NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2013-02463 **Panel**: G. Riecken, W. Hoole, E. Murray **Decision Date**: August 30, 2013

Non-specific chronic pain – Whether a permanent functional impairment examination is necessary if non-specific chronic pain is the only accepted condition – Policy item #39.02 of the Rehabilitation Services and Claims Manual, Volume II – Meaning of "will be granted" in item #39.02 – Section 23(1) of the Workers Compensation Act – Effect of the B.C. Supreme Court decision in Jozipovic v. British Columbia (Workers' Compensation Board)

In cases of non-specific chronic pain, there is no discretion under policy item #39.02 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) to grant a permanent functional impairment (PFI) permanent disability award pursuant to section 23(1) of the *Workers Compensation Act* in an amount greater than 2.5%. In these circumstances, a PFI evaluation would be pointless as policy restricts the award for non-specific chronic pain to 2.5% regardless of the results of the evaluation.

The worker fell at work and injured his back. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted his claim, but decided his only permanent condition was non-specific chronic pain. The Board issued a decision providing the worker with a 2.5% PFI award for non-specific chronic pain, and did not measure his level of function through a PFI evaluation. The worker appealed this decision to the Review Division of the Board, requesting a PFI evaluation. The Review Division confirmed the Board decision. The worker then appealed the Review Division decision to the WCAT. On appeal, WCAT confirmed the Board's decision to provide the worker with a 2.5% PFI award for non-specific chronic pain, and denied his request for a PFI evaluation.

The panel considered two lines of decisions that had developed at WCAT following the B.C. Supreme Court decision in *Jozipovic v. British Columbia (Workers' Compensation Board)* 2011 BCSC 329. The first line of decisions found that, where the only accepted condition was non-specific chronic pain, item #39.02 of the RSCM provides a mandatory 2.5% PFI award. The second line of decisions relied on *Jozipovic* for the proposition that in assessing a PFI award, impaired function could not be disregarded simply because it is caused by chronic pain. Accordingly, a worker may be entitled to have a PFI evaluation, even if the only permanent condition was non-specific chronic pain. The panel preferred the first line of decisions, finding there was no discretion in item #39.02 to provide an award higher than 2.5% if the worker's only accepted permanent condition was non-specific chronic pain.

The panel discussed the meaning of the phrase "will be granted" in item #39.02, concluding that the grammatical and ordinary sense of these words was imperative. As the wording of item #39.02 was imperative, the maximum award a worker could receive for non-specific chronic pain was 2.5%. The panel further considered the distinction between scheduled and non-scheduled awards, and concluded that the award contemplated by item #39.02 was neither a scheduled nor non-scheduled award.

The panel discussed the decision in *Jozipovic*, noting the Court found it was patently unreasonable to provide no PFI award for loss of range of motion with organic causes. The panel decided that the definition of non-specific chronic pain excluded organic causes, and therefore *Jozipovic* was distinguishable.

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Panel: Guy Riecken, Vice Chair
Warren Hoole, Vice Chair
Elaine Murray, Vice Chair

Introduction

[1] This appeal concerns the worker's permanent partial disability award.

[2] The worker was employed as a care aide in December 2007 when he slipped and fell in his employer's parking lot and suffered injuries to his low back and coccyx. The Workers' Compensation Board (Board)[1] initially disallowed the worker's claim, but a review officer in the Board's Review Division varied the Board's decision and accepted the claim for a back strain and coccyx contusion (*Review Reference #R0089690*, July 18, 2008).

[3] As explained in a September 13, 2010 letter to the worker, in implementing the review officer's decision the Board paid temporary disability (wage loss) benefits to the worker commencing from December 11, 2007 and ending April 6, 2009. The Board also accepted chronic pain as a permanent condition under the claim, found that this condition had stabilized by April 6, 2009, and referred the claim to the Disability Awards Department to assess a possible permanent partial disability award. That decision was upheld by the Workers' Compensation Appeal Tribunal (WCAT) in a November 22, 2011 decision (*WCAT-2011-02921*).

[4] In a December 5, 2011 decision the Board granted the worker a permanent partial disability award assessed at 2.5% of total disability for permanent non-specific chronic pain, effective April 7, 2009. That award was assessed by a disability awards officer without referring the worker for a permanent functional impairment (PFI) examination. The award was confirmed by a review officer in a March 26, 2012 decision (*Review Reference #R0139141*), which the worker is now appealing.

[5] The worker disagrees with the Board's assessment of his permanent partial disability award, and in particular disputes the decision to assess the award without the benefit of a PFI examination. Although the Board's letter also included a decision that the worker is not eligible to have his permeant partial disability award assessed on a loss of earnings basis, the worker has informed WCAT that he does not wish to pursue that issue on appeal.

[1] The Board operates as WorkSafeBC.

Issue(s)

[6] The issue in this appeal is whether the Board properly assessed the worker's permanent partial disability award on a functional impairment basis. This includes the question of whether a PFI examination is required.

Jurisdiction and Method of Hearing

[7] Section 239(1) of *Workers Compensation Act* (Act) provides for appeals to WCAT of final decisions by review officers regarding compensation matters.

[8] The chair of WCAT has assigned this appeal to be decided by a three-person panel under section 238(5) of the Act.

[9] This is an appeal by way of rehearing, in which WCAT considers the record and also has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal. WCAT has inquiry power, including the discretion to seek further evidence, but is not obliged to do so.

[10] Subject to the limited circumstances in section 251 of the Act, WCAT must make its decision on the merits and justice of the case, but in doing so, must apply a policy of the Board's board of directors that is applicable in the case (section 259(2)). The applicable policy is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

[11] The worker is represented by a lawyer. The employer filed a notice of participation in the appeal.

[12] In the notice of appeal the worker requested that the appeal be considered in writing (through written submissions). The WCAT Registry invited both parties to provide written submissions. The worker's representative provided written submissions. The employer has not provided a submission.

[13] We have considered the criteria for determining the method of hearing in item #7.5 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) and conclude that an oral hearing is not required. The appeal does not involve significant issues of credibility, and turns on the assessment of medical evidence and the application of law and policy. We conclude that the appeal can be considered in the manner requested by the worker, through a review of the record and consideration of the written submissions.

Background and Evidence

[14] The first medical report received from the Board was from Dr. Hale, a physician in general practice, dated December 10, 2007. The worker described slipping on an icy surface in a parking lot at work and falling on his "tail bone." He also scratched his hand. The worker had pain in the mid back, lower back and coccygeal area. The

diagnosis was a back strain and the worker would be unable to return to work for more than 20 days.

[15] X-ray reports from December 10, 2007 indicated that the thoracic spine was normal, and no fracture was identified at the sacrum and coccyx.

[16] The worker began physiotherapy on December 12, 2007.

[17] In a December 18, 2007 progress report Dr. Ngui (the worker's regular general practitioner) diagnosed a contusion of the L5 spine, and indicated that the worker was ready for a rehabilitation program. He would not be ready to return to work for more than 20 days.

[18] In a December 20, 2007 letter the Board disallowed the worker's claim because the injuries did not arise out of and in the course of employment as required by section 5(1) of the Act. The Board had disallowed the claim after considering the Board's policy on injuries in parking lots.

[19] In *Review Reference #R0089690* (July 18, 2008) the review officer noted that the Board had not disputed that the worker had slipped on ice and fell in the parking lot at work, or that the worker has sustained injuries in the fall. The review officer varied the Board's decision, and concluded that the worker had suffered compensable injuries, namely a back strain and a coccyx contusion. The review officer acknowledged that the worker had also reported injuries to his hands, but found that the medical reports on file only included low back and coccyx injuries.

[20] In implementing the July 18, 2008 review decision the Board obtained the clinical records for the worker from Dr. Ngui. These included Dr. Ngui's chart notes from late 2007 to June 2010, as well as copies of some medical imaging reports and consultation reports from Dr. Badii, rheumatologist. These include the following:

- Dr. Badii's June 12, 2008 consultation report in which he notes the worker's previous 2003 work injury, and an April 2003 MRI of the lumbar spine showing bilateral spondylolysis and degenerative disc disease at L4-5 without disc herniation. An updated CT scan of the lumbar spine in February 2008 showed the bilateral L5 pars defect, a mild generalized disc bulge at L3-4, and a broad based disc bulge at L4-5 contacting the thecal sac but not causing significant spinal stenosis. The two-level disc bulges were said to be slightly more prominent than on the previous study. Dr. Badii's impression was that the worker had severe lower back pain since the December 2007 work injury. The pain radiated into the left leg, and the worker complained of leg thigh numbness with prolonged sitting. He had pre-existing bilateral L5 spondylolysis. Dr. Badii requested a bone scan and then an updated MRI.

- A June 27, 2008 bone scan report described minor degeneration appearing to change with the disc spaces and facet joints at approximately T12. Blood flows and immediate views over the lumbar spine and pelvis appeared normal.
- A March 3, 2009 MRI report described the pars defect at L5 with no interval development of anterolisthesis, and an assimilation joint between the left L5 and S1 as seen on a prior CT examination was unchanged.
- Dr. Badii's April 7, 2009 consultation report in which he noted the bone scan and MRI results and commented that he did not see any lesion that is amenable to any kind of surgical intervention. Nor would the worker benefit from spinal injections. Pain treatment would have to centre on medications. The worker was on Oxycodone for pain control.
- Dr. Ngui's chart notes to June 2010 which include references to the worker's ongoing back pain and prescriptions for Oxycodone.

[21] The medical records were reviewed by Dr. van der Meer, a medical advisor at the Board, and in an August 23, 2010 clinical opinion Dr. van der Meer answered a number of questions from a case manager about the worker's injuries, as follows:

> 1. The medical evidence supports a lumbar strain and coccyx contusion resulting from the compensable injury. There was no clinical or radiological evidence of an aggravation of the pre-existent L5 spondylolysis or an aggravation of pre-existent lumbar spine DDD [degenerative disc disease]. It is my opinion that the worker had reached MMR [maximum medical recovery] at the time of the reassessment by Dr Badii on April 7, 2009. There had been no clinical change since the prior assessment in June 2008. According to the AP [attending physician] chartnotes the worker remained disabled as the result of low back pain until his return to work in February 2010.
>
> 2. There is no objective evidence to support a PFI under this claim.
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> 3. Pain complaints have been present for more than six months, and for longer than the anticipated recovery period for a strain. The claim meets the Board criteria for chronic pain.
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> 4. The chronic pain is likely permanent.
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> 5. The chronic pain is reasonably related to the accepted injury.
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> 6. There sufficient medical information on file to constitute a Complex Multidisciplinary Pain Assessment.
>
> 7. There are no restrictions or medically plausible limitations.

8. Please see 1 [this was in response to the case manager's question about when the worker reached maximum medical improvement with respect to any PFI or chronic pain].

[all quotations are reproduced as written unless otherwise noted]

[22] As noted earlier, in implementing the review decision, the Board communicated a number of decisions to the worker in a letter dated September 13, 2010, which quoted the full content of Dr. van der Meer's opinion. The case manager accepted chronic pain under the claim, found that this condition had medically plateaued by April 7, 2009 as a permanent condition, and that the worker was not entitled to wage loss benefits beyond April 7, 2009.

[23] In a decision dated February 8, 2011 a review officer acknowledged the worker's submission that in the September 13, 2010 letter the case manager had made a decision not to accept any aggravation of the worker's pre-existing lumbar spine conditions. The review officer found that the case manager had not made such a decision, and declined to take jurisdiction over the issue. The review officer confirmed the case manager's decisions regarding permanent chronic pain and the termination of wage loss benefits. The worker appealed that decision to WCAT.

[24] While that appeal was pending, in a March 17, 2011 letter, the worker's representative also requested the Board to provide a decision on acceptance of a permanent aggravation to both pre-existing L5 spondylosis and pre-existing lumbar spine degenerative disc disease as a result of the worker's slip and fall accident on December 10, 2007.

[25] In May 3, 2011 submissions to WCAT the worker argued, in part, that the September 13, 2010 letter from the Board contained a decision to deny acceptance of an aggravation of pre-existing L5 spondylosis, an aggravation of pre-existing lumbar spine degeneration and numbness and loss of strength in the left leg. The worker submitted that these conditions should be accepted as permanent conditions and referred to the Disability Awards Department for a full PFI examination.

[26] The case manager responded to the worker's March 2011 request in a letter dated July 7, 2011 communicating his decision that the worker did not sustain an aggravation to his pre-existing L5 spondylolysis or an aggravation of his pre-existing lumbar degenerative disc disease. The worker requested a review of that decision (which was registered as *Review Reference #R0133947*), and provided written submissions to the Review Division on November 3, 2011.

[27] The WCAT decision respecting the appeal of the February 8, 2011 Review Division decision (and the September 13, 2010 Board decision letter) was issued on November 22, 2011 (*WCAT-2011-02921*), in which the vice chair identified the following issues (which we set out in a somewhat different order):

1. Did the Board adjudicate any permanent conditions other than chronic pain?

2. If the answer to question #1 is yes, then are there any of those conditions that should have been accepted by the Board, specifically an aggravation of pre-existing L5 spondylosis or an aggravation of the degenerative disc disease in worker's lumbar spine.

3. Is the worker entitled to further wage loss benefits beyond April 6, 2009?

[28] In his November 22, 2011 decision the vice chair reached the following conclusions:

1. The Board had investigated and adjudicated the aggravation issue. Although the Board officer had not explicitly referred to this issue in the September 13, 2010 decision letter, the letter implicitly addressed the issue because it quoted in its entirety an opinion of Dr. van der Meer dated August 13, 2010 that discussed a number of the worker's conditions, including the pre-existing conditions of the spine, and pain complaints. The case manager's letter then went on to accept one of those conditions (chronic pain) as permanent, and referred it to the Disability Awards Department. The vice chair concluded that by necessary implication the Board rejected the other conditions.

2. Based on the opinion of Dr. van der Meer that there was no clinical or radiological evidence of such an aggravation, the vice chair confirmed the Board's decision not to accept an aggravation of the worker's pre-existing L5 spondylolysis or of the pre-existing lumbar spine degenerative disc disease.

3. Based on a review of the medical evidence on file and the opinion of Dr. van der Meer, the vice chair found that the worker's compensable condition had reached a medical plateau by April 6, 2009, and the worker was not entitled to wage loss benefits beyond that date.

[29] Dr. Ngui submitted a Physician Response On Opioid Extension form dated September 3, 2011 to the Board (This would not have been included in the file disclosure for the appeal that resulted in the November 2011 WCAT decision.) In the form, Dr. Ngui indicated that opioids were no longer indicated and no longer prescribed for the worker. In response to a question about the worker's level of function, Dr. Ngui ticked a box indicating that on the worker's last visit, he had returned to his pre-injury functional level. He also ticked a box that the worker's pain level as 1 out of 10 (no pain at all).

[30] On December 5, 2011 the Board issued the decision (the subject of this appeal) granting the worker a functional award of 2.5% of total disability for permanent chronic pain. In the PFI review memorandum (form 24), which was attached to the decision, the disability awards officer (DAO) noted that the worker's claim had been referred to the Disability Awards Department to assess entitlement to a permanent partial disability award relating only to the accepted permanent condition of chronic back pain. The DAO referred to the guidelines for section 23(1) awards for chronic pain under policy item #39.02, "Chronic Pain," including the definitions of specific and non-specific chronic pain.

[31] The DAO concluded that the worker has non-specific chronic pain because it has continued beyond the normal recovery time for a lumbar strain and a coccyx contusion without a clear medical explanation. As the extent of the pain was disproportionate, the worker was entitled to an award of 2.5% of total disability, effective April 7, 2009, the day following the date on which wage loss payments ended. The award would continue until the worker reached 65 years of age. This assessment of the worker's entitlement to a permanent partial disability award was conducted on the basis of the medical information in the file, without referring the worker for a PFI examination.

[32] The DAO also noted the case manager's determination, in the September 13, 2010 letter, that the worker had no medical restrictions or medically plausible limitations, which means he is considered able to return to his pre-injury employment. Based on his review of the information on file the DAO agreed with this determination, and found that the worker is not entitled to a loss of earnings assessment under section 23(3) of the Act.

[33] In a February 14, 2012 letter (*Review Reference #R0133947*) a review officer informed the worker that, because the November 22, 2011 WCAT decision had found the review officer had erred in not taking jurisdiction over a possible aggravation of the worker's pre-existing lumbar spine conditions, and had gone on to make a final binding decision on that issue, the Board's July 7, 2011 decision had been superseded by the WCAT decision. Consequently, the review officer declined to conduct a review of the Board's July 7, 2011 decision.

[34] In the March 26, 2012 decision now under appeal, another review officer confirmed the Board's December 5, 2011 decision respecting the worker's permanent partial disability award. The review officer acknowledged the worker's submission that the Board should arrange for further medical examinations to determine the extent of his entitlement to a functional award. The review officer explained that generally, in order to assess the extent of any loss of range of motion and other objective impairments, an examination of the worker is conducted, known as a PFI examination. However, when chronic pain is the only accepted permanent condition under a claim (as in this case), a PFI examination is not conducted, as the Board has determined that in these cases, the worker does not have a permanent condition with a potential objective physical impairment. The review officer noted that RSCM II policy item #96.30 allows a DAO to

calculate a permanent partial disability award without the benefit of a medical examination if this is considered unnecessary given the medical evidence in the file.

[35] The review officer acknowledged that in circumstances where there is both a physical injury and a loss of range of motion related to chronic pain, the Board must consider the loss of range of motion in determining the permanent partial disability award. However, in this case the only accepted permanent condition is non-specific chronic pain.

[36] The review officer also referred to the criteria in RSCM II policy item #39.02 and confirmed the DAO's decision that the worker is entitled to a functional award under section 23(1) of 2.5% for chronic pain. Noting that no limitations or restrictions had been identified which would prevent the worker from continuing to work in his pre-injury occupation, the review officer also confirmed that the worker is not eligible to have his permanent partial disability award assessed on a loss of earnings basis under section 23(3) of the Act.

Findings and Reasons

Law and Policy

[37] The worker's award for chronic pain was granted under section 23(1) of the Act, which provides that if a permanent disability results from a worker's injury, the Board must estimate the impairment of the worker's earning capacity resulting from the nature and degree of the injury, and provide the worker with compensation calculated on the basis of the estimated loss of average net earnings resulting from the impairment. This is referred to as a functional award or functional impairment award.

[38] As a guide to determining the compensation payable for permanent partial disability under section 23(1), pursuant to section 23(2) of the Act the Board has established a rating schedule of percentages of impairment of earning capacity for specific injuries. The Permanent Disability Evaluation Schedule (PDES), found at Appendix 4 of RSCM II, includes impairment ratings based on limitations to the ranges of motion of various joints, including those in the spine. Item #77 of the PDES provides a range of impairment ratings from 0-24% for loss of range of motion in the lumbar spine. The Act also provides for a second method of determining the compensation payable in cases of permanent partial disability, found in section 23(3). Section 23(3) provides that the Board may pay the worker compensation based on the difference between a worker's average net earnings before the injury, and either the average net earnings the worker is earning after the injury or the amount the Board deems the worker capable of earning after the injury. This is referred to as a loss of earnings award.

[39] However, the Board may make loss of earnings payments under sections 23(3) only if the Board has determined under 23(3.1) that the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) does not appropriately compensate the worker for the injury (referred to as a "so exceptional" determination).

[40] Section 23(3.2) provides that in making a "so exceptional" determination the Board must consider the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation.

[41] RSCM II policy 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 state that the normal practice is for a section 23(1) evaluation (the PFI evaluation) to be conducted by the Board disability awards medical advisor 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.

[42] Policy item #39.01 provides that the Board may determine a worker's functional impairment award without a PFI examination if there is sufficient medical information on file to complete the assessment. Policy item #93.30 provides that the Board may calculate the percentage of disability without the benefit of a medical examination in cases of "minor" disability. Policy item #97.40 provides that this may be done in cases of "very minor" disability.

[43] In policy item #39.02, "Chronic Pain," the Board has adopted a definition that states that chronic pain is pain that persists six months after an injury and beyond the usual recovery time of a compensable injury. The policy also distinguishes between two types of chronic pain symptoms:

> Specific chronic pain – pain with clear medical causation or reason, such as pain that is associated with a permanent partial or total physical or psychological disability.
>
> Non-specific chronic pain – pain that exists without clear medical causation or reason. Non-specific pain is pain that continues following the recovery of a work injury.

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[44] Policy item #39.02 also discusses the kinds of evidence the Board may consider in an assessment under section 23(1) for chronic pain. Part 4 of the policy, which addresses entitlement to a section 23(1) award for chronic pain, is the part of the policy most relevant to the issue in this appeal. It states:

> 4. Entitlement to a Section 23(1) Assessment:
>
> Entitlement to a section 23(1) award for chronic pain may only be considered after all appropriate medical treatment and rehabilitation interventions have been concluded.
>
> (a) Specific Chronic Pain – Consistent with the Impairment
>
> Where a worker has specific chronic pain that is consistent with the associated compensable physical or psychological permanent impairment, the section 23(1) award will be considered to appropriately compensate the worker for the impact of the chronic pain. Pain is considered to be consistent with the associated compensable impairment where the pain is limited to the area of the impairment, or medical evidence indicates that the pain is an anticipated consequence of the physical or psychological impairment. In these cases, an additional award for the specific chronic pain will not be provided, as it would result in the worker being compensated twice for the impact of the pain.
>
> (b) Specific and Non-Specific Chronic Pain – Disproportionate to the Impairment
>
> A worker's entitlement to a section 23(1) award for chronic pain will be considered in the following cases:
>
>> i) Where a worker experiences specific chronic pain that is disproportionate to the associated objective physical or psychological impairment.
>>
>> Pain is considered to be disproportionate where it is generalized rather than limited to the area of the impairment or the extent of the pain is greater than that expected from the impairment.
>>
>> In these cases, a separate section 23(1) award for chronic pain may be considered in addition to the award for objective permanent impairment.

> ii) Where a worker experiences disproportionate non-specific chronic pain as a compensable consequence of a work injury or disease.
>
> Disproportionate pain, for the purposes of this policy, is pain that is significantly greater than what would be reasonably expected given the type and nature of injury or disease.
>
> Where the Board determines that a worker is entitled to a section 23(1) award for chronic pain in the above noted situations, an award equal to 2.5% of total disability will be granted to the worker.

[45] The Board has also published a non-binding Practice Directive #C-1, Pain and Chronic Pain Adjudication, Management and Compensation Guidelines" (Practice Directive). The Practice Directive explains the Board's view that pain is not a diagnosis, but rather a symptom of an underlying disorder or condition. It is the worker's report of his or her subjective experience, and there is no genuine experience of pain which is less "real" or valid than another. In the Practice Directive the Board recognizes that while pain does not result in restrictions (clinical proscriptions to avoid an activity), it can lead to limitations (impaired functioning) and disability.

[46] The Practice Directive explains that in cases where a worker is entitled to a section 23(1) award, and chronic pain disproportionate to the impairment has also been accepted, a separate award for chronic pain may be considered.

[47] Policy item #39.10, "Permanent Disability Evaluation Schedule," explains that the PDES is a set of guide-rules, not fixed rules. The Board is free to apply other variables related to the degree of physical or psychological impairment in arriving at a final award. Other variables relating to social or economic factors, and in particular, the actual or projected loss of earnings of a worker because of the disability is not a variable that can be considered. To assist adjudicators with consideration of additional factors not formally contained in the PDES, the Board has developed guidelines that are set out in the Additional Factors Outline (Outline). The Outline is not binding. It is publicly available on the Board's Internet site (www.worksafebc.com).

[48] Policy item #39.50, "Non-Scheduled Awards," provides that any award where the PDES is not directly or indirectly used in the assessment is a non-scheduled award. This covers impairments in all parts of the body not listed in the PDES. Disabilities resulting from multiple injuries or occupational diseases may also involve non-scheduled awards. The policy provides that in the case of non-scheduled awards, judgment is used to arrive at a percentage of disability appropriate to the particular claimant's impairment. Regard will be had to, inter alia, the section 23(1) evaluation, the circumstances of the claimant, medical opinions of Board or non-Board doctors, and to schedules used in other jurisdictions.

[49] 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 a PFI 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.

Submissions

[50] In his September 4, 2012 written submission to WCAT the worker advises that he does not wish to pursue entitlement to a loss of earnings award in the context of this appeal (also confirmed in a letter dated January 16, 2013), but submits that the functional award does not compensate him for the full nature and extent of his impairment. In particular, the worker disagrees with the review officer's conclusion that where only non-specific chronic pain has been accepted as a permanent condition, as in this case, the Board is not required to consider loss of range motion due to chronic pain in assessing the award.

[51] The worker points to references in the medical record to limited range of motion in his lower back. These include Dr. Ngui's chart note from November 29, 2008 which includes a finding of decreased range of motion "due to pain," and the June 12, 2009 consultation report from Dr. Badii which notes that the worker had 50% forward flexion in the lumbar spine, and that the worker reported pain in the central lower back with forward bending.

[52] The worker submits that the Court's reasoning in *Jozipovic v, Workers' Compensation Appeal Tribunal*, 2011 BCSC 329[2], applies in this case. The worker argues that the Court found that it was patently unreasonable for WCAT to grant only a flat 2.5% award for chronic pain where there was evidence that the worker had a range of motion loss as a result of chronic pain. The worker submits that *Jozipovic* stands for the general proposition that the Board cannot deny a PFI award for loss of range of motion simply because that loss results from chronic pain.

[53] The worker submits that the references in the medical record to limited motion in his lumbar spine provide evidence that he suffers from permanent impairments in relation to his back in addition to the 2.5% award he has received. The remedy he seeks is a finding that he is entitled to have the Board conduct a PFI evaluation to assess the full extent of his compensable disability.

[2] An appeal of this decision was allowed on other grounds related to the Board's policy on loss of earnings assessments in *Jozipovic v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 174. The Court of Appeal did not disturb the B.C. Supreme Court's judgment with respect to Mr. Jozipovic's functional award.

[54] In the course of considering the appeal we arranged for the WCAT Registry to notify the worker's representative of some WCAT decisions that had reached different conclusions with respect to the need for a PFI evaluation in a case where the only permanent condition being considered in a section 23(1) assessment is chronic pain. We considered it appropriate to advise the representative of the different approaches that are followed in some WCAT decisions that were made since the worker's September 2012 written submissions.

[55] In particular, we advised the representative of the following decisions and invited him to comment on them: *WCAT-2013-00555*; *WCAT-2013-00861*; *WCAT-2013-01291*; and, *WCAT-2013-01500*[3].

[56] The worker provided a further written submission dated June 24, 2013. The worker relies on the reasoning of the panel in *WCAT-2013-00555* where the panel stated that "any accepted, disproportionate chronic pain condition giving rise to accepted objective impairment, should result in a possible permanent award in respect of the objective impairment in addition to the 2.5% chronic pain itself." The worker also refers to the following statement by the panel in paragraph 51 of that decision:

> *Jozipovic* makes clear that a subjective complaint can result in a separate [functional] award in addition to chronic pain. It does not matter if the worker's chronic pain is unexplained (non-specific), or, put another way, is not "objective."

[57] The worker also refers to *WCAT-2013-01500*, a decision in which the panel found that although the worker was entitled to an award under policy item #39.02 for non-specific chronic pain, assessment of the degree to which the pain impairs the worker (if at all) is irrelevant, since the disability award for the pain condition is set inalterably in the policy at 2.5% (paragraph 72 of the decision). The worker refers to the following passage from that WCAT decision, where the panel stated (at paragraph 73):

> The functional impairment in that case [*Jozipovic*] stemmed from the existence of not only chronic pain, but of the physiological change which gave rise to that condition. As a result, the permanent disability award granted in total could exceed the 2.5% figure mandated for chronic pain by policy item #39.02.

[58] The worker argues that he suffered from a physiological injury – a coccyx contusion. He submits that this condition gave rise to the chronic pain condition. Therefore, the worker contends that he is entitled to an award that exceeds his current chronic pain award.

[59] The worker has not provided any new medical evidence to WCAT in support of his position.

[3] These decisions can be accessed on WCAT's Internet site (www.wcat.bc.ca).

Analysis

[60] As a preliminary matter, recognizing the worker's wish not to pursue the section 23(3) loss of earnings issue in this appeal, we will not address that issue in our decision. In addition, the worker has not disputed the effective date of the award or its termination at age 65. While MRPP item #3.3.1 provides that WCAT has jurisdiction to address any issue determined in either the Review Division decision or the Board decision(s) under review, WCAT will generally restrict its decision to the issues raised by the appellant in the notice of appeal and the appellant's submissions to WCAT.

[61] Although WCAT has the discretion to address issues not raised by the parties, in this case we limit our decision to the only issue disputed by the worker, namely, whether the Board has properly assessed his permanent partial disability award on a functional impairment basis. This includes the question of whether a PFI examination is required.

[62] We begin our consideration with the question of whether the worker is entitled to a section 23(1) award for chronic pain. We note that the worker has not disputed the decision to grant him the 2.5% for chronic pain, only that he did not receive a larger award and that his claim was not referred for a PFI examination.

[63] However, in reviewing the evidence in the claim file and the worker's submissions, we have some concerns about whether a chronic pain award is warranted in this case. We say this because of the medical evidence concerning the worker's pre-existing conditions of the lumbar spine as identified in the medical imaging reports and Dr. Badii's reports. These are not compensable conditions, and a previous WCAT decision has determined that they were not aggravated as a result of the December 2007 work accident. Dr. Badii discusses these pre-existing conditions in relation to the worker's pain complaints (although he also discusses the worker's work injury). It would seem reasonable to infer that the worker's lumbar pain may be, at least in part, due to his non-compensable lumbar spine conditions.

[64] We are also concerned that Dr. Ngui's September 2011 opioid medication report to the Board indicates that the worker's pain level was at the lowest level, and his level of function had returned to his pre-injury levels. This report was a few months before the decision to award 2.5% for chronic pain. However, we have also considered the brevity of this report, its relative lack of detail, and the fact that it was directed at the issue of whether the Board should continue to pay for an opioid medication prescription for the worker, and not to the more general question of whether the worker meets the chronic pain criteria. It also commented on the worker's complaints during the one-week period prior to his last visit to Dr. Ngui, and not to the longer history or prognosis for the worker's pain complaints. We place little weight on this report with respect to the worker's section 23(1) award.

[65] We place considerable weight on Dr. van der Meer's August 2010 clinical opinion. While she did not have Dr. Ngui's September 2011 report before her, she reviewed the clinical records up to the time of her memorandum, including those from Dr. Ngui and Dr. Badii. She was aware of the pre-existing lumbar spine conditions, and commented on them specifically. Her memorandum to the case manager is the most detailed medical opinion evidence with respect to the worker's compensable injuries and his pain complaints. Dr. Van der Meer opined both that the worker meets the Board's definition of chronic pain, and that it is permanent.

[66] Based on the medical evidence as a whole, and Dr. van der Meer's August 2010 opinion in particular, we find that the worker's chronic pain is permanent and that it meets the criteria in policy item #39.02 for an award of 2.5% of total disability.

[67] We turn to the worker's argument with respect to the need for a PFI examination to assess a potential further degree of functional impairment beyond the 2.5% recognized in the chronic pain award.

[68] As noted earlier, we are aware that two lines of analysis have developed in WCAT decisions regarding awards for non-specific chronic pain since the B.C. Supreme Court decision in *Jozipovic*.

[69] In one line of reasoning, WCAT panels have found that where the only permanent condition accepted under the claim is chronic pain (typically, in these cases, this will be described as non-specific chronic pain), the only functional award available is based on a 2.5% PFI rating under policy item #39.02. Accordingly, a PFI evaluation is not required to assess the objective impairment, as the only consideration is whether the worker satisfies the criteria in policy item #39.02. Examples of decisions applying this reasoning are *WCAT-2011-02736* and *WCAT-2013-01500*. These decisions tend, as part of the reasoning, to distinguish *Jozipovic* on the basis that the worker in that case had both a lumbar disc bulge and specific chronic pain accepted as permanent conditions, and not solely non-specific chronic pain.

[70] The other line of decisions relies on *Jozipovic* for the proposition that in assessing a section 23(1) award, impairment of function as expressed in such factors as reduced range of motion cannot be disregarded simply because they result from chronic pain which has been classified as non-specific under policy item #39.02. Accordingly, a worker may be entitled to have a PFI evaluation even if the only permanent condition accepted is non-specific chronic pain. Decisions that follow this reasoning include *WCAT-2011-02050*, *WCAT-2013-00555, WCAT-2013-00861*, and *WCAT-2013-01291*.

[71] The question of which line of reasoning to adopt is squarely before us since, as a result of prior binding decisions (including *WCAT-2011-02921*), the only permanent condition referred to the Board's Disability Awards Department for consideration of a permanent partial disability award is chronic low back pain (which the DAO and review officer have

classified as non-specific), while there is some evidence in the medical records that the worker may have reduced mobility in his low back which is said to be due to his pain.

[72] We acknowledge the worker's submission (with reference to *WCAT-2013-01500*), that there is a physiological basis for his chronic pain, namely the coccyx contusion. The worker's position is that this means that more than the 2.5% award for chronic pain is available, such that a PFI examination is warranted. However, the panel in *WCAT-2011-02921* has already confirmed the decisions of the case manager and the review officer (in *Review Reference #R0119976*) that the compensable injuries had reached maximum medical recovery, and the only permanent condition referred to the Disability Awards Department is chronic pain. Therefore, the circumstances in this case differ from those in *Jozipovic*, and the passage cited from *WCAT-2013-01500* does not assist the worker.

[73] The worker also cites the references to reduced range of lumbar motion in some of his physicians' records as supporting the need for a PFI evaluation. As explained in the following reasons, we do not consider such an evaluation necessary.

[74] In our view, because the only permanent condition before us in this appeal is non-specific chronic pain, the worker's only possible section 23(1) award is one based on a PFI rating of 2.5%. It follows that there would be no purpose in carrying out a PFI evaluation. Regardless of whether the worker demonstrates, during a PFI examination, a PFI rating greater or less than 2.5% for his non-specific chronic pain, he will inevitably receive an award based on 2.5% of total disability.

[75] We reach this conclusion on the basis of our interpretation of policy item #39.02, the final paragraph of which states:

> Where a Board officer determines that a worker is entitled to a section 23(1) award for chronic pain in the above noted situations, an award equal to 2.5% of total disability **will be granted** to the worker.
>
> [our emphasis]

[76] The question is what meaning did the board of directors[4] intend to give to the phrase "will be granted"? Did they intend that phrase to exclude even the potential for any PFI rating other than 2.5% in relation to chronic pain? Or did they intend something else?

[4] As we explain later in this decision, the chronic pain policy in RSCM II #39.02 was originally adopted by the Board's panel of administrators in 2002. The panel of administrators made policy decisions prior to 2003. Since 2003, policy decisions have been made by the Board's board of directors. As of February 11, 2003 the policies of the board of directors include the RSCM I and RSCM II (Resolution of the board of directors 2003/02/11-05).

[77] The Supreme Court of Canada reiterated the proper approach to statutory interpretation in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1. At paragraph 21, the court held:

> [21] The parties both relied on the approach used in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10, which confirmed that statutory interpretation involves a consideration of the ordinary meaning of the words used and the statutory context in which they are found:
>
> > It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.

[78] In British Columbia, the modern principle is buttressed by section 8 of the *Interpretation Act,* R.S.B.C. 1996, c. 238, which provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[79] Here, the board of directors use the words “will be granted” with respect to the percentage applicable to a chronic pain award. The word “will” (as a verb), unlike such terms as “must” and “shall” is not a legal term of art and is not defined in the Act, the *Interpretation Act*, or in policy. Its ordinary meaning in the context of the policy is, however, analogous to such terms as “must” and “shall.” In our view, the grammatical

and ordinary sense of the word “will” in the context of this policy is imperative.[5] That is, the use of the word “will” indicates a direction that the Board must apply the 2.5% PFI rating to chronic pain awards. In our view, the final sentence in policy item #39.02 requires a mandatory or fixed award of 2.5% for chronic pain under section 23(1). In a case where the only permanent condition being assessed under section 23(1) is chronic pain, we consider the language of policy item #39.02 to be inconsistent with the provision of a further functional award for any other features of the chronic pain experience, including limited range of movement.

[80] We consider this conclusion to be consistent with the context and purpose of policy item #39.02 as a whole.

[81] We recognize that policy item #39.02 begins with the statement that “This policy sets out guidelines for the assessment of section 23(1) awards for workers who experience disproportionate disabling chronic pain as a compensable consequence of a physical or psychological work injury.” We considered whether this suggests that the 2.5% award is itself only a guideline or starting point. Yet had the board of directors intended the 2.5% award for chronic pain to serve only as a guideline, it would have used the word “may” rather than “will” or modified “will” by such phrases as “generally”, “normally”, or “in most cases.” The board of directors did not use any such language with reference to the 2.5% award.

[82] We agree with the statement to that effect by the former chair of WCAT in *WCAT-2005-06524*, a determination under section 251(1) of the Act with respect to policy item #39.01 in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). Although included as part of the “former” policy provisions in RSCM I, the wording of policy item #39.01 is identical to item #39.02 in RSCM II. We agree with the analysis of the chair in *WCAT-2005-06524* with respect to interpretation of the chronic pain policy, including the meaning of the word “guidelines” in the first paragraph of the policy.

[83] We note that the chair’s analysis was in response to a section 251 referral from a vice chair who considered RSCM I item #39.01 to be patently unreasonable. In her June 24, 2004 referral memorandum[6] the vice chair discussed the version of policy item #39.01 (“Subjective Complaints”) that preceded the chronic pain policy (which came into effect on January 1, 2003), and the fact that although the former policy did not include a fixed percentage for subjective chronic pain, most subjective complaints awards were approximately 2.5%. In cases where adjudicators exceeded 2.5%, the vice chair noted that they did so because of the impact of the pain on the worker’s ability to perform certain physical activities. For example, the vice chair noted that historically awards had

[5] “Will” (as a verb) is defined in the *Concise Oxford English Dictionary* as including: “**1.** expressing the future tense. > expressing a strong intention or assertion about the future. **2.** expressing inevitable events.”
[6] The June 24, 2005 section 251(2) referral memorandum is publicly accessible at WCAT’s Internet site (www.wcat.bc.ca) under the “Research Library” tab; accessed August 14, 2013.

exceeded 2.5% for subjective complaints in recognition of such factors as the following: inability of a worker to stand 8 hours per day; inability to use tools; loss of strength; difficulty lifting; difficulty with ambulation; difficulty with balance; instability; and difficulty with concentration, memory or cognitive function.

[84] In her June 24, 2004 memorandum the vice chair went on to list pain-related factors that also have the potential of impairing future earning capacity, including the following: limited use of a major weight-bearing joint; effects of pain on concentration, memory, cognition or mood; inability to obtain relief from any pain control modality; adverse affects of pain on interpersonal relationships; impaired sleep; significant weight fluctuations; and reliance on prescription pain medications known to be addictive or to have significant adverse side effects. The vice chair did not consider her list to be exhaustive.

[85] In her referral memorandum the vice chair went on to state that she considered the introduction of the fixed 2.5% chronic pain award in the chronic pain policy meant she could no longer take into consideration, when assessing a chronic pain award, the kinds of common consequences of a pain condition as listed above.

[86] In responding to the vice chair's referral, at page 21 of the decision, the chair concluded that the use of the word "guidelines" at the outset of the current policy item #39.01 does not mean that the 2.5% of total disability for chronic pain is intended to be a guideline from which decision-makers can depart in individual cases. Like the chair in *WCAT-2005-06524* we "conclude that … [policy item #39.02] provides for a fixed award in the amount of 2.5% of total without granting any discretion to the decision-maker to depart from the award of 2.5%."

[87] In a case such as this one, where the only permanent condition under consideration is non-specific chronic pain, we do not consider the fixed 2.5% PFI rating to be consistent with the addition of a further award beyond 2.5% to reflect such factors in the PDES as measurements of reduced range of motion. In other words, where the only permanent condition is non-specific chronic pain, we consider the board of directors' choice of a fixed award based on 2.5% of total disability to mean that the payment based on that percentage is intended to be the only compensation under section 23(1) for impairment of earning capacity due to chronic pain.

[88] Some of the panels who have directed PFI evaluations for stand-alone non-specific chronic pain have commented that there is no reason to treat specific and non-specific chronic pain differently in terms of any resulting limitation of range of motion. For example, in *WCAT-2013-00555*, the panel found at paragraph 50 that:

> … the reasoning in *Jozipovic* should apply equally to cases of non-specific chronic pain (in terms of an entitlement to a PFI evaluation). Simply put, if a worker suffers a compensable injury (sprain/strain), and that injury causes a compensable permanent impairment

> (chronic pain), which in turn causes a loss of range of motion, then that range of motion loss should be assessed.

[89] The panel in *WCAT-2013-00555* goes on to quote from paragraphs 69, 70 and 73 of the reasons of Bruce J. in *Jozipovic*.

[90] However, we consider the distinction between the treatment of specific and non-specific chronic pain to be central to the policy. Aside from providing differing definitions of the two categories of chronic pain, the policy expressly provides for a possible "separate" award for disproportionate specific chronic pain "in addition to" the award for objective permanent impairment. With respect to disproportionate non-specific chronic pain, the policy does not make any reference to the chronic pain award being either "separate" from or "in addition to" any other impairment.

[91] Yet both categories of chronic pain must be "disproportionate" to qualify for an award, and both will result in an award based on the same fixed percentage of total disability. Given those common features, it is reasonable to ask: what purpose is served by having two different categories of chronic pain in the policy?; and, how to give meaning to the use of "separate" and "in addition to" with respect to one category, but not the other? In our view, the most logical answer is that the policy intends different results in terms of compensation for the two categories of chronic pain. In the case of specific chronic pain (with which, by definition, there will be some other concurrent form of permanent physical or psychological impairment), the 2.5% PFI rating may be separate from and in addition to the impairment rating for the other impairment. However, for (stand-alone) non-specific chronic pain the only award available to compensate for the impairment of earning capacity is the fixed 2.5% award under the chronic pain policy.

[92] Although Bruce J. did not explicitly limit her analysis to a situation where specific chronic pain co-exists with another permanent injury that could cause functional impairment, we consider the existence of both chronic pain and a lumbar disc herniation to have been a material fact in the *Jozipovic* case. We consider that fact to distinguish *Jozipovic* from the present case. Moreover, we find support for this approach in the first paragraph of Bruce J.'s analysis (paragraph 69):

> [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 there is nothing in the legislation or the policies adopted by the board of directors that precludes an award under section 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 Workers' Compensation Board 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

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> functional impairment. The unanswered question is why, **on the facts of this case**, WCAT concluded that the petitioner's chronic pain failed to give rise to a measurable reduction in range of motion.
>
> [emphasis added]

[93] It appears from the portions of paragraph 69 we have highlighted that WCAT's concession about how chronic pain is treated under the legislation and policy, from which the Court's analysis seems at least in part to follow, is related to "pain due to organic causes." In our view, the reference to organic causes of pain is inconsistent with the definition of non-specific chronic pain in policy item #39.02 (pain that exists without clear medical causation or reason). In addition, the reference to the question raised "on the facts of this case" suggests that any guidance to be taken from the analysis in paragraphs 69 – 73 of *Jozipovic* is limited to cases with similar circumstances (where another compensable injury or impairment co-exists with chronic pain and provides an organic basis for it).

[94] We agree with those WCAT panels who have distinguished *Jozipovic* in cases where the only permanent condition before them is non-specific chronic pain. We do not interpret *Jozipovic* to be inconsistent with our view of the chronic pain policy as a whole, including the distinctions between specific and non-specific chronic pain.

[95] Turning to the broader statutory and policy context, we acknowledge that while section 23(1) requires the Board to estimate the impairment of earning capacity in cases of permanent partial disability, the Act does not specify a particular means of doing so. While section 23(2) authorizes the Board to compile the PDES and to use it in determining the compensation payable in cases of permanent disability, the Act does not make the use of the PDES mandatory, nor does it preclude the use of the PDES in any particular category of disability. The principles applied to the assessment of section 23(1) compensation, including the use of the PDES, have been set out in policy.

[96] With only two exceptions, the policy framework provides for two kinds of section 23(1) awards, scheduled awards in which the PDES impairment ratings are used directly or indirectly to calculate the award, and non-scheduled awards in which it is not used. Scheduled awards are discussed in policy item #39.10 and non-scheduled awards in policy item #39.50.

[97] We agree with the analysis of the former chair at pages 19 to 21 in *WCAT-2005-06524* to the effect that chronic pain awards are not scheduled awards. In reaching this conclusion, she noted that policy item #39.01 is silent with respect to whether chronic pain awards are scheduled or non-scheduled awards (the same is true of policy item #39.02). She also referred to the analysis in *WCAT-2004-04324* (a decision with respect to WCAT's jurisdiction under section 239 of the Act), which notes that chronic pain is not mentioned in the PDES (accordingly there is no impairment rating in the PDES for chronic pain), and concluded that chronic pain awards are not scheduled.

The chair noted that the approach in *WCAT-2004-04324* generally had been followed in other WCAT decisions, and that she agreed with it.

[98] In *WCAT-2005-06524* the chair went on to observe that an award under the chronic pain policy did not fit into the description of a non-scheduled award in policy item #39.50 because the amount of the award for chronic pain is not a matter of judgment.

[99] At page 20 of her determination, the chair questioned whether, like the fixed 3.0% award for loss of taste and smell in RSCM I policy item #39.41 (the same policy is found in RSCM II), the 2.5% award for chronic pain fits into a third category of section 23(1) awards which are neither scheduled nor non-scheduled.

[100] We agree with the analysis of the former chair and conclude that, being based on a fixed percentage of disability, the chronic pain award available in policy item #39.02 is neither a scheduled nor a non-scheduled award. It does not come within a category of awards for which judgment is used, and it does not come within the category of scheduled awards in which the PDES impairment rating system is used as a guideline or a starting point, and for which other factors can be considered.

[101] In practice, the use of range of motion measurements (as taken during a PFI examination) in order to obtain an impairment rating is inherent to the use of the PDES and to the category of scheduled awards. The PDES impairment ratings for the spine are either fixed percentages for cases of certain surgeries and compression fractures, or a range of percentages based on range of motion measurements. The PDES provides that the higher of the two is used. In cases without surgery, only the range of motion ratings are available (subject to policy item #39.10 and the consideration of other factors such as those in the Outline).

[102] We acknowledge that the experience of pain may result in reduced movement as well as other functional limitations. We conclude, however, that where there is no known permanent injury or condition other than non-specific chronic pain, it would be inconsistent with the nature of the fixed chronic pain award, and with the policy framework as a whole, to provide an award based on measurements of range of motion. To do so would be to treat chronic pain as the subject of a scheduled award instead of as a fixed award. It would also fail to recognize the clear intention set out in the policy to distinguish between cases of specific chronic pain and non-specific chronic pain.

[103] In our view, it would also be inconsistent with the objects of the chronic pain policy to provide an additional award based on range of motion deficits and a PDES impairment rating in a case of stand-alone non-specific chronic pain. In considering the objects of the policy, we have referred to the context in which the policy was introduced.

[104] Policy item #39.02 (and its RSCM I parallel policy item #39.01) came into effect pursuant to the panel of administrator's *Resolution 2002/11/19-04 Re: Chronic Pain* (Resolution). The preamble to the Resolution acknowledged the Government of British

Columbia's core review (Alan Winter's 2002 *Core Review of the Workers' Compensation Board* (Winter Report)) and specifically recognized that the Board had undertaken a review of chronic pain policies.

[105] The Board's review of chronic pain policies included "Chronic Pain,"[7] a discussion paper from the Board's former Policy and Regulation Development Bureau (Policy Bureau paper), and public consultations. The Policy Bureau paper was referred to in the course of stakeholder consultations prior to finalizing the Board's approach to chronic pain. The Winter Report and the Policy Bureau paper discussed a number of approaches to compensation for chronic pain.

[106] For example, in the Winter Report the core reviewer proposed that entitlement to section 23(1) compensation for chronic pain should be through a rating schedule developed, implemented and maintained by the Board. The schedule would contain four levels of impairment that would be objectively distinguishable from each other. There would be a pain-related impairment evaluation based on factors such as severity of pain, activity restrictions, emotional distress, pain behaviours, and treatment received. The core reviewer referred to the classification system proposed by the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides 5th edition revised). There would be four levels of chronic pain awards in 5% increments up to a maximum PFI rating of 20%. Entitlement to a section 23(1) award would consider the objective physical or psychological impairment, and the percentage of impairment from the chronic pain schedule, and these two percentages would be combined to determine the overall section 23(1) award.

[107] The Policy Bureau paper identified a number of concerns about the Winter Report proposals as being difficult to implement due to lack of objective evidence regarding a person's pain experience. The Policy Bureau paper also discussed the Board's existing approach to chronic pain under section 23(1), and summarized a variety of approaches to compensation for chronic pain across Canada.

[108] The Policy Bureau paper set out the following five options: maintaining the status quo (as set out in policy item #39.02, "Subjective Complaints," that was in force at that time); adopting the Winter Report recommendations; focusing on early intervention and section 23(1) consideration for non-specific chronic pain only; focussing on early intervention and limiting section 23(1) consideration to cases of specific chronic pain where there is an associated physical or psychological disability; and adopting the Nova Scotia model (at that time) which focused on early intervention and treatment with compensation limited to the duration of the pain treatment.

[109] It was against the backdrop of these issues and various approaches to compensation for chronic pain that the panel of administrators saw fit to identify in the preamble to the Resolution that stakeholders were concerned with lack of clarity around the provision of

[7] The Chronic Pain discussion paper can be accessed in the Board's Internet site; accessed August 12, 2013.

section 23(1) awards for chronic pain. In this context, it makes sense that the Resolution was intended to provide clarity. An effective way to do so would be to mandate a fixed percentage of disability for all cases of compensable permanent chronic pain; the panel of administrators chose 2.5% as the fixed percentage for all cases that meet the requirements for a chronic pain award. Consequently, in our view the context surrounding the promulgation of policy item #39.02 is also consistent with the plain meaning of that policy as mandating only an award of 2.5% of total disability for a section 23(1) chronic pain award.

[110] In deciding on the approach in the current chronic pain policy, the panel of administrators necessarily chose not to adopt the other approaches discussed in the Winter Report and the Policy Bureau paper. While not expressly stated in the resolution, it is clear the panel of administrators decided not to adopt the proposal from the Winter Report to use a schedule with a range of impairment ratings to assess the amount of a chronic pain award. While the Winter Report proposal involved establishing a different schedule for chronic pain than the PDES, we consider the panel of administrators' rejection of the approach in the Winter Report in favour of a fixed percentage award to be part of a policy choice that favours certainty over flexibility in assessing the compensation for pain-related impairment of earning capacity. We consider that choice to be consistent with the exclusion of the use of the PDES ratings based on ranges of motion in cases of stand-alone chronic pain.

[111] In addition, the choice of the panel of administrators of the fixed 2.5% award instead of the proposal in the Winter Report for a range of compensation up to 20% for chronic pain favours limiting section 23(1) compensation over extending it or making it more generous (the Policy Bureau paper recognized that under the existing Subjective Complaints policy, on average the range of subjective pain awards, which were made on a judgment basis, was 0 – 2.5%). We consider the use of PDES ratings based on range of motion deficits, with the potential for a PFI rating of up to 24% for the lumbar spine, to be inconsistent with the policy objective of limiting rather than expanding compensation for chronic pain.

[112] As a result, we conclude that the phrase "will be granted," read in its entire context and in its grammatical and ordinary sense within the scheme of the Act and the policy framework, sets out a mandatory, global percentage for the purposes of a section 23(1) award for non-specific chronic pain. We consider the use of the word "will" in this context permits only a single outcome, and that additional impairment ratings for the various consequences of non-specific chronic pain, including functional deficits such as ranges of motion, are not consistent with the meaning of the words or the objects of the policy. If this is so, there is no purpose in referring a worker for a PFI evaluation to obtain range of motion measurements if the only permanent condition at issue is non-specific chronic pain. Regardless of the outcome of the evaluation, the worker's section 23(1) chronic pain award will be based on 2.5% of total disability. Many other WCAT panels have reached a similar conclusion, including those cited earlier.

[113] In view of the mandatory 2.5% award for chronic pain under policy item #39.02, we do not consider the more general policy guidance found in policy item #97.40 to be of assistance in a case where the only permanent condition is chronic pain. Although policy item #97.40 provides that it is always open to the Board to conclude that a worker's disability is greater or less than the percentage resulting from a PFI evaluation, that latitude does not exist if the only possible award for chronic pain is 2.5%.

[114] The WCAT decisions that have directed PFI evaluations of pain-related impairment in cases of stand-alone chronic pain have tended to rely, in part, on the observation that the Act and the chronic pain policy do not expressly prohibit the use of PFI evaluations in section 23(1) assessments for chronic pain. We agree that neither the Act nor policy item #39.02 expressly include such a prohibition. However, in light of our analysis of the meaning of the chronic pain policy and our understanding of its objects, we do not agree that the absence of such a prohibition is, in itself, sufficient to support the use of PFI evaluation findings (generally in conjunction with PDES ratings) in addition to the fixed chronic pain award in the chronic pain policy. Although there is no prohibition on ordering a PFI evaluation, we suggest that such recourse is pointless, as regardless of the outcome, the section 23(1) award for non-specific chronic pain will still be based on a PFI rating of 2.5%.

[115] The WCAT decisions that have directed PFI evaluations for stand-alone non-specific chronic pain also rely on their interpretation of *Jozipovic*. As we have already noted, in that case, the worker had sustained not only a permanent chronic pain condition but also a permanent lumbar disc injury. He had undergone a PFI evaluation in which he demonstrated limited lumbar motion. However, the Board and WCAT had decided that he was not entitled to an award based on the range of motion measurements because the examining physician had described these as unreliable because they were due, or partly due, to the worker's low back pain. Bruce J. concluded that it was wrong for the Board and WCAT to disregard the worker's pain-limited range of motion deficits and provide him only with the 2.5% PFI rating provided for in policy item #39.02.

[116] However, we see nothing in Bruce J.'s reasoning that requires a PFI evaluation for a worker who, as in our case, is ONLY suffering from a permanent non-specific chronic pain condition with no other permanent injury. We do not understand Bruce J. to have reached a conclusion as to the meaning of policy item #39.02 that is different from ours as set out above. On the contrary, at paragraph 28 of her reasons, Bruce J. appears to endorse, or at least recognize, the notion that "there was a flat rate of 2.5% disability for chronic pain under Policy #39.02." Similarly, at paragraph 73, Bruce J. suggests that it is "notable that the chronic pain award is always a flat rate of 2.5%..."

[117] In our view, *Jozipovic* merely reflects the sensible view that, where another permanent physical (or psychological) injury co-exists with chronic pain, it may under-compensate a worker to limit the award to the 2.5% mandated under policy item #39.02 simply because the pain also affects, in some part, the assessment of the physical or psychological impairment associated with the co-existing permanent injury. However,

on our reading of it, *Jozipovic* does not stand for the proposition that, where it is ONLY permanent non-specific chronic pain at issue, a PFI rating other than 2.5% will be merited, or even possible. As already noted, although considered only briefly in *Jozipovic*, it appears that Bruce J. agreed that the PFI rating for chronic pain alone was a "mandatory" or "flat" amount of 2.5%.

[118] Consequently, we do not consider that *Jozipovic* is inconsistent with our conclusion that, even if the worker in this case may have some pain-related limitation of movement, a stand-alone chronic pain award under section 23(1) must be calculated on the basis of a 2.5% rating, with the result that a PFI evaluation would serve no purpose.

[119] In our view, before deciding to evaluate a worker for any of the various types of functional deficits normally recognized in scheduled and unscheduled awards, it must first be possible under the Act and policy to give effect to the results of any such evaluation. For workers with stand-alone non-specific chronic pain, policy item #39.02 removes the ability to recognize the results of such an evaluation and instead directs a mandatory 2.5% award. As we see no scope for awarding compensation for any impairment of earning capacity other than by this mandatory amount, it follows that we see no purpose to referring the worker for a PFI evaluation. We therefore disagree with the line of WCAT cases suggesting a PFI evaluation is appropriate for workers with stand-alone (that is, "non-specific" in the phrasing of the policy) permanent chronic pain.

[120] We acknowledge that the chronic pain policy presents difficulties in its application, including the seemingly illogical notion inherent in the "non-specific" chronic pain aspect of the policy that a worker can be left with permanent non-specific chronic pain, but without another permanent physical or psychological injury for which the pain is a symptom. Indeed, the Practice Directive itself recognizes that pain is not a diagnosis, but rather a symptom of an underlying disorder or condition. To conclude that "non-specific" chronic pain can exist in the absence of an identified disorder, condition or other medical explanation for that symptom is, in our view, perplexing. In such cases a WCAT panel may be tempted to refer the matter to a PFI assessment on the basis that greater scrutiny of the worker's case will reveal an additional permanent injury that is responsible for the chronic pain and that may, in turn, provide a basis for a separate PFI rating.

[121] However, in a suitable case (subject to the limits on WCAT's jurisdiction under the Act) where there is an evidentiary basis for concern about a possible injury or condition in addition to what the Board may have identified as stand-alone chronic pain, we consider that the proper approach would be to engage in a section 249 or section 246 process.

[122] It may also be that some WCAT panels disagree with the Board's policy choices as reflected in policy item #39.02, particularly as that choice reflects a less than generous approach to compensation for impairment of earning capacity due to the effects of non-specific chronic pain. However, that is a matter for a possible referral under section 251 of the Act. In the case before us, the worker has not raised an argument with respect to

the lawfulness of policy item #39.02, and we have applied the policy in deciding his appeal, as section 250(2) of the Act requires.

[123] In some cases, it may be tempting to consider evidence that a worker has been unable to return to work, or is able to return to work only on a limited basis, because of the severity of the non-specific chronic pain, to support the need for a PFI evaluation. In such cases the extent of the impaired earning capacity does not appear to be properly compensated through the fixed 2.5% award for chronic pain. However, we note that evidence of actual loss of earnings is generally not used to estimate earnings impairment under section 23(1), even for scheduled awards for which additional factors may be considered; see: policy item #39.10. As stated by the Court of Appeal in *Jozipovic v British Columbia (Workers Compensation Board)* 2012 BCCA 174, at paragraph 11:

> The Functional Impairment Method [under section 23(1)] of calculating compensation for permanent partial disability is generic in the sense that it does not consider the nature of the worker's actual or potential employment in assessing compensation.

[124] Accordingly, we do not agree that in a section 23(1) assessment actual loss of earnings provides a basis to depart from the fixed disability rating for non-specific chronic pain in favour of a combined chronic pain and range of motion (PDES) award or other award purporting to recognize the various other possible consequences of non-specific chronic pain. In some cases, however, the income loss may raise an issue of whether, in light of the worker's occupation and the nature and severity of the pain, the stand-alone chronic pain award provides appropriate compensation, and whether the worker is eligible for an assessment of an award under section 23(3) on a loss of earnings basis. In the case before us, however, there is information in the file indicating the worker returned to work, and he has informed WCAT that he does not wish to pursue an appeal of the denial of a loss of earnings assessment.

[125] As noted earlier, in some cases there may be evidence that suggests that additional investigation may reveal an organic cause for the worker's chronic pain, or some additional compensable injury, that might lead to additional entitlement. We noted that in appropriate cases it is possible for WCAT to utilize its inquiry powers under sections 246(2) and 249 of the Act. In this case, we have not undertaken further investigations. The worker has not provided additional medical evidence on appeal, and has not suggested that further investigations by WCAT are required. In light of the medical evidence in the file and the narrow issue before us, we do not consider it necessary to seek further medical information.

[126] Finally, we wish to emphasize that our reasoning in this appeal relates only to stand-alone permanent chronic pain, that is, non-specific chronic pain under the wording of policy item #39.02. Where some other permanent injury is also present, (unless there is sufficient medical evidence on file to determine the award as

contemplated by policy items #39.01 and #97.40) a PFI evaluation may well be required. The second injury is not covered by policy item #39.02 and may result in the types of deficits that may be identified in an evaluation by a disability awards medical advisor or an external service provider. In such cases, policy item #39.02 allows for a "separate" 2.5% award for disproportionate specific chronic pain "in addition" to the award for any objective permanent impairment related to the other permanent physical or psychological injury or injuries.

[127] Having considered the medical evidence and the worker's submissions, we find that the Board properly assessed the worker's permanent partial disability award under section 23(1) for non-specific chronic pain. As non-specific chronic pain is the only permanent condition accepted in relation to the claim, and policy item #39.02 allows only for a fixed award of 2.5% of total disability, we find that it was appropriate for the Board to assess the award based on the medical and other information available in the claim file without referring the worker for a PFI evaluation.

[128] Finally, and in the alternative, if we had concluded that a further PFI award is possible in addition to a stand-alone chronic pain award, we would not have found it necessary for the worker to be assessed at a PFI examination in the circumstances of this case. Based on our review of the medical evidence as discussed earlier in our decision, we would consider him to have a "very minor disability" within the meaning of policy item #97.40. We are satisfied that there is sufficient medical information on file to determine the worker's section 23(1) entitlement without a medical examination, in keeping with policy item #39.01.

[129] We deny the worker's appeal.

Conclusion

[130] We deny the appeal and confirm *Review Decision #R0139141* dated March 26, 2012. The worker is entitled to a permanent partial disability award based on 2.5% of total disability for non-specific chronic pain under policy item #39.02. A referral for a PFI examination is not necessary as no further functional impairment award in relation to the worker's non-specific chronic pain is possible.

[131] The worker did not request reimbursement of any expenses related to this appeal, and we make no order regarding expenses.

Guy Riecken
Vice Chair

Warren Hoole
Vice Chair

Elaine Murray
Vice Chair

GR/ml/cv

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