NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2014-03154 **Panel:** Herb Morton **Decision Date**: October 28, 2014

Sections 251 and 23(1) of the Workers Compensation Act – Policy item #39.12 of the Rehabilitation Services and Claims Manual, Volume II – Enhancement factor – Whether policy item #39.12 is patently unreasonable for excluding non-scheduled awards – Chronic pain awards

Policy item #39.12 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), as it relates to non-specific chronic pain awards made pursuant to policy item #39.02, is not patently unreasonable under section 251(1) of the *Workers Compensation Act* (Act). Policy item #39.12 states in part that the Board will not award an enhancement factor in relation to a chronic pain award.

The vice chair discussed the requirements for referring a policy to the chair of WCAT pursuant to section 251 of the Act. Section 251(1) provides that WCAT may refuse to apply a policy of the board of directors of the Workers' Compensation Board, operating as WorkSafeBC (Board), only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. The meaning of the term "patently unreasonable" in section 251(1) can be interpreted in light of the common law definition of patent unreasonableness. The issue is not whether a particular policy is the "best" or "correct" interpretation of the Act. As long as the policy is a viable option within the framework of the Act, it must be respected.

The wording of section 23(1) of the Act is general, which gives the board of directors considerable scope to develop policy regarding permanent disability awards under the Act. Policy items #39.02 and #39.12 of the RSCM II meet the requirement in the Act that the Board assess the impairment of the worker's earning capacity from the degree of the injury. While degree is generally assessed on a scale, degree can also be measured in terms of a fixed award. Thus, policy item #39.12 is a viable option under the Act for addressing chronic pain and is not so patently unreasonable that it is incapable of being supported by the Act and its regulations.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

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Panel: Herb Morton, Vice Chair

Introduction

[1] The worker has appealed the March 18, 2014 Review Division decision (*Review Decision #R0167387*), to the Workers' Compensation Appeal Tribunal (WCAT). The review officer confirmed a decision dated October 8, 2013 by a disability awards officer of the Workers' Compensation Board, operating as WorkSafeBC (Board or WCB). The disability awards officer granted the worker a second award of 2.5% of total disability award for chronic pain, without any enhancement factor in respect of her bilateral chronic hand pain.

[2] The worker's claim was accepted for bilateral carpal tunnel syndrome. She received a permanent partial disability award of 5.0% of total disability for bilateral chronic hand pain (2.5% of total disability for each hand). She seeks an additional award of 1.25% of total disability, as an enhancement factor. She submits the policy in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) at item #39.12, "Enhancement," is patently unreasonable in providing that:

> Enhancement is only applied to scheduled awards. An enhancement factor is not applied to non-scheduled awards, such as chronic pain.
>
> [all quotations are reproduced as written, except as marked and with footnotes deleted]

[3] All references to policy in this decision mean policy in the RSCM II, unless otherwise specified.

[4] The worker is represented by a workers' adviser. By notice of appeal dated April 17, 2014, the worker requested that her appeal be heard in writing. The worker provided a written submission on July 3, 2014, the employer provided a submission on July 30, 2014, and the worker provided a rebuttal on August 15, 2014. By letter dated August 19, 2014, a WCAT appeal coordinator advised that submissions were considered complete.

[5] I find that the worker's appeal involves questions of law and policy, and can be properly considered on the basis of the written evidence and submissions without an oral hearing.

Issue(s)

[6] The general issue raised by the worker's appeal is whether she is entitled to an enhancement factor of 1.25% of total disability, in connection with her permanent disability awards for chronic pain in each hand. This requires consideration as to whether the policy at item #39.12 "is so patently unreasonable that it is not capable of being supported by the Act and its regulations," so as to warrant a referral to the WCAT chair under section 251(2) of the *Workers Compensation Act* (Act).

Jurisdiction

[7] The Review Division decision has been appealed to WCAT under section 239(1) of the Act. WCAT may consider all questions of fact, law, and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Board that is applicable (sections 250(2) and 251 of the Act).

[8] WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal. If the evidence supporting different findings is evenly weighted on an issue respecting the compensation of a worker, WCAT must resolve that issue in a manner that favours the worker (section 250(4) of the Act).

Background and Evidence

[9] The worker began working for the employer, a marina, on February 22, 2007. She was employed as a labourer in constructing a boathouse, earning $13.00 per hour. Her work duties included transplanting grass and adding top soil to a beach (using a shovel and wheelbarrow). This related to a sea grass replanting project.

[10] She submitted an application for compensation for bilateral hand and arm complaints, indicating her last day worked was April 25, 2007 (apart from four days worked from May 7 to 10, 2007). The worker was diagnosed as having bilateral carpal tunnel syndrome. She underwent surgery on August 7, 2007 for a decompression of her left carpal tunnel, and on September 17, 2007 for a decompression of her right carpal tunnel.

[11] The worker's claim was accepted by the Board. By decision dated October 10, 2008, a case manager advised that she accepted that the worker had developed chronic pain secondary to the accepted bilateral carpal tunnel syndrome and related surgeries, and that her pain complaints were permanent. Wage loss benefits were terminated effective September 21, 2008 as the worker's condition had stabilized. The worker's claim was referred to the Board's Disability Awards Department to arrange for an assessment of any entitlement she may have to a permanent disability pension relating to the chronic pain condition.

[12] On October 23, 2008, a disability awards officer granted the worker an award of 2.5% of total disability for chronic pain. On March 9, 2009, a claims adjudicator, Disability Awards Department, advised the worker that her circumstances were not considered to be "so exceptional" such that she would meet the requirements to be considered for a loss of earnings pension award under section 23(3) of the Act (on the basis that she had the ability to adapt to another occupation and would not incur a significant loss of earnings). At the time of a subsequent injury in February 2011, the worker was employed for a construction company on a full-time basis, earning $20.00 per hour.

[13] On May 3, 2013, the Review Division granted the worker's request for an extension of time to request a review of the October 23, 2008 decision. On August 19, 2013, in *Review Decision #R0158286*, a review officer varied the October 23, 2008 decision. The review officer reasoned:

> I am persuaded by the submission of the worker's representative that the worker's left hand and right hand were separate body parts and that was all that was meant by the application of the term, "bilateral", to the worker's left hand CTS [carpal tunnel syndrome]/chronic pain and right hand CTS/chronic pain. I would add that the worker's left hand and right hand are separate, non-adjacent body parts. I find that the worker is entitled to two awards for non-specific chronic pain in her left hand and in her right hand.

[14] By decision dated October 8, 2013, a disability awards officer granted the worker a further award of 2.5% of total disability for her chronic pain. An attached memorandum of September 27, 2013 noted:

> The worker is now assessed at 5.00% and was previously assessed at 2.50% which represents a further 2.50% to be granted for chronic pain associated with the worker's bilateral carpal tunnel syndrome.
>
> **Administrative data:**
>
> …
>
> **3. Effective date:** The effective date of this additional award will remain September 22, 2008.
>
> …
>
> **6. Percentage of disability & nature:** As outlined above, an award equal to 2.5% of total disability will be granted for the chronic pain related to the worker's compensable injuries.
>
> **7. Scheduled:** The Permanent Disability Evaluation Schedule has not been used in the assessment of this award. Policy item # 39.50 Non-Scheduled Awards states; "*Any award where the Schedule is not directly or indirectly used in the assessment is a non-scheduled award*."

This policy goes on to state that "*Neither the age adaptability or enhancement factors nor devaluation are formally applied in respect of non-scheduled awards".*

[15] The worker requested a review of the October 8, 2013 decision, seeking an enhancement award with respect to her bilateral chronic hand pain. By decision dated March 18 2014, a review officer confirmed the October 8, 2013 decision. He cited the policy at item #39.12 and advised that section 99(2) of the Act required that he apply an applicable policy of the board of directors. The worker has appealed the Review Division decision to WCAT.

Law and Policy

[16] The statutory basis for permanent disability awards is contained in section 23 of the Act. Section 23 provides, in part:

> (1) Subject to subsections (3) to (3.2) and sections 34 and 35, if a permanent partial disability results from a worker's injury, **the Board must**
>
> (a) **estimate the impairment of earning capacity from the nature and degree of the injury**, and
>
> (b) pay the worker compensation that is a periodic payment that equals 90% of the Board's estimate of the loss of average net earnings resulting from the impairment.
>
> (2) The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.
>
> [emphasis added]

[17] Policy concerning permanent disability awards is set out in Chapter 6 of the RSCM II. Item #39.00 concerns assessments of permanent disability under section 23(1) of the Act. Item #39.00 provides:

> In all cases where a permanent partial disability results from a worker's injury, the Board must assess the worker's entitlement to a permanent partial disability award under section 23(1) of the *Act*. **Section 23(1) is a mandatory legislative provision which sets out the rule the Board follows in determining a worker's impairment of earnings capacity resulting from a work injury**.
>
> The percentage of disability determined for the worker's condition under section 23(1)(a), reflects the extent to which a particular injury is likely to impair a worker's ability to earn in the future.

> A permanent partial disability award calculated under section 23(1) also reflects such factors as:
>
> - short term fluctuations in the compensable condition;
> - reduced prospects of promotion;
> - restrictions in future employment;
> - reduced capacity to compete in the labour market; and
> - variations in the labour market
>
> [emphasis added]

[18] Item #39.02 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.

[19] Item #39.10 concerns the "Permanent Disability Evaluation Schedule":

> Section 23(1) awards may be made with reference to the *Permanent Disability Evaluation Schedule* ("*Schedule*"), which is set out in Appendix 4. This is a rating schedule of percentages of disability for specific injuries or mutilations.
>
> The *Schedule* is a set of guide-rules, not a set of fixed rules. The Board is free to apply other variables in arriving at a final award; but the "other variables" referred to means other variables relating to the degree of physical or psychological impairment, not other variables relating to social or economic factors, nor rules (including schedules and guide-rules) established in other jurisdictions. In particular, the actual or projected loss of earnings of a worker because of the disability is not a variable which can be considered.
>
> In cases where the specific impairment is not covered by the *Schedule*, but the part of the body in question is covered, the Board must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the section 23(1) evaluation and other medical and non-medical evidence available. The final award is arrived at by taking this percentage of the percentage allocated in the *Schedule* to the disabled part of the body. Because the *Schedule* is used in the calculation, this type of award is still considered as a scheduled one. For example, the amputation of an arm down to the proximal third of the humerus or its disarticulation at the shoulder is scheduled at 70% of total disability. Suppose a worker suffers a severe crush injury to the arm which culminates in a permanent loss of half its function. The final assessment would be 50% of 70%, i.e. 35% of total disability.

[20] Item #39.12 provides, in part:

> *#39.12 Enhancement*
>
> Where a worker has an additional disability which pre-existed the injury or the injury causes more than one disability, the Board, in certain situations, increases the overall percentage of disability that would otherwise be awarded. This is known as the "enhancement factor".
>
> Enhancement is only applied to scheduled awards. **An enhancement factor is not applied to non-scheduled awards, such as chronic pain.**
>
> The Board applies enhancement in the following limited situations:
>
> 1. Arms
>
> An enhancement factor is applied to disabilities on opposite sides of the body involving both arms. For example, a right wrist and a left wrist, or a left shoulder and a right elbow, etc. An enhancement factor of 50% of the lesser arm disability is added to the total of the percentages awarded for each separate arm disability.
>
> [emphasis added]

[21] Additional policy is provided in item #39.12 concerning disabilities involving the legs, assisted ambulation, spine, thumb and one or more fingers, and eyes.

[22] The policy at item #39.12 was amended by a resolution of the board of directors dated July 20, 2010 (RE: Enhancement/Devaluation of Permanent Disability Awards, 2010/07/20-04). The resolution approved amendments to items #39.12, as well as other policy items, and was stated to constitute a policy decision of the board of directors. It was made effective January 1, 2011 and was stated to apply to all decisions made on or after January 1, 2011. The amendments included the new provisions expressly stating that enhancement is only applied to scheduled awards, and that an enhancement factor is not applied to non-scheduled awards, such as chronic pain.

[23] The policy amendments followed the issuance of a policy discussion paper[1]. At a meeting on January 27, 2010, the board of directors approved the release of a discussion paper with options and proposed policy amendments to stakeholders for

[1] Archived policy discussion papers are currently accessible on the Board's website at: http://www.worksafebc.com/regulation_and_policy/archived_information/policy_discussion_papers/default.asp

comment (until May 14, 2010). The discussion paper was entitled "Enhancement/Devaluation of Permanent Disability Awards." The discussion paper set out the following background:

> **5. BACKGROUND**
>
> **5.1 The Workers Compensation Act ("Act")**
>
> When a worker suffers a disability as a result of a workplace injury or disease, WorkSafeBC ("WCB") pays compensation during the course of the disability. In most cases, the disability is temporary. In some cases, however, the worker may not fully recover and may be left with a permanent disability.
>
> Permanent disability awards commence at the point when the worker's temporary disability stabilizes. Permanent disability awards may be total or partial. This issue relates to the assessment of permanent partial disabilities.
>
> The Act sets out the general rule for evaluating a permanent partial disability. Section 23(1) of the Act provides that the WCB must:
>
> - estimate the impairment of earning capacity from the nature and degree of the injury; and
> - pay the worker compensation that is a periodic payment that equals to 90% of the WCB's estimate of the loss of average net earnings resulting from the impairment.
>
> The Act provides that the WCB may compile a rating schedule of percentages of impairment of earning capacity for specified injuries. The rating schedule may be used as a guide in determining the compensation payable for a worker's permanent partial disability. That schedule is set out in the WCB's Permanent Disability Evaluation Schedule ("PDES").
>
> **5.2 The PDES**
>
> The PDES serves as a guide in the measurement of a worker's permanent partial disability by setting out percentages of disability for given permanent medical impairments. These percentages represent the portion of total disability (100%) that results from a permanent physical or psychological impairment. If a worker suffers multiple disabilities in different areas of the body, then the scheduled percentages are added together, not to exceed 100% total disability.
>
> **The aim of the PDES is to maintain a consistent, objective approach to evaluating a worker's impairment. Consistency ensures that workers who suffer similar disabilities are provided compensation based on the same percentage of total disability.**

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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> **The percentages set out in the PDES represent the loss occurring when a disability exists alone, in an otherwise healthy limb or body. When a disability exists alongside another disability in the same or another part of the body, adjustments may have to be made to the scheduled percentages. Policy provides for these adjustments by allowing for other variables to be considered when assessing the degree of physical impairment and any adjustments to the scheduled percentages. Two of these additional variables are enhancement and devaluation.**
>
> [emphasis added]

[24] The discussion paper addressed the subject of enhancement as follows:

> **5.3 Policy and Practice**
>
> The current enhancement and devaluation policies originated from a series of Workers' Compensation Reporter ("WCR") Decisions in the 1970's.
>
> Much of the language in those decisions was imported word for word into policy. Substantively, these policies have remained virtually unchanged since the consolidation of the RS&CM [*Rehabilitation Services and Claims Manual*] in 1984.
>
> *5.3.1 Enhancement Policy and Practice*
>
> The WCB may, in certain situations, increase the overall percentage of the disability that would be awarded. One situation is through the application of the enhancement factor. An enhancement factor may be added when the combined effect of two disabilities, exceeds the sum of the scheduled percentages allocated to each disability.
>
> Policy provides enhancement can be applied to disabilities involving both ears, both eyes, the spine, and a thumb and one or more fingers.
>
> Policy also provides that enhancement may be awarded for injuries to both arms or both legs. For example, consider a worker with impairment to both legs. The overall impact on a worker's functioning where the worker suffers immobility of the right ankle (12%) and immobility of the left knee (25%) in combination may be far greater than 37%, the sum of both impairments.
>
> By policy, an enhancement factor of 50% of the lesser disability may be added to the total of the percentage awarded for each separate disability. This calculation is set out below:
>
> …
>
> **In practice, with respect to disabilities in the limbs, the Disability Award Department only applies enhancement to bilateral disabilities**

> **involving both arms** (e.g. right wrist and left elbow), or bilateral disabilities involving both legs (e.g. right ankle and left ankle). **In applying enhancement in these situations, the WCB recognizes that where a worker has disabilities involving both arms, or both legs, it may be significantly more difficult to function. As a result, the worker may be considered to be disabled to a greater extent than the sum of the individual disabilities.**
>
> [emphasis added]

[25] The discussion paper addressed enhancement and chronic pain as follows:

> *7.1.3 Enhancement and Chronic Pain*
>
> Recently the WCAT has applied enhancement in a case involving chronic pain [*WCAT-2009-02481*]. Chronic pain is a non-scheduled award that exists outside of the PDES as a separate policy. [Policy item #39.02, *Chronic Pain*, of the *RS&CM*, Vol. II.]
>
> In certain situations, the PDES does not capture the full extent of the worker's disability. In these cases, chronic pain, as well as enhancement, devaluation, and other adjustments such as the age adaptability factor, may be added to account for a worker's full disability. These adjustments are referred to as non-scheduled awards.
>
> **A chronic pain award, like enhancement, devaluation, and the age adaptability factor, is applied to scheduled awards after they are calculated. However, each of these non-scheduled awards is made independent of each other. For example, enhancement is not applied to age adaptability. For the same reason, enhancement and devaluation are not applied to chronic pain.**
>
> **Given this recent decision, a statement in the enhancement policy may be required to clarify that enhancement is not applied to non-scheduled awards, such as chronic pain**.
>
> [emphasis added]

[26] The discussion paper set out different options, including maintaining the status quo (involving a lack of clarity in policy), amending the enhancement policy to reflect longstanding Board practice (that enhancement would not be applied to non-scheduled awards, such as awards for chronic pain) or to expand the situations in which enhancement would apply (and to clarify that enhancement applied to non-scheduled awards).

[27] Following consultation with stakeholders by the Policy and Research Division, the board of directors approved the July 20, 2010 resolution as set out above, amending the policy to clarify that enhancement would not be applied to non-scheduled awards, such as awards for chronic pain.

Submissions

[28] The worker requests an enhancement award of 1.25% in addition to the two separate awards of 2.5% of total disability for chronic pain in her left and right upper extremities. The worker submits that the reasoning contained in the policy discussion paper, cited above, does not make any rational sense in relation to her circumstances. She submits that her chronic pain award is not added to some other scheduled award "to account for a worker's **full disability**." Her award is solely for chronic pain. Accordingly, the worker submits that there is no rational basis to exclude consideration of an enhancement factor in connection with the granting of her second chronic pain awards. The worker further submits:

> There is, of course, the larger question of whether the general rationale in the discussion paper has any meaningful underlying logic. We submit it does not.
>
> We submit that a chronic pain award cannot be properly equated with an "adjustment" such as age adaptability. This is an "apples" and "oranges" comparison.
>
> A chronic pain condition is a disability condition and not a mere "add-on". Whereas age adaptability is provided in recognition that the worker is of an age where it is more difficult to adapt and an additional award is provided in recognition of this.
>
> We submit that the determination to exclude chronic pain (when the only awards are for chronic pain) from "enhancement" is patently unreasonable and does not reflect the worker's loss of function by way of bilateral disability when simply adding the two chronic pain awards.

[29] Among other things, the employer submits that policy item #39.12 concerns scheduled awards and is not applicable as the worker's award for chronic pain is not a scheduled award. The employer further submits that there is limited, if any, evidence of disability. In any event, pain, in and of itself, is not a diagnosis and thus not an injury. Hence, it is the employer's position that the criterion of item #39.12 is not met, in terms of the opening wording of the policy which refers to a worker having "an additional disability which pre-existed the injury or the injury causes more than one disability…." The employer has also raised some related questions, which are addressed below as preliminary matters.

Preliminary Matters

(a) Specific issue in dispute

[30] The employer submits that the worker is simply taking exception to the policy, and no facts are provided to support her arguments. There is a lack of evidence to show that the worker has in fact suffered an enhancement of the subjective and non-specific

compensable chronic pain symptoms and that these symptoms lead to an additional disability. The employer submits that there are other channels for dealing with requests for consideration of a change or modification in policy.

[31] The policy in question is one which was established by the board of directors as set out in their July 20, 2010 resolution (which amended policy effective January 1, 2011). The legislature has provided an avenue for addressing issues of lawfulness of policy as set out in section 251 of the Act.

[32] In *Johnson v. BC (WCB)*, 2011 BCCA 255, the British Columbia Court of Appeal (BCCA) reasoned:

> [47] As counsel for the WCB submits to this Court, where a challenge to a board of directors' policy is made through the *WCA* [*Workers Compensation Act*] internal process, the WCAT appeal and the policy review provide an opportunity for submissions, creation of a full record and issuance of reasons for decision that can be considered on judicial review. Depending on the petitioner's degree of success before the appeal tribunal, the court on judicial review will have at least one, and possibly all of the following: a WCAT appeal panel decision, a WCAT chair determination (s. 251(3)) and a board of directors' determination (s. 251(6)).

[33] In *Johnson*, the BCCA found that the chambers judge erred in proceeding to address an issue of lawfulness of policy in the absence of the reasons of the administrative body. I interpret the decision in *Johnson* as meaning that where an issue of lawfulness of policy under the Act is raised, it is both appropriate and desirable that this be addressed within the workers' compensation system, pursuant to the processes established under section 251 of the Act.

[34] While it is open to the board of directors to review and revise their policies as they consider appropriate, this is a separate process from that established by section 251 for addressing an issue regarding the lawfulness of a policy as it applies to a particular case. The worker has expressly raised as an issue in her appeal the lawfulness of the policy at item #39.12. I find that she is entitled to raise this issue in her appeal, and I consider it appropriate to proceed to address that issue.

[35] A prior Review Division decision dated August 19, 2013 *(#R0158286*) found that the worker was entitled to two awards for non-specific chronic pain in her hands. I consider that this provides a sufficient factual basis for addressing the issue raised by the worker's appeal. For reasons set out further below, I do not consider that evidence regarding the impact of the worker's disability on her earning capacity is germane to the determination of her award under section 23(1) of the Act. (Accordingly, the fact that at the time of her further injury in 2011, the worker was employed for a construction company on a full-time basis earning $20.00 per hour is not relevant to my decision.)

I further find that this is not a case where the issue raised by the worker is academic or moot, or otherwise need not be resolved for the purposes of deciding the worker's appeal.

(b) Scope of appeal and request for investigation

[36] The employer provides submissions regarding the evidence with respect to the worker's limitations and functional abilities. The employer suggests that this may be a matter requiring further investigation as to whether the worker actually did sustain (or continues to sustain) a permanent partial disability associated with her chronic pain symptoms. The employer cites the policy at item #40.32, "Worsening or Improvement of Disability," which provides that if the disability on which an award is based worsens, or the worker should unexpectedly recover from a disability classified as permanent, the extent of the disability is reassessed and a new decision may be made.

[37] In response, the worker notes that it is open to the employer to request an extension of time to appeal the prior Review Division decision of August 19, 2013.

[38] The October 8, 2013 decision by the disability awards officer, and subsequent Review Division decision of March 18, 2014, concerned the implementation of the August 19, 2013 Review Division decision. I find that the issue of the worker's entitlement to two awards for non-specific chronic pain in her hands is not before me in this appeal. I do not consider that any further investigation by the Board is necessary to my consideration of the worker's appeal in respect of her request for an additional amount for enhancement. Any question with respect to whether there has a been a significant change in the worker's disability since her award was made effective on September 22, 2008 would involve a new issue for adjudication by the Board. I do not consider it necessary to my consideration of the worker's appeal to inquire into or address that question.

Reasons and Findings

[39] As set out above, the prior Review Division decision of August 19, 2013 has not been appealed to WCAT and is not before me in this appeal. That decision found the worker was entitled to two awards for non-specific chronic pain (one for her right hand and one for her left hand), based on her compensable bilateral carpal tunnel syndrome. I consider that the decision to grant two chronic pain awards involved recognition of injuries to both of her hands, which would otherwise meet the requirement of the first sentence of the policy at item #39.12 which refers to the situation where an injury causes more than one disability.

(a) Lawfulness of policy – request for section 251 referral

[40] The Board and WCAT must apply an applicable policy of the board of directors, subject to section 251 of the Act. Section 99(2) of the Act provides, in relation to decision-making by Board officers and review officers:

> The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case.

[41] Section 250(2) of the Act further provides, in relation to decision-making by WCAT:

> The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

[42] Section 251 of the Act sets out a process for addressing issues of lawfulness of policy under the Act. It provides, in part:

> (1) The appeal tribunal may refuse to apply a policy of the board of directors **only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations**.
>
> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.
>
> [emphasis added]

[43] In *Speckling v. British Columbia (Workers' Compensation Board),* 2005 BCCA 80, the BCCA described the effect of the "patent unreasonableness" standard of review as follows:

> [33] Having confirmed the correctness of the patently unreasonable standard of review, I agree with the chambers judge's summary of the approach to be taken in applying that standard. He noted the following principles (at para. 8):
>
> 1. The standard of review is that of patent unreasonableness: *Canada (Attorney General)* v. *P.S.A.C.* [Public Service Alliance of Canada] (1993), 101 D.L.R. (4th) 673 (S.C.C.).

2. "**Patently unreasonable" means openly, clearly, evidently unreasonab**le: *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748.

3. The review test must be applied to the result not to the reasons leading to the result: *Kovach* v. *British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).

4. The privative clause set out in s. 96(1) of the Act requires the highest level of curial deference: *Canada Safeway v. B.C. (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 (C.A.)

5. A decision may only be set aside where the board commits jurisdiction error.

6. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not: *Douglas Aircraft Co. of Canada Ltd.* v. *McConnell*, [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto* v. *Ontario Secondary School Teachers' Federation et al* (1997), 144 D.L.R. (4th) 385 (S.C.C.).

[emphasis added]

[44] In *Cowburn v. WCB of BC*, 2006, BCSC 722, Mr. Justice Maczko reasoned:

> [25] The judgment of Mr. Justice Iacobucci in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, is frequently cited by courts attempting to define patent unreasonableness. He said the following at p. 777:
>
> > The difference between "unreasonable" and" patently unreasonable" lies <u>in the immediacy or obviousness of the defect</u>. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant <u>searching or testing to find the defect</u>, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary' patently', an adverb, is defined as 'openly, evidently, clearly"'. This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and

> thinking will be required before the judge will be able to grasp the dimensions of the problem. See *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also *Toronto (City) Board of Education v. O.S.S.T.F.* [Ontario Secondary School Teachers' Federation], *District 15*, (1997), 144 D.L.R. (4th) 385 *per* Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

[26] He expanded on this principle in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, where he said at ¶ 52:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.), at pp. 963-964, *per* Cory J., *Sherbrooke (Ville) c. Centre communautaire juridique de l'Estrie*, [1996] 3 S.C.R. 84 (S.C.C.), at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[27] More recently, in *Voice Construction Ltd. v. Construction & General Workers' Union,* [2004] 1 S.C.R. 609, Mr. Justice LeBel offered the following comment at ¶ 41:

> It is illuminating in this respect to consider the definition of patent unreasonableness by Dickson J. (as he then was) in *C.U.P.E.* [Canadian Union of Public Employees]*, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.), at p. 237, which is the seminal judgment of our Court in the development of a modern law of judicial review. Rather than contemplating the metaphysical obviousness of the defect, he explained that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation."

[45] I find that the issue as to whether the policy at item #39.12 is "patently unreasonable" is appropriately addressed on the basis of the approaches described in *Speckling* and *Cowburn*.

[46] The term “enhancement” is not contained in the Act. The term “enhanced” is used in one instance in the Act. Section 39(1)(e) of the Act requires the Board to assess, levy, and collect sufficient funds from independent operators and employers to, among other things,

> (e) provide and maintain a reserve for payment of that portion of the disability **enhanced** by reason of a pre-existing disease, condition or disability;
>
> [emphasis added]

[47] The wording of some provisions in the Act is quite general in nature, and leaves considerable scope for the development of policy under the Act to govern the application of the provision. To illustrate, in *Western Stevedoring Co. Ltd. v. W.C.B.*, 2005 BCSC 1650, Mr. Justice Groberman of the BCSC (as he then was) considered a petition for judicial review which raised an issue concerning the lawfulness of a policy precluding the granting of relief of claim costs in relation to the first ten weeks of a worker’s disability. The court found, at the outset:

> [10] Under section 82 of the *Workers Compensation Act*, the board of directors of the Board is required to establish "policies" regarding compensation. The word "policy" may be somewhat misleading, since the "policies" are effectively inflexible rules. Their existence is authorized by statute, so as long as the policies adopted are within the board of directors' jurisdiction, no issues of unlawful fettering of discretion arise.

[48] The court further reasoned:

> [65] As I have indicated, s. 39(1)(e) is skeletal legislation, which merely provides that the Board is required to levy assessments on employers in order to maintain a reserve (within the accident fund) “for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability.” The Board argues that nothing in the *Act* specifically requires that reserve to be administered as a separate fund, or specifically directs that those portions of claims allocated to s. 39(1)(e) be excluded from consideration in setting an employer’s premiums. In its argument, it says:
>
> > There is no statutory provision that describes the application and operation of the reserve fund. How the reserve fund is to be assessed, what categories of injury or claim will be considered, what factors qualify an injury or claim for consideration, what relief will be considered, who will make the decisions, or how the decisions will be implemented are matters on which the *Workers Compensation Act* is silent,

> and are matters left to the Board to resolve as matters of policy. The Board has answered those questions. Having given the Board authority to levy the assessments, their manner of assessment and how they are factored into the assessment rate are left to the Board.

In support of these propositions, the Board cites *Merrill Ring Wilson Ltd. v. Workmen's Compensation Board*, [1933] 4 D.L.R. 57 (PC). While *Merrill Ring* does establish that the precise manner of making s. 39 assessments rests with the Board, I do not accept that it goes so far as to grant the Board unfettered discretion in determining how it will establish, fund and utilize the various reserves.

[66] For its part, the petitioner agrees that the ***Act*** does not expressly require the Board to relieve individual employers from the burden of paying surcharges to cover the portion of their employees' claims that are attributable to pre-existing disease, conditions or disabilities. It argues, however, that the clear intention of s. 39(1)(e) is to relieve employers of the disincentive that they might otherwise have to hiring workers with pre-existing diseases, conditions or disabilities. The petitioner goes on to argue that any exercise of discretion by the Board which is not in keeping with this intention is a patently unreasonable one.

[67] **Section 39(1)(e) does establish a reserve with the purpose of removing disincentives to the hiring of workers with pre-existing diseases, conditions or disabilities. I agree that in exercising its discretion with respect to the operation of the accident fund, and in calculating and assessing premiums, the Board must have this purpose in mind. It is not, however, the only factor that the Board is entitled to take into account in setting policies applicable to s. 39(1)(e). The section does not exist in a vacuum. Rather, it is part of a complex scheme that has numerous objectives. The Board is, therefore, entitled to consider a variety of factors in establishing and operating the s. 39(1)(e) reserve, including, for example, efficiency in administering the accident fund, and the practicality of adjudication. If the Board were not allowed to consider such matters, it would have made little sense for the legislation to give the Board discretion in the operation of the reserve[.]**

[68] The real question, then, is whether the Board's decision to exclude the first ten weeks of a claim from allocation to the s. 39(1)(e) reserve is a patently unreasonable exercise of discretion. I am not convinced that it is. It is apparent that the cost associated with assessing claims for allocation to the s. 39(1)(e) reserve justifies the establishment of a threshold before a claim is considered.

> Indeed, the petitioner concedes that that is so. **It argues, however, that the Board should be required to demonstrate that there is a rationale for setting that threshold at ten weeks rather than some other length of time. With all due respect, that argument ignores the fact that it is for the petitioner to demonstrate that the period chosen by the Board is patently unreasonable. It has not done so.**
>
> [69] **In particular, it does not appear to me that in setting the threshold at ten weeks, that Board has taken into account improper considerations, acted for an improper purpose, or failed to consider the purpose of s. 39(1)(e). While thresholds other than ten weeks might be justifiable, or even preferable to the ten-week threshold, there is no basis for finding the ten-week threshold to be patently unreasonable.**
>
> [70**]** **I am also unable to say, in the context of the evidence in this case, that a policy of excluding the first ten weeks of longer claims from allocation to the s. 39(1)(e) reserve is clearly irrational, given the multitude of considerations that the board of directors of the Board is entitled to take into account in setting policy.** In particular, the evidence does not satisfy me that this limitation on employer relief from assessments is so serious as to undermine the goals of s. 39(1)(e). The evidence relative to this issue in this case is minimal, however, and I would not preclude the possibility that a focussed attack on this particular policy in a particular case might not result in a different assessment by the court.
>
> [emphasis added]

[49] *Appeal Division Decision #95-0062*, "Section 39(1)(e) Policies," 11 W.C.R. 295, of the former Appeal Division of the Board, similarly reasoned at page 297 in connection with a challenge to the lawfulness of the policy which was established regarding the operation of the section 39(1)(e) reserve:

> To require the Board to accumulate a reserve for a broad purpose is a different matter from requiring it to accomplish the purpose in specific ways. Subsection 39(1)(e) states the broad purpose for which the reserve is intended but provides no guidance as to the implementation of that purpose. It provides no guidance as to how the provision is to be applied to individual cases. It would appear that the provision calls for policies regarding the manner in which it is to be applied to individual cases. **Subsection 39(1)(e) may be interpreted, therefore, as leaving implicitly a substantial amount of discretion for policy making as regards its potential application to individual cases**. The history behind the provision reinforces that interpretation.

> …
>
> Since the *Act* is silent on the application of Section 39(1)(e) to individual cases and the policies must be relied on in that respect, it is important that the policies be clear.
>
> [emphasis added]

[50] Under the Act as amended March 3, 2003, the Board and WCAT must apply an applicable policy (subject to section 251 of the Act).

[51] A 2005 decision by the former WCAT chair (*WCAT-2005-06524*) concerned a referral under section 251 of the Act in relation to the policy at item #39.01 of the *Rehabilitation Services* and *Claims Manual, Volume I* (RSCM I) regarding the granting of chronic pain awards of 2.5% of total disability. The WCAT chair found that the policy at RSCM I item #39.01 was not patently unreasonable and must be applied by WCAT. The question with respect to the lawfulness of the policy at RSCM II item #39.02 was not before her in that decision.

[52] In this appeal, the worker does not challenge the lawfulness of the policy at RSCM II item #39.02 regarding the granting of a second award of 2.5% of total disability for chronic pain. That issue is not raised in this appeal. I have, nevertheless, reviewed the policy at item #39.12 concerning enhancement within the context of this policy. The fact that a fixed award of 2.5% is payable for chronic pain, in any case in which the threshold requirements for such an award is met, means that no additional award may be made in circumstances where the effects of the worker's chronic pain are perceived to be of a greater extent, whether due to the high level of pain experienced by a particular worker in one case or the bilateral nature of the chronic pain as in this case.

[53] This appeal concerns the application of section 23(1) of the Act, which provides that if a permanent partial disability results from a worker's injury, the Board must estimate the impairment of earning capacity from the nature and degree of the injury.

[54] *Appeal Division Decision #92-0193*, "Section 23(1) – Measuring Disability," 8 W.C.R. 75, noted on page 77:

> *Workers Compensation in Canada* (Second Edition), by Dr. Terence Ison, states the following with respect to the statutory language of Section 23(1):
>
> > Although that language requires the boards to achieve what is logically impossible, it is generally interpreted as a mandate to adopt a physical impairment of calculation, and that interpretation is enhanced by other statutory provisions authorizing the boards to adopt disability rating schedules. To ascertain the nature and severity of any residual disability, a board doctor usually makes a clinical examination of the worker. That may be supplemented by

> other evidence, including the testimony of the worker about the physical significance of a disability, but evidence of the impact on actual earnings of the worker is irrelevant.

Section 23(1) mandates the physical impairment method of pension calculation. Section 23(2) authorizes the Board to adopt a disability rating schedule. Section 23(3) provides for the payment of pensions on a projected loss of earnings basis.

The analysis advanced by Dr. Ison is reflected in the *Rehabilitation Services and Claims Manual* adopted as policy by the governors. Rehabilitation Services and Claims Manual #39.00 states:

> The physical impairment method is the primary one used for measuring permanent disabilities. It is the method provided for in Section 23(1). In applying this method, the Board does not normally have regard to the individual worker's actual loss of earnings. It considers only the physical condition of the worker. It results in a percentage of disability being allocated to the claimant's condition.

[55] *Appeal Division Decision #92-0193* reasoned as follows (at page 78):

> The intent of the Permanent Disability Evaluation Schedule was discussed at length in the report of the commissioner of inquiry into the *Workers Compensation Act reporting in 1965 (the Tysoe Commission)*. Mr. Justice Tysoe stated (at 273):
>
> > A percentage of impairment of earning capacity allotted under the schedule or awarded in a judgement (non-scheduled) award represents an effort to state in terms of percentages, and on the average, the extent to which the particular disability will impair the workman's ability to earn. In arriving at this percentage, those preparing the schedule, or in the case of a judgement award those making the award, have had regard to the ability to the workman to do average labouring work. That is to say, regard is not had to the particular class of employment in which the particular workman has been engaged at the time of the injury.
>
> The Tysoe Commission analysis is reflected in the policy manual excerpt that the Board does not normally have regard to the individual worker's actual loss of earnings in applying the physical impairment method of measuring a permanent disability. As Mr. Justice Tysoe stated, the functional award is an effort to state in terms of percentages and on the average the extent to which the particular disability would impair the worker's ability to earn. That principle is common to both scheduled and non-scheduled awards. There is nothing in the Act that would suggest scheduled awards ought to be any more or less generous to workers than non-scheduled awards.

[56] Policy at item #39.00 states:

> In all cases where a permanent partial disability results from a worker's injury, the Board must assess the worker's entitlement to a permanent partial disability award under section 23(1) of the Act. Section 23(1) is a mandatory legislative provision which sets out the rule the Board follows in determining a worker's impairment of earnings capacity resulting from a work injury.
>
> The percentage of disability determined for the worker's condition under section 23(1)(a), reflects the extent to which a particular injury is likely to impair a worker's ability to earn in the future.

[57] The effect of statutory provisions authorizing the making of binding policy has been addressed in various court decisions. In *Yukon (Workers' Compensation Appeal Tribunal) v. Yukon (Workers' Compensation Health and Safety Board)*, 2005 YKSC 5, [2005] Y.J. No. 5, the Yukon Territory Supreme Court considered an application regarding the policy-making power of the Yukon Workers' Compensation Health and Safety Board (Yukon Board). Upon consideration of the provisions of the Yukon *Workers Compensation Act*, R.S.Y. 2002, c. 231, the court found that the Yukon Board had authority to make policy which was binding upon the appeal committee. With respect to an argument regarding fettering, the court reasoned:

> 55 The classic definition of the fettering of discretion can be found in *H.E.U.* [Hospital Employees' Union] *Local 180 v. Peace Arch District Hospital* (1989), 35 B.C.L.R. (2d) 64 (B.C.C.A.) where the Court quoted S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed. at page 311 as follows:
>
> > A tribunal entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. Thus, a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied indiscriminately to all cases before it; but its statutory discretion may be wide enough to justify the adoption of a rule not to award any costs save in exceptional circumstances, as distinct from a rule never to award any costs at all.
>
> 56 It is my view that the concept of fettering one's discretion is a common law principle that could apply to the board or an appeal committee. Under this Act however, the concept of fettering has a much reduced scope or application. The board is empowered to make policy and the policy is binding upon the appeal committee. In circumstances where there was no statutory authority to make binding policy, it would be appropriate to argue that an

> administrative policy could result in fettering the discretion of a board or tribunal. **The concept of fettering, in my view, cannot apply to the policy itself which is mandated by legislation so long as it is within the objectives of the Act or "the margin of manoeuvre contemplated by the legislature**". See *Re Lewis and Superintendent of Motor Vehicles for British Columbia*, [1980] B.C.J. No. 1433, at page 528.
>
> 57 I do not rule out the application of fettering to a board or appeal committee decision but simply state that the board policy itself cannot be a fetter by virtue of its statutory mandate.
>
> [emphasis added]

[58] In *Schulmeister v. BC (WCAT)*, 2007 BCSC 1580, the BCSC analyzed the legal effect of a policy of the board of directors as follows:

> [123] Section 82(1)(a) of the Act requires the Board to set and revise policies respecting compensation, assessment, rehabilitation and occupational health and safety. The policies contained in the RSCM pursuant to s. 82(1)(a) of the Act, including policy item #22.00, have been validly prepared for the purposes of the Act and within the general terms of the Board.
>
> [124] Generally**, if subordinate legislation is both within the general purposes of the parent legislation and within the terms of the regulation-making authority**, the subordinate legislation is as valid and effective as if it had been enacted by the legislature itself: see David Phillip Jones & Anne S. de Villars, Principles of Administrative Law, 4th ed. (Toronto: Thomson Carswell, 2004) at 101.
>
> [emphasis added]

[59] A discussion of policy options in situations in which a statute grants a discretion is found in *Skyline Roofing v. Alberta (WCB)*, [2001] 10 W.W.R. 651 (Alta. Q.B.). The Court reasoned (at page 685):

> 82 **Exactly how far a policy can go must in each case be a matter of statutory interpretation of the enabling legislation**. …
>
> 83 The particular issue here is whether a statutory policy can narrow or foreclose or "fetter" a discretion granted by the statute. If the statute creates a discretionary power, can the policy specify some or all of the circumstances in which the discretion must be exercised in a particular type of case? As has been seen, an informal policy cannot fetter a discretion granted by statute. Does the fettering rule apply to policies authorized by statute? **A policy could potentially operate in a number of ways:**

> (a) **The policy could be a fixed and inflexible rule that applies in every case. The policy exhausts the discretion.**
>
> (b) The policy could create a presumption, but each Applicant could argue why the policy should not apply in a particular case.
>
> (c) [T]he policy could be a summary and weighing of factual and discretionary factors that apply in most cases, but in each particular case the decision-maker must decide if the policy should be applied, an exception should be made, or the policy should be modified.
>
> (d) The policy could be considered along with all other relevant factors, but it should not be given special weight in individual cases.
>
> The distinction between the second and third options is admittedly subtle, and may only amount to a difference in the burden of proof. The third option has the advantage of emphasizing the duty to consider each case on its own merits. … Which option applies to a particular policy authorized by statute must be a matter of statutory interpretation in each case.
>
> [emphasis added]

[60] The policies at items #39.02 and #39.12 do not, as in the case of some other policies, use words such as "generally" or "usually" to signal that they are intended to be applied as guidelines which allow for flexibility in their application based on particular circumstances. The effect of the policies at items #39.02 and #39.12 is to limit individual awards for chronic pain to 2.5% of total disability, and to preclude application of an enhancement factor where more than one award for chronic pain is made. It is evident that the policy is intended as a fixed and inflexible rule that applies in every case where an award for chronic pain is made, which exhausts the discretion contained in section 23(1) of the Act.

[61] In *Yukon (WCAT)*, the court identified the issue regarding the lawfulness of a policy as concerning whether the policy is within "the margin of manoeuvre contemplated by the legislature."

[62] The statutory imperative of section 23(1) is that if a permanent partial disability results from a worker's injury, the Board must estimate the impairment of earning capacity from the nature and degree of the injury. In this case, the nature of the worker's permanent

impairment is chronic pain. The degree of the impairment is not measured by way of a rating on a scale. However, it was found to constitute non-specific chronic pain which is defined in policy at item #39.02 as follows:

> 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.

[63] Policy at item #39.02 sets out the evidence to be considered in considering a worker's eligibility for a chronic pain award:

> 3. Evidence Considered in a Chronic Pain Section 23(1) Assessment:
>
> In making a determination under section 23(1), the Board will enquire carefully into all of the circumstances of a worker's chronic pain resulting from a compensable injury or disease.
>
> The evidence that the Board may consider in a section 23(1) assessment for chronic pain includes the following:
>
> i) The findings of any multidisciplinary assessments.
> ii) Information provided by the worker's attending physician as well as any other relevant medical information on the claim.
> iii) The worker's own statements regarding the nature and extent of the pain.
> iv) The worker's conduct and activities and whether they are consistent with the pain complaints.
> v) In cases of specific chronic pain, the Board will consider the extent of the associated physical or psychological permanent impairment and whether the specific chronic pain is in keeping with the particular permanent impairment.
>
> The evidence that is relied upon to support the assessment of a section 23(1) award must be fully documented.

[64] The policy further provides that 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.
>
> [emphasis added]

[65] I consider that in this context, the further requirement that the Board estimate the impairment of earning capacity from the "degree" of the injury is met through the application of these requirements. While the "degree" of the permanent impairment resulting from an injury will normally involve an assessment on some type of scale, the degree may also be assessed in terms of whether it is of sufficient magnitude to warrant a fixed award.

[66] The legislative decision to establish the standard of "patent unreasonableness" as the test to be applied in reviewing the lawfulness of a policy under the Act clearly signals the legislative intention that policy decisions by the board of directors are to be accorded a high degree of deference. The issue is not whether a particular policy is considered, as a matter of legal interpretation, to be the "best" or "correct" interpretation of the Act. The policy-makers are entitled to take into account a range of factors under the Act in setting policy. So long as the policy represents a viable option within the framework of the Act, it must be respected.

[67] In connection with chronic pain awards, the board of directors has exercised its authority to establish a policy in a fashion which exhausts the discretion under section 23(1) by establishing a fixed and inflexible rule that applies in every case.

[68] Section 23(2) of the Act authorizes the Board to compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases. It is implicit to this authority, and the general authority of the board of directors under section 82 of the Act, that the board of directors has authority to establish policy governing the application of this rating schedule. The policy at item #39.02 concerning enhancement stipulates that its application is restricted to scheduled awards. For additional clarity, the policy specifies that an enhancement factor is not applied to non-scheduled awards, such as chronic pain.

[69] As noted, under section 23(2) of the Act, the board of directors has authority to establish a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases. There is nothing in section 23(1) which requires that various aspects of the schedule, or policies associated with the application of the schedule, also apply to the making of awards under section 23(1) of the Act. The fact that "enhancement" is recognized by policy in connection with the application of the schedule does not mean a similar policy must necessarily be adopted for chronic pain awards under section 23(1) of the Act.

[70] Another policy approach, which provided for an additional or higher award for bilateral pain or pain of an exceptionally disabling nature, might be perceived as more fair. However, I consider that this concerns the correctness or reasonableness of the policy, rather than whether it represents a permissible policy option under the Act.

[71] I consider that the chronic pain policy takes into account both the nature of the injury, and to a limited extent, the degree of the injury, as required by section 23(1) of the Act. Given the difficulties associated with measuring pain or subjective complaints, as a separate factor from the measurement of physical impairment of function, I consider that the policy represents a viable option under the Act for addressing this type of injury. It is one which can be rationally supported under the Act. The statutory requirement that the Board must estimate the impairment of earning capacity from the nature and degree of the injury is met through the establishment by the board of directors of policy which sets both the threshold for the granting of a pension award for chronic pain and the amount of any award for chronic pain.

[72] Accordingly, I am not persuaded that the policy at item #39.12 (which provides that enhancement is only applied to scheduled awards, and does not apply to non-scheduled awards, such as chronic pain) is so patently unreasonable that it is not capable of being supported by the Act. Grounds for referring policy at item #39.12 to the WCAT chair under section 251(2) of the Act are not established. I will, therefore, apply the policy pursuant to section 250(2) of the Act.

(b) Application of Policy

[73] The only issue raised by the worker in this appeal concerns her eligibility to an increased award for enhancement. Policy at item #39.12 is clear in precluding an increase for enhancement, based on her bilateral chronic pain awards. Applying the policy, I find the worker is not entitled to an enhancement factor with respect to her bilateral chronic pain awards. I agree with the review officer's decision, and deny the worker's appeal.

[74] No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.

Conclusion

[75] I deny the worker's appeal and confirm the March 18, 2014 Review Division decision. The worker is not entitled to an enhancement factor with respect to her bilateral chronic pain awards.

Herb Morton
Vice Chair

HM/gw