconsider the worker's entitlement under section 23(1) of the Act, having regard to the principles outlined in the reasons for judgment, which are set out below.

Reasons and Findings

[33] Section 23(1) of the Act provides that the Board must estimate the worker's impairment of earning capacity resulting from the nature and degree of the injury when the worker has sustained a permanent partial disability, and provide the worker with compensation that equals 90% of the estimated loss of average net earnings resulting from the impairment.

[34] Section 23(2) of the Act provides for a rating schedule of percentages of impairment of earning capacity for specific injuries, and provides a guide in determining the compensation payable. The Permanent Disability Evaluation Schedule recognizes 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. It is not possible to measure mobility of a single vertebra. The Permanent Disability Evaluation Schedule further recognizes that spine movement varies with an individual's body type, age, and general health, such that a judgment factor will be necessary in spine assessment.

[35] The *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) item #39.00 recognizes that section 23(1) is a mandatory legislative provision to determine a worker's impairment of earnings capacity that results from a work injury. This is expressed as a percentage of total disability. The percentage of disability is intended to reflect the extent to which a compensable injury is likely to impair a worker's ability to earn in the future.

[36] RSCM II item #39.01 provides that the Board is responsible for ensuring that the necessary examinations and other investigations are carried out to assess and make a decision regarding a worker's entitlement to a permanent partial disability award. RSCM II items #96.30 and #97.40 describe the normal practice is for a section 23(1) evaluation[4] to be conducted by the Board or an external service provider. This evaluation is usually the primary input to determine a worker's entitlement to a loss-of-function award; however, it is not the only medical evidence the Board may use.

[4] This is also referred to as the permanent functional impairment evaluation.

[37] RSCM II item #97.40 provides further guidance on assessing a permanent partial disability award. This policy item requires the Board to enquire carefully into all of the circumstances of a worker's condition resulting from a compensable injury. While the permanent functional impairment evaluation may suggest the worker's impairment is a certain percentage, it is always open to the Board to conclude the worker's disability is greater or less than that amount.

[38] The *Judicial Review Procedure Act* at section 6 provides that when reconsidering a matter referred back, the tribunal must have regard to the court's reasons for giving the direction and to the court's direction. In this case, we are directed to have due regard to the principles outlined in the reasons for judgment.

[39] In the judicial review decision, Madam Justice Bruce accepted that the previous WCAT panel had concluded the worker's expressions of pain with low back movement were genuine and not consciously fabricated. Madam Justice Bruce stated as follows:

> [69] WCAT concedes that s. 23(1) of the *Workers Compensation Act* contemplates a loss-of-function award for a reduction in range of motion caused by pain due to organic causes and that there is nothing in the legislation or the policies adopted by the board of directors that precludes an award under s. 23(1) for both loss of range of motion and chronic pain. Indeed, **the concept of chronic pain as out of proportion to the pain normally expected from an injury clearly implies that an award is in addition to other forms of functional impairment. Moreover, the fact that the WCB policies contemplate an award for chronic pain as a form of functional impairment is clear evidence of an acknowledgement by the board of directors that chronic pain can cause functional impairment.** The unanswered question is why, on the facts of this case, WCAT concluded the petitioner's chronic pain failed to give rise to a measureable reduction in range of motion.
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> [70] It is not sufficient, in my view, to say that there was no evidence of functional impairment due to the unreliability of the range of motion measurements. This is a circular argument. If chronic pain can lead to a compensable loss of range of motion, then why the petitioner's test results were rendered unreliable due to their source being from chronic pain in this case remains a mystery. Had WCAT or the WCB concluded that the petitioner's chronic pain was not genuine or that for some other reason his range of motion test results were consciously manipulated, there would have been some explanation for the end result. However, as discussed earlier, the petitioner's complaints of chronic pain were accepted as valid and genuine.
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> [71] Thus I am left with no explanation as to why, in this particular case, chronic pain did not lead to an award for reduction in range of motion.

> Where the findings of the tribunal are not rationally supported by the evidence they must be irrational and clearly unreasonable.
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> [Emphasis added]

[40] The court accepted as a general proposition, that chronic pain can lead to a compensable loss of range of motion, and found that the decision of the previous WCAT panels to not grant the worker a functional impairment award under section 23(1) for a loss of range of motion due to chronic pain was patently unreasonable.

[41] Several WCAT panels have recognized the difficulty in assessing a worker's loss of range of motion under the Permanent Disability Evaluation Schedule when a worker's presentation at a permanent functional impairment evaluation is compounded by pain. We summarize the various approaches panels have taken to address this situation. While we are not bound to follow previous WCAT decisions, we find that the decisions described below provide useful guidance on how the percentage of disability might be determined when a worker presents with evidence of an objective impairment together with chronic pain.

[42] In *WCAT-2006-03087,* a WCAT noteworthy decision, the panel found a worker can have both pain-restricted range of motion and chronic pain, as an award for chronic pain did not necessarily compensate for the reduced range of motion caused by pain. In that case, the panel considered other evidence on the claim file to make factual findings regarding the worker's range of motion, and directed the Board to use that information to assess the permanent functional impairment entitlement. The panel concluded an award should not be based on unreliable range-of-motion measurements. She directed the Board to revisit the worker's entitlement to a chronic pain award given her finding that there was a range-of-motion functional impairment.

[43] In *WCAT-2010-02370* the panel found the results from a permanent functional impairment evaluation to be unreliable. She concluded it was then necessary to consider if there was other evidence of a functional disability beyond disproportionate chronic pain, which in that case there was. The panel determined the worker was entitled to another permanent functional impairment examination to assess whether he was entitled to a functional award beyond chronic pain and cold intolerance.

[44] In *WCAT-2010-02530* the panel followed the approach set out in *WCAT-2006-03087* and directed the Board to use the evidence from an orthopaedic surgeon to calculate the worker's entitlement to a loss-of-function award when the results from the permanent functional impairment evaluation were not reliable. The panel found that the relevant evidence to consider in such circumstances was the evidence regarding a worker's functional impairment at the time the condition had reached medical plateau.

[45] In *WCAT-2011-01111* the Board had declined to provide a worker with a loss-of-function award because of his pain behaviour and self-limitation. The panel found that the worker had an objectively documented physiological condition that could reasonably be considered the cause of his loss of range of motion. In that case, the panel referred the matter back to the Board for further investigation, pursuant to section 246(2)(d) of the Act, and directed the Board to perform another permanent functional impairment evaluation of the worker. She relied on those results to assess the worker's entitlement to an award for loss of range of motion. This approach was followed in *WCAT-2012-00139*.

[46] The panel in *WCAT-2011-01752* concluded the results from a permanent functional impairment evaluation were not invalid because the worker also presented with chronic pain. She compared those results to other medical evidence to confirm the overall consistency of the measurements. The panel found that as the worker's chronic pain was compensable, there was no reason to reject the range-of-motion measurements from the original permanent functional impairment evaluation in the absence of evidence the results were invalid.

[47] In *WCAT-2011-01756* the panel applied the reasoning in the judicial review decision and found the Board had erred in law by basing the worker's functional award solely on an award of 2.5% for chronic pain, in the absence of a finding that the worker was intentionally manipulating the evaluation process or that the pain was not genuine. The panel directed the Board to determine the functional award, taking into account any new medical evidence including a possible second permanent functional impairment evaluation, in accordance with the Court's reasoning in the judicial review decision. This approach was followed in *WCAT-2011-02383.*

[48] The panel in *WCAT-2011-02944* found the worker had a potential permanent loss of range of motion but she was not prepared to rely on incomplete measurements obtained at the first permanent functional impairment evaluation. The panel found the worker was entitled to a second permanent functional impairment assessment to determine if the loss of range of motion was a result of the compensable injury.

[49] We turn now to the specific facts of this appeal. We considered whether it was necessary to convene an oral hearing in order to assess the worker's credibility in relation to his pain complaints; however, after careful review of the claim file and the reasons for judgment in the judicial review decision, we conclude the worker's credibility is not at issue, and accept that the worker's pain is genuine. While Dr. Ragheb had raised concern about the worker's voluntary guarding and non-organic pain presentation during the permanent functional impairment, he did not provide an opinion that the worker was intentionally manipulating the evaluation process or that his pain was not genuine. If an assessing physician, such as a Disability Awards medical advisor, is of the opinion that a worker is consciously manipulating the evaluation process, such that the results are unreliable, there must be clear, unequivocal language stating such an

opinion. The comments of Dr. Ragheb in this case fall short of establishing that the test results should be disregarded in assessing the worker's disability award.

[50] The evidence from the occupational rehabilitation program suggests the worker's pain is genuine, that he had put forth good effort during the program, and that pain limited his range of motion. We also note the opinion of Dr. Bubber that the worker had not exaggerated his pain, but rather presented in an open and honest manner. Drs. Hill and Mutat have not provided evidence to suggest the worker's pain presentation was disingenuous.

[51] We find it is significant that the Board accepted the worker's claim on a permanent basis for an L5-S1 disc herniation. Had the worker undergone an L5-S1 discectomy, as suggested by his treating orthopaedic surgeons, the Permanent Disability Evaluation Schedule would provide for a minimum award of 2.0% in recognition of the impairment resulting from surgical loss of intervertebral disc. While the worker did not choose to undergo surgical repair of his L5-S1 disc herniation for other medical reasons, the objective medical evidence establishes that he continues to present with residual symptoms that impair his function. Upon discharge from the occupational rehabilitation program and at the permanent functional impairment evaluation, the worker presented with decreased straight leg raises and reduced ability to squat. He had decreased functional tolerances for many activities, such as pushing, pulling, sitting, standing and walking. The Board has accepted that his diminished level of function prevents him from returning to all aspects of his pre-injury employment as a fabricator.

[52] We accept that the worker has a residual functional impairment in his lumbar spine as a result of the work injury. The question we are now faced with is how to assess that impairment. The fact that chronic pain forms part of the worker's presentation does not relieve us of the obligation to "estimate the worker's impairment of earning capacity resulting from the nature and degree of the injury".

[53] We agree with previous WCAT panels that an award for loss of range of motion made under the Permanent Disability Evaluation Schedule cannot be based on measurements that do not accurately estimate the degree of impairment. There must be an objective assessment of the measurements to determine whether they can be explained by reason of the residual impairment including a chronic pain condition. This may include consideration of an opinion from a Disability Awards medical advisor or other medical opinions regarding the measurements obtained, consideration of other medical evidence on a claim file that sets out range of motion measurements, and consideration of the worker's own evidence with regard to his or her pain and how it may have affected the range of motion measurements from a permanent functional impairment evaluation. It also requires an exercise of the decision maker's judgment given the specific facts of a particular case.

[54] We have considered several options to assess the functional impairment in the worker's lumbar spine, including the following:

- Exercising our discretion under section 246(2)(d) of the Act to request the Board conduct a second permanent functional impairment evaluation of the worker;
- Using the existing range-of-motion measurements obtained by Dr. Ragheb on December 15, 2004;
- Referring the worker to an independent health professional pursuant to section 249 of the Act to assess the residual impairment to his lumbar spine;
- Seeking an opinion from a Board Disability Awards medical advisor, pursuant to section 246(2)(d) of the Act, as to what the expected loss of range of motion would be given the worker's injury and the available medical evidence;
- Assessing the worker's functional impairment pursuant to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides); or
- Using medical evidence from other treating professionals regarding the worker's lumbar spine range of motion to assess his entitlement to a scheduled award.

[55] The worker has requested we rely on the results from the December 15, 2004 permanent functional impairment evaluation to calculate his entitlement to a scheduled award for the loss of function to his lumbar spine.

[56] Requesting the Board complete a second permanent functional impairment evaluation is a potentially viable option to obtain reliable data upon which to base a functional award. This approach may be particularly useful when, as was the case in *WCAT-2011-02944*, the original permanent functional impairment evaluation is incomplete or found to be invalid for some other reason. We recognize the worker's concern that this approach creates delay and the possibility for further "churn" in the appeal system; however, when there is insufficient evidence available to objectively assess a worker's functional impairment, this method may provide the necessary evidence to complete that assessment. Similarly, a referral to an independent health professional is another approach that may be adopted in order to obtain sufficient expert medical evidence to assess a worker's percentage of disability. In this appeal, for reasons that follow, we find there is sufficient evidence available to assess the worker's percentage of disability and accordingly we do not find it is necessary to refer the worker for further evaluations.

[57] In some cases, the assessment of the percentage of disability may be confounded to the point that it is necessary to obtain an opinion on the likely degree of impairment that would be expected given the nature of the work injury or similar injuries. One such case may be when the assessment of a permanent impairment occurs after a non-compensable intervening event causes further disability. Another such case may arise when a worker is unable to complete a permanent functional impairment assessment, but there is objective evidence of a residual impairment. A third case when this approach may be taken is when a worker has a pre-existing non-compensable condition in the same area of impairment. Seeking an expert opinion

from a Board Disability Awards medical advisor or an independent health professional may provide objective medical evidence upon which to assess a percentage of disability.

[58] The AMA Guides provide a standardized approach to rating physical impairments. In many instances, the Board and WCAT panels have relied on the AMA Guides to assess a permanent impairment, particularly when the disability is not one that is set out in the Permanent Disability Evaluation Schedule. In the Additional Factors Outline, the Board has adapted impairment ratings from the AMA Guides. We agree with the worker that in this particular case application of the AMA Guides would be contrary to Board policy, given that the Permanent Disability Evaluation Schedule already provides for ranges of impairment of the lumbar spine. Use of the AMA Guides may be of assistance to assess a permanent functional impairment for disabilities that are not set out in the Permanent Disability Evaluation Schedule. In addition, in circumstances where a permanent functional impairment evaluation cannot be completed in accordance with Board practice, it may be appropriate to consider rating a worker's impairment under the AMA Guides.

[59] Previous WCAT panels have made factual findings on the range-of-motion measurements to be used to calculate a permanent impairment based on various medical sources on a claim file. We agree with the panel in *WCAT-2010-02530* that the relevant evidence regarding measurements to be used for a permanent functional impairment assessment are those taken at about the time the condition has plateaued. We also agree with the comments of the panel in *WCAT-2011-01111* that caution must be taken in using range-of-motion measurements from various treating professionals, as varying assessment methods and/or equipment may be used to obtain the range-of-motion measurements.

[60] In the present appeal, there is incomplete evidence of the worker's lumbar range of motion apart from that set out in the permanent functional impairment evaluation. Neither Dr. Mutat nor the assessors at the occupational rehabilitation program reported the worker's lumbar range-of-motion measurements. Dr. Hill, in February 2006, provided approximate ranges of loss in extension and flexion; however, we find the ranges reported by Dr. Hill do not represent the best evidence of the worker's lumbar range of motion, as the measurements are approximate ranges and are not complete for the purpose of a lumbar spine permanent functional impairment assessment. Moreover, those measurements are taken 16 months after the date of plateau.

[61] The question that arises in this appeal is whether the range-of-motion measurements from the permanent functional impairment evaluation of December 15, 2004 can be relied upon to assess the worker's entitlement to a scheduled award for loss of range of motion to his lumbar spine. At the time of discharge from the occupational rehabilitation program the worker presented with moderate reduction in range of motion of his lumbar spine in all directions. Dr. Ragheb found the worker had restrictions in active lumbar range of motion with pain. Measurements from the permanent functional impairment

examination suggest the worker's lumbar flexion was reduced by 50%, lumbar extension reduced by 60%, and lateral flexion reduced by 25%.

[62] Dr. Hill examined the worker in 2005 and 2006, and reported the worker presented with significant reduction in range of motion of his lumbar spine. When we compare the measurements Dr. Ragheb obtained at the permanent functional impairment evaluation to the other available medical evidence regarding the worker's lumbar spine range of motion, we conclude both illustrate that the worker has moderate reduction in range of motion of his lumbar spine.

[63] Item #77 of the Permanent Disability Evaluation Schedule provides for percentages of loss of range of motion of lumbar spine flexion (0 to 9%), extension (0 to 5%), and lateral flexion to the right and left (each 0 to 5%), with the maximum disability rating for the lumbar spine not to exceed 24%. Normal lumbar spine range-of-motion values as set out in the Permanent Disability Evaluation Schedule include flexion at 60 degrees, extension at 25 degrees, and lateral flexion at 25 degrees in each direction.

[64] We recognize that the Board has created the Permanent Disability Evaluation Schedule as a guideline that supports consistency between similar cases in the assessment of permanent partial disability awards. This approach, however, does not relieve a decision maker from the obligation to *estimate* the impairment of earning capacity resulting from the nature and degree of the injury, as set out in section 23(1) of the Act. In some cases, as recognized in policy item #97.40, this may warrant a lesser or greater percentage than that suggested by the application of the Permanent Disability Evaluation Schedule to the results obtained at a permanent functional impairment evaluation. Similarly, the preamble to the impairment ratings for the spine in the Permanent Disability Evaluation Schedule recognizes that there is a judgment factor necessary in the assessment of the spine.

[65] Determination of a permanent functional impairment is not an exact science, and requires the decision maker to consider all of the evidence to estimate the impairment. In addition, section 23(2) of the Act provides that the Permanent Disability Evaluation Schedule is a *guide* in determining the compensation payable. The fact that it may be difficult to apply the Permanent Disability Evaluation Schedule in a particular case does not end the analysis. Other methods, including using judgment based on consideration of all of the evidence, may be employed to estimate the impairment of earning capacity in a particular case, especially where the facts make it difficult to apply the exact impairment rating from the Permanent Disability Evaluation Schedule.

[66] When we apply the Permanent Disability Evaluation Schedule to the measurements obtained from the December 15, 2004 permanent functional impairment evaluation, we agree with the worker that the measured reduction in range of motion of his lumbar spine calculates to a 9.5% impairment rating. The worker has argued that he ought to be entitled to an award based on the 9.5% for the loss of range of motion to his lumbar spine plus 2.5% for low back disproportionate chronic pain, for an overall award of 12%

of total disability. The 9.5% impairment rating for the worker's L5-S1 disc herniation would be almost 40% of the value of the maximum disability rating for the lumbar spine (9.5 / 24.0).

[67] We find that if we were to provide the worker with both the full award for the reduction of range of motion of his lumbar spine (9.5%) and the chronic pain award (2.5%) we would be over-compensating the worker for his functional impairment. There is no dispute that the worker's range of motion was reduced because of his chronic pain. While providing a worker only with a chronic pain award and no scheduled award when it is difficult to assess the limitation in range of motion due to pain behaviour may under-compensate a worker, similarly, providing both the full scheduled award and the award for chronic pain when the limitation in range of motion is affected by chronic pain may result in over compensation.

[68] The worker has a one-level disc herniation of the lumbar spine. The worker has suggested this impairment warrants an award of 12% of total disability, which we note represents 50% of the maximum value for impairment to all five levels of the lumbar spine. We find that an award of 12% of total disability for a one level disc herniation together with chronic pain over-compensates the worker for the two permanent conditions accepted on his claim.

[69] In the decisions that form the basis of this appeal, the worker was provided an award for chronic pain, as his low back pain at that time was considered to be disproportionate to his level of impairment, which, at that time, was not rated. There is no dispute the worker has specific chronic pain in his lumbar spine. What is now at issue is whether that pain is disproportionate to his level of impairment. RSCM II item #39.02 provides specific chronic pain that is consistent with the associated physical impairment does not warrant an additional award for chronic pain, as the pain symptoms are compensated for by the loss-of-function award. It is only when specific chronic pain is disproportionate to the objective physical impairment that an additional award is provided. RSCM II item #39.02 defines disproportionate pain as pain that is significantly greater than what would be reasonably expected given the type of injury.

[70] We have considered what constitutes disproportionate specific chronic pain. Board policy requires that the pain be significantly greater than what would be expected from the type of injury. This requires consideration of the medical evidence together with a worker's own evidence regarding the pain. It is a subjective assessment of the degree and nature of the pain a worker experiences. There are many variables that can be used to assess whether the pain is disproportionate, including consideration of the type of pain (burning, stabbing, dull, or aching pain), the frequency of the pain (constant, occasional, with movement, with certain activities), the intensity of the pain, whether the pain disturbs a worker's sleep, the amount and frequency of medication intake to control the pain, and the effect of the pain on a worker's ability to earn income. Inability to return to pre-injury employment, work full time, work long shifts or take overtime hours as a result of pain are all indications that earning capacity has been impaired.

[71] There is ample evidence regarding the severity of the worker's low back and left leg pain complaints. As noted by Dr. Ragheb, active range of motion of the worker's lumbar spine reportedly caused severe back pain. Dr. Bubber observed the worker to present with significant pain behaviours during her assessment, and she found his presentation to be stoic rather than exaggerated. Similarly, Dr. Hill has reported the worker experiences significant low back and left leg pain with any activity, which was described in February 2006 as "incapacitating pain".

[72] In the facts of this case, there is no dispute that the worker's pain influenced his ability to complete the testing at the permanent functional impairment evaluation. While we are not prepared to find that this invalidated the results from the permanent functional impairment evaluation, we find we must take this into account when considering the assessment of the worker's entitlement to a loss-of-function award for both the loss of range of motion to his lumbar spine and the effect of his chronic pain. We contemplated providing the worker with the full scheduled award for the loss of range of motion to his lumbar spine based on the measurements from the permanent functional impairment evaluation and not providing the worker with an award for chronic pain. This approach was taken in *WCAT-2012-00139*. While this approach may be one way of recognizing that chronic pain is compensated for by the award for loss of range of motion, we find that this is not the most appropriate option in this specific case, given the reasons provided in the judicial review decision, and in particular the court's comment that there is nothing that prohibits a worker from receiving awards for both chronic pain and for loss of range of motion due to chronic pain.

[73] We find it is appropriate to recognize both the worker's limitations in range of motion due to his disc herniation and pain, and to recognize the disproportionate low back chronic pain he experiences, without over-compensating him for his overall functional impairment. We find that a lesser amount than 9.5% more appropriately represents the worker's loss of range of motion for the impairment. When we take into account the evidence from the permanent functional impairment evaluation together with the other medical evidence regarding the worker's presentation, we find the worker is entitled to an award of 6.0% of total disability to compensate for the reduction in range of motion of his lumbar spine, and an award of 2.5% of total disability for his specific but disproportionate chronic pain.

[74] We find this approach recognizes that the permanent functional impairment evaluation results reflected the worker's limitations due to the disc herniation at the L5-S1 level, the worker's chronic pain, and the worker's efforts to voluntarily and/or involuntary protect his injured area by guarding his movements. RSCM II item #97.40 provides us with discretion to decide whether a worker's disability is greater or less than the percentage of impairment calculated from the permanent functional impairment evaluation. On a judgment basis, we find that the scheduled level of impairment to the worker's lumbar spine is 6.0% of total disability. The worker's reduction in range of motion at the time of discharge from the occupational rehabilitation program, which coincides with the date of medical plateau, was described as "moderate" in all directions. We find that this

language is consistent with a percentage of disability of 6.0% for the loss of range of motion of the lumbar spine for a one-level disc herniation and chronic pain, given that the maximum impairment for all five levels of the lumbar spine is 24% of total disability.

[75] In reaching our decision, we place weight on the comments of Dr. Ragheb. We find Dr. Ragheb is in the best position to assess the validity of the measured results, as he performed the testing and is an expert at assessing permanent impairments for pension purposes. We note that Dr. Ragheb reported that active movement of the worker's lumbar spine was accompanied by severe back pain and with voluntary protective guarding. We do not go so far as disregard the range of motion results from the permanent functional impairment evaluation as unreliable; however, we find we must take into account the worker's voluntary protective guarding that Dr. Ragheb had observed. This is particularly so if we accept that the worker is entitled to an award for specific disproportionate chronic pain.

[76] The worker has also been diagnosed with a left-sided sacral nerve root deficit. We have considered whether the worker is entitled to additional awards for the sacral nerve root deficit and the symptoms it produces. RSCM II item #39.10 provides that the Permanent Disability Evaluation Schedule is a set of guide rules and not fixed rules. The decision maker may consider other variables that are related to the degree of physical impairment to determine the final pension award. "Other variables" refers to the degree of physical or psychological impairment, and not other variables relating to social or economic factors.

[77] We have considered whether the worker is entitled to an additional award for other variables, including loss of sensation or loss of motor strength, as contemplated by the Additional Factors Outline, for an S1 nerve root deficit. Dr. Mutat, Dr. Ragheb, and Dr. Hill have reported the worker's sensory examinations were normal or that sensation was intact. Based on the expert medical evidence from those examinations, we find the worker is not entitled to an additional award for loss of sensation.

[78] Similarly, we find the worker is not entitled to an additional award for loss of motor strength, given that there is insufficient medical evidence of a neurological deficit arising from the disc protrusion. Dr. Ragheb opined that the worker had non-pathological collapsing weakness in all muscles of both lower extremities, which was not consistent with a sacral nerve root deficit, nor consistent with the worker's bulky muscle appearance. Dr. Hill in February 2006 detected some weakness of the great toe and foot extension; however, he indicated that this may be due to guarding. Dr. Mutat had not detected specific neurological deficits. We find that the award for loss of range of motion of the lumbar spine, together with the award for chronic pain, compensates the worker for the impairment of earning capacity resulting from the permanent disability.

[79] The worker has not disputed the effective date of the permanent partial disability award or the date of termination of his award. We find the worker is entitled to a permanent

partial disability award, on a loss of function basis, equal to 8.5% of total disability effective October 25, 2004 and payable to age 65.

Conclusion

[80] We allow the worker's appeal and vary the Review Division decision. We find the worker is entitled to an award of 8.5% of total disability to compensate for his permanent functional impairment, comprised of an award of 6.0% of total disability for the loss of range of motion in his lumbar spine, and 2.5% of total disability for the specific and disproportionate low back chronic pain.

[81] The worker has not requested reimbursement of expenses, and from our review of this matter, none are apparent. We make no order for reimbursement of expenses.

Debbie Sigurdson
Vice Chair

Beatrice K. Anderson
Vice Chair

Guy Riecken
Vice Chair

DS/jd