Noteworthy Decision Summary

Decision: A1700491 **Panel:** Andrew Pendray **Decision Date:** October 31, 2018

Duration of Permanent Disability Payments – Reopening more than 3 years after date of injury – Section 23.1 of the Workers Compensation Act – Section 32 of the Workers Compensation Act – Item #70.20 of the Rehabilitation Services Claims Manual, Volume II.

This decision is noteworthy for its interpretation of section 32(3) of the *Workers Compensation Act* (Act) and analysis of whether the Workers' Compensation Board, operating as WorkSafeBC (Board), has jurisdiction to reconsider the duration of permanent partial disability benefits when it reopens a worker's claim more than three years after the date of injury to consider a significant change in the worker's permanent disability.

The worker injured his lower back in a fall at work in 2010. In *WCAT-2013-00109* it was determined that the worker was entitled to a permanent partial disability award payable until he reached 70 years of age. The Board set the worker's permanent partial disability award at 13.76% of total disability. In *WCAT-2016-01091* the panel found that the worker had experienced a significant worsening of his permanent condition and was entitled to a reopening of his claim to reassess the amount of his permanent partial disability award.

Following an evaluation of the worker's functional impairment, the Board increased the amount of permanent partial disability benefits to 21% of total disability. On a review of that decision, the worker submitted that the amount of his disability award should be increased and should be made payable to age 80. The Review Division increased the permanent partial disability award to 22% of total disability, but concluded that the Board did not have jurisdiction to address the duration of the benefits, as the decision had been made in *WCAT-2013-00109*. On appeal to WCAT, the worker argued that when the Board reopened his claim and reassessed the amount of permanent partial disability benefits more than three years after the date of injury, subsection 32(3) of the Act gave the Board jurisdiction to make a new decision on the duration of benefits

The panel interpreted section 32 of the Act in accordance with the principles endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. The panel concluded that the reference in subsection 32(1) to the Board having the ability to treat a recurrence of injury more than three years after the date of injury as if it were "the happening of the injury" does not mean that the Board equally has the jurisdiction to consider all matters anew when, more than three years after an injury, a worker experiences an increased degree of permanent disability as described in subsection 32(3). The panel concluded that the legislative intent of subsection 32(3) is accurately captured in item #70.20 of the *Rehabilitation Services and Claims Manual, Volume II*, which focuses on the manner in which a worker's average earnings should be calculated where there is a reopening more than three years after the date of injury. The panel considered Practice Directive #C5-1 and concluded that insofar as it interprets subsections 32(1) and 32(3) of the Act as being joined, or forming part of a list, it is inconsistent with the grammatical and ordinary sense of the words in those subsections.

The panel concluded that the Board does not have jurisdiction to reconsider the duration of a permanent partial disability award when a worker's claim is reopened to address a significant change in the worker's permanent disability more than three years after the date of injury.

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DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

WCAT Decision Number: A1700491
WCAT Decision Date: October 31, 2018

Introduction

[1] This appeal concerns the worker's entitlement to permanent disability benefits in respect of a low back injury he sustained in a fall in September 2010.

[2] The matter of the worker's entitlement to permanent disability benefits, and specifically the amount and duration of those benefits as provided for by the *Workers Compensation Act* (Act), has been an ongoing issue since February 2012. At that time, the Workers' Compensation Board (Board)[1] first determined that the worker was entitled to permanent disability benefits equal to 5.80% of total disability, payable until the worker reached 65 years of age.

[3] Eventually, after a review and appeal, the Board issued a January 28, 2013 decision letter which determined that the worker was, pursuant to section 23(1) of the Act, entitled to receive permanent disability benefits equal to 13.75% of total disability. In *WCAT-2013-00109,* the Workers' Compensation Appeal Tribunal (WCAT) determined that the worker's permanent disability benefits were, pursuant to section 23.1 of the Act, payable until he reached 70 years of age.

[4] The worker experienced a significant worsening of his permanent disability condition subsequent to 2013. In an August 11, 2016 decision letter the Board determined that the worker was entitled to permanent disability benefits equal to 21% of total disability. It is that decision that led to the current appeal.

[5] In requesting a review of the Board's August 11, 2016 decision letter the worker took the position that he ought to receive a further 1% permanent disability award for mild L5 sensory radiculopathy, and that his permanent disability benefits ought to continue until he reached 80 years of age. In *Review Reference #R0213010*, the Review Division agreed with the worker's position on the issue of radiculopathy, but determined that the Board did not have jurisdiction, in the August 11, 2016 decision letter, to address the duration of his permanent disability benefit payments.

[6] On appeal from that decision, the worker takes position that he is entitled to further permanent disability benefits of 1% of total disability for loss of strength, and 1% for loss of sensation related to his L4-5 nerve root. The worker also reiterates his position that his permanent disability benefits ought to be payable until he turns 80 years of age.

[1] The Board operates as WorkSafeBC.

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Issue(s)

[7] The issues under appeal are:

- Did the Board properly estimate the impairment of the worker's earning capacity from the nature and degree of his permanent injuries as required by section 23(1) of Act? Specifically, is the worker entitled to an increase in his section 23(1) award in relation to loss of sensation and loss of strength?
- Did the Board have jurisdiction to consider the duration of the worker's permanent disability benefits? If so, should the worker continue to receive permanent disability benefits until he reaches 80 years of age?

Jurisdiction

[8] Section 239(1) of the Act permits appeals from Review Division decisions to WCAT, subject to the exceptions set out in section 239(2) of the Act.

[9] This is a rehearing by WCAT. WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further evidence, although it is not obliged to do so. WCAT exercises an independent adjudicative function and has full substitutional authority. WCAT may reweigh the evidence and substitute its decision for the appealed decision or order. WCAT may confirm, vary, or cancel the appealed decision or order.

[10] Subject to section 250(4) of the Act, the standard of proof in an appeal is the balance of probabilities. Section 250(4) provides that in a matter involving the compensation of a worker, if the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in a manner that favours the worker.

[11] The appeal proceeded by way of an oral hearing, at which the worker testified and his representative made submissions. Further written submissions were provided by the worker's representative subsequent to the hearing.

Background

[12] While working as a building maintenance person in September 2010 the appellant worker fell and landed on his lower back. Despite undergoing surgery to treat an L4-5 disc herniation, the worker continued to experience low back and right leg pain. In November 2011 the Board concluded that the worker had been left with permanent injuries identified as a "recurrent L4/5 disc herniation…and chronic low back with right leg pain."

[13] On October 6, 2010 the worker underwent an L4-5 discectomy and L5 foraminotomy procedure as treatment for his compensable September 2010 injuries. In follow-up examinations the worker's treating neurosurgeon, Dr. Chan, noted that the worker reported recurrent right leg pain. On examination of November 10, 2010 Dr. Chan indicated that the worker did not have any motor weakness, and that he was able to toe stand, heel stand, and squat on both sides.

[14] The worker received nerve block treatment to the right L5 nerve root in 2011 in the hopes of improving his reported right leg pain and numbness symptoms, as well as epidural steroid injections at the L4-5 level of his lumbar spine. Although he also attended an occupational rehabilitation treatment program, the worker continued to report ongoing pain symptoms in his back as well as pain and numbness in his right leg.

[15] On November 4, 2011 the Board determined that the worker's had been left with a permanent L4-5 disc herniation and "chronic low back with right leg pain."

[16] After referring the worker for a permanent functional impairment evaluation, the Board determined, in a February 23, 2012 decision letter, that the worker was entitled to permanent disability benefits equal to 5.80% of total disability[2], payable until the worker reached 65 years of age. That decision was confirmed by the Review Division, but was varied in *WCAT-2013-00109*. There, WCAT determined that the worker was entitled to have his permanent disability benefit entitlement calculated based on the loss of range of motion he had experienced in his lumbar spine, as measured at his permanent functional impairment evaluation from January 2012. WCAT further determined that the worker's permanent disability benefits would continue until he reached 70 years of age.

[17] As a result, the Board issued a January 28, 2013 decision letter informing the worker that he was entitled to receive permanent disability benefits equal to 13.75% of total disability based on his reduced range of motion (10.25% of total disability), chronic pain, and mild right L5 radiculopathy.

[18] The worker continued to report symptoms of low back and right leg pain, as well as right leg buckling, through 2013. In a November 20, 2013 consultation report Dr. Chan indicated that his opinion was that the worker's right leg buckling was due to mechanical low back pain.

[19] The worker was seen by Dr. Dvorak, an orthopaedic surgeon, in August 2014. Dr. Dvorak indicated that on formal motor testing the worker had marked voluntary giving way and marked pain in both legs to simple sensory and motor testing. Dr. Dvorak noted, however, that he felt that the worker may have "some component of peripheral neuropathy." Dr. Dvorak recommended that the worker increase his physical activity, and suggested that he attend a chronic pain program.

[20] The Board determined, in an October 15, 2014 decision letter, that the worker had not experienced a significant worsening in his permanent compensable condition. That decision was confirmed in *Review Reference #R0186590*. In *WCAT-2016-01091*, the panel found that the worker had experienced a significant worsening in his condition, and that he was therefore entitled to a reopening for a reassessment of his entitlement to permanent disability benefits.

[21] The worker underwent a further permanent functional impairment evaluation on July 13, 2016.

[22] Relying on the results of that evaluation, the Board issued the August 11, 2016 decision letter that ultimately led to the current appeal, finding that the worker was entitled to permanent

[2] 2.00% for surgery to the lumbar spine, 2.5% for chronic pain, and 1.00% for mild right L5 sensory radiculopathy.

disability benefits equal to 21% of total disability, including 2.5% for chronic pain and 18.50% for loss of range of motion of the lumbar spine. No award was provided for radiculopathy. In that decision letter the Board also noted the following with respect to the duration of the worker's permanent disability benefits:

> Section 23.1 of the *Act* provides that your monthly permanent disability award is payable to the date that you reach age 65. It recognizes that age 65 is the standard retirement age for workers. Based on the information on file, I have determined that the standard age of retirement applies in your case. However, if WorkSafeBC determines that there is a later date of retirement, benefits may be extended to this later date.
> I have reviewed the circumstances of your claim and have extended the calculation of your permanent disability benefits to 70 as noted in the WCAT decision of January 15, 2013.

[23] In *Review Reference #R0213010*, the Review Division varied the Board's August 11, 2016 decision to include a further 1.0% permanent disability award for "sensory radiculopathy," bringing his total award to 22% of total disability. Although the worker submitted to the Review Division that payment of his permanent disability benefits ought to continue until he was 80 years old, the Review Division concluded that the Board did not, in the August 11, 2016 decision letter, have jurisdiction to address the duration of the worker's permanent disability benefits, as that decision had been made in *WCAT-2013-00109*.

Reasons and Findings

Did the Board properly estimate the impairment of the worker's earning capacity from the nature and degree of his permanent injuries as required by section 23(1) of Act? Specifically, is the worker entitled to an increase in his section 23(1) award in relation to loss of sensation and loss of strength?

[24] Section 23(1) of the Act provides that where a permanent partial disability results from a compensable injury, the Board must estimate the impairment of the worker's earning capacity from the nature and degree of the injury. The Board must then pay the worker compensation based on an estimate of the loss of average net earnings resulting from the impairment. This compensation is expressed as a percentage of total disability, and is often referred to as the functional impairment award.

[25] Section 23(2) of the Act provides that the Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries which may be used as a guide in determining the compensation payable in permanent disability cases. The Board has, therefore, established the Permanent Disability Evaluation Schedule (PDES), which is found at Appendix 4 of the RSCM II[3].

[3] Section 250(2) of the Act requires WCAT to apply published policy of the board of directors of the Board, subject to the provisions of section 251 of the Act. The *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), contains the published policy applicable to this appeal.

Loss of Strength

[26] Part VI of the PDES provides for disability ratings for loss of strength in the lower extremities. Item G, "Loss of Strength," sets out that a disability rating is only to be applied if there is strong, consistent, objective evidence of loss of strength that is not taken into account by amputation or loss of range of motion value, and is not covered by peripheral nerve ratings. In addition, there must be clear pathological explanation for the worker's experienced weakness.

[27] The worker's position is that he has consistently reported loss of strength in his right leg since the date of injury. He submits that many of the reports of his family doctor, and reports from various specialists he has seen, have noted this issue.

[28] At the oral hearing of his appeal the worker described that he would at times experience weakness in his right leg that would cause him to fall down. The worker stated that this issue first commenced after his initial surgery in 2010, and that he had in fact fallen while undergoing a medical assessment in 2015. The worker explained that the weakness that he felt in his right leg affected his ability to walk, to get up from a seated position, and to work "a full job." The worker indicated that as a result of his right leg weakness he was essentially unable to do any physical jobs, and that if he lifted anything more than a couple of pounds, he could fall.

[29] I accept that the worker has consistently reported a feeling of weakness in his right leg in the years since his injury. Specific examples of that reporting include at a January 2012 permanent functional impairment evaluation, at a November 2013 consultation with Dr. Chan, and at an August 2014 consultation with Dr. Dvorak.

[30] I note, in reviewing the above, that Dr. Chan specifically indicated in November 2013 that his view was that the worker's reported right leg weakness was due to mechanical low back pain. Dr. Dvorak indicated that his view was that the worker's "giving way" in his right leg was "voluntary." In my view, those medical opinions suggest that rather than a clear pathological reason for the weakness in the worker's right leg, he in fact experiences that weakness as a result of his pain condition. On that basis, I would not consider the worker to be entitled to receive a permanent disability award for loss of strength in the right leg.

[31] The worker submits that in considering whether he experiences a compensable loss of strength in the right leg, I ought to rely on the opinion provided by Dr. Parhar, a family physician who examined the worker for the purposes of his worker's compensation issues in both 2015 and in April 2017.

[32] In a May 3, 2017 report Dr. Parhar indicated that he assessed the worker's right lower extremity strength to be "4/5," which equated to "Movement possible against some resistance by the examiner." Dr. Parhar noted that he had obtained the same finding when he had examined the worker in 2015.

[33] Dr. Parhar indicated that his view was that the "best pathological explanation" for the weakness in the worker's right leg was "involvement" of the worker's L4-5 disc herniation. He explained that his view was that the worker's L5 nerve root, which was affected by that injury, would affect the strength of muscle groups in the right lower extremity, especially those involved with

extension and dorsiflexion of the great toe. Dr. Parhar noted that the worker's extension and dorsiflexion of the right toe had measured at 4/5 strength both in August 2015 and April 2017.

[34] Dr. Parhar acknowledged that the worker was experiencing a wider motor strength loss that could not be explained entirely by the worker's L4-5 disc herniation injury. Dr. Parhar's view was that this could be explained by a peripheral neuropathy or issues with other areas of the lumbar spine which had not been found to be compensable by the Board.

[35] I find Dr. Parhar's opinion as to the likely cause of the worker's loss of strength in his great toe to be compelling, and I accept it. Certainly, that opinion is well reasoned, and accords with the fact that the Board has already accepted that the worker's L5 nerve root has been affected by his permanent injury, and provided him with an award of 1.0% of total disability for mild right L5 sensory radiculopathy (discussed further below).

[36] I note that the PDES, at item IX, explains that sensory and motor awards for loss of nerve root function include consideration of consequent loss of range of motion and loss of strength, unless there is an additional mechanical, anatomical, or other underlying pathological reason for limitations of these functions.

[37] Here, Dr. Parhar does not describe the worker's right great toe loss of strength as being related to anything other than his loss of L5 nerve root function, for which the worker has already received a permanent disability award. As a result, I do not consider the worker to be entitled to receive a further 1.0% permanent disability award for the loss of strength he experiences in relation to his L5 radiculopathy condition.

[38] I also find that the worker is not entitled to a loss of strength award with respect to what Dr. Parhar has described as the worker's "wider motor strength loss" in the right leg. I accept that, as Dr. Parhar has indicated, the worker's wider motor strength loss cannot be attributed to a clear pathological cause, let alone a cause directly related to his compensable injury which would entitle him to a permanent disability award for that issue. The appeal is denied on this issue.

Loss of Sensation

[39] Above, I have referenced the criteria set out in the PDES for sensory awards for loss of nerve root function.

[40] The worker submits that he should be provided with an increase to his permanent disability benefits for loss of nerve root function, based on the findings of Dr. Parhar's two examinations of August 2015 and April 2017.

[41] When the Board first determined that the worker was entitled to receive a 1.0% award for sensory loss in his L5 nerve root in 2013, it based that determination on the conclusion that the worker had a "mild right L5 sensory radiculopathy." That mild right L5 sensory radiculopathy was identified by Dr. Ragheb, who had completed a January 18, 2012 permanent functional impairment evaluation of the worker on behalf of the Board.

[42] The question is whether the worker's radiculopathy condition has worsened since that time, such that his permanent disability award for that condition ought to be increased. In my view, the evidence supports the worker's contention that it has.

[43] In his August 2015 examination of the worker Dr. Parhar indicated that the worker had "moderately decreased sensation in the right L4-L5 distribution to vibration sense, light touch sense, pin prick sense, and temperature sense." He noted further that sensory examination in the left lower extremity was normal.

[44] The worker was also examined at a permanent functional impairment evaluation in July 2016, by Dr. Khunkhun. Dr. Khunkhun reported that the worker reported reduced sensation to light touch in both of his legs and feet.

[45] I prefer Dr. Parhar's conclusions on the nature of the worker's sensory loss to Dr. Khunkhun's general report. It is clear from Dr. Parhar's report that he undertook a detailed examination of the worker's sensation in the lower extremities, including multiple different testing methods. Dr. Khunkhun's report provides no such detail, and in fact does not provide an opinion as to whether the worker experiences reduced sensation due to his permanent lumbar disc injury.

[46] A moderate sensory loss related to an L4 or L5 nerve root condition would entitle the worker to a permanent disability award of 2.0%. I accept the worker's submission that, based on Dr. Parhar's findings, he ought to therefore be entitled to receive a 1.0% increase to his permanent disability benefits. The appeal is allowed on this issue.

[47] I note, in passing, that although Dr. Parhar has indicated in his most recent 2017 report that he would have classified the worker's sensory loss at that time as severe, the worker did not take the position that I ought to apply that finding to my consideration of his permanent disability entitlement under this appeal. I agree with the worker's submission that Dr. Parhar's findings from 2015 are the most relevant and compelling for the purposes of this appeal, as they most accurately reflect the worker's status at the time the matter of his entitlement to permanent disability benefits was reopened.

Did the Board have jurisdiction to consider the duration of the worker's permanent disability benefits?

[48] Section 23.1 of the Act, "Period of payment for total or partial disability," explains that, for workers who are less than 63 years of age at the time of injury, payments for permanent partial disability will continue only until the worker reaches 65 years of age: Section 23.1(a)(ii).

[49] That termination date will be extended in cases where the Board is satisfied that the worker would retire after reaching 65 years of age. In such circumstances, payments will continue until a retirement date determined by the Board: Section 23.1(a)(ii).

[50] As noted above, this is the second occasion on which the worker has raised the issue of the duration of his permanent partial disability benefits to WCAT. In *WCAT-2013-00109*, the worker argued that his permanent partial disability benefits ought to continue at least until he reached 70 years of age. The panel in *WCAT-2013-00109* accepted that argument.

[51] Pursuant to section 255 of the Act, decisions of WCAT are final and conclusive.

[52] The worker acknowledges that *WCAT-2013-00109* was final and conclusive at the time it was issued. He submits, however, that his circumstances have changed since that decision was issued, and that he is now more likely to continue working until he reaches 80 years of age. The worker takes the position that as the matter of his entitlement to permanent disability benefits was reopened beyond three years from the date of injury, section 32(3) of the Act provides the Board with the jurisdiction to once again consider the issue of the duration of his permanent disability benefits.

[53] On review, the Review Division rejected the worker's submissions that his permanent disability benefits ought to be extended to a date beyond that which had been determined in *WCAT-2013-00109*. Specifically, the Review Division concluded that the Board did not have jurisdiction to make a second decision on the termination date of the worker's permanent disability benefits, due to the fact that such a decision can only be made once.

[54] I agree with the decision of the Review Division. In my view, the Act does not provide the Board with the jurisdiction to decide the duration of the period of payment for permanent disability benefits on more than one occasion. As the final decision as to the duration of the period of payment for the worker's permanent disability benefits was made in WCAT-*2013-00109*, I find that the worker's appeal on this issue must be denied. My reasons for reaching this conclusion follow.

Analysis

[55] A consideration of whether the Board had jurisdiction to issue a new decision on the duration of the worker's permanent disability payments requires an exercise of the principles of statutory interpretation.

[56] Statutory interpretation in Canada requires discerning legislative intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's scheme and object: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27

[57] The overarching object of the Act is to ensure a compulsory, no-fault, mutual insurance system for workers' and employers. Workers' compensation legislation generally is based on four principles cited with approval by the Supreme Court of Canada in *Pasiechnyk v. Saskatchewan (W.C.B.)*, [1997] 2 S.C.R. 890:

> [27] Montgomery J. also commented on the purposes of workers compensation in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that the scheme is based on four fundamental principles:
>
> (a) compensation paid to injured workers without regard to fault;
>
> (b) injured workers should enjoy security of payment;
>
> (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and

(d) compensation to injured workers provided quickly without court proceedings.

[58] The Act creates a complete scheme for administering the payment of compensation benefits and levying of assessments on employers to maintain the accident fund: *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188, at paragraph 15.

[59] With that overarching object and scheme in mind, I turn to a consideration of the specific sections of legislation at issue in this appeal.

Sections, 32, 96, and 23.1

[60] A worker's permanent disability benefits are paid, pursuant to section 23(1) of the Act, by way of periodic payment that equals 90% of the Board's estimate of the loss of average net earnings resulting from impairment.

[61] Section 33 of the Act provides that the Board must determine the amount of average earnings with reference to the worker's average earnings and earning capacity at the time of the worker's injury. Sections 33.1 to 33.9 provide rules for the determination of average earnings.

[62] The current version of the Act generally promotes finality in the decision-making process. I note that section 96(1) of the Act provides that a decision of the Board is final and conclusive, and not open to review in any court. Further, the Board's ability to reconsider one its own decisions is limited to a period of not more than 75 days from the date a decision is made, as set out in section 96(5) of the Act.

[63] Section 96(2) of the Act does provide the Board with the ability to reopen a matter that has been previously decided, but only in circumstances where there has been a significant change in the worker's medical condition that the Board previously decided was compensable, or where there has been a recurrence of a worker's injury. Section 96(3) of the Act further sets out that if the Board determines that a worker's significant change or recurrence justifies a change in "a previous decision respecting compensation or rehabilitation," the Board may make a new decision that varies the previous decision.

[64] Section 32 of the Act specifically provides the Board with jurisdiction to issue a new decision regarding a worker's average earnings in specific circumstances:

> 32 (1) For the purpose of determining the amount of compensation payable where there is a recurrence of temporary total disability or temporary partial disability after a lapse of 3 years following the occurrence of the injury, the Board may calculate the compensation **as if the recurrence were the happening of the injury** if it considers that by doing so the compensation payable would more nearly represent the percentage of actual loss of earnings suffered by the worker by reason of the recurrence of the injury.
>
> (2) Where a worker has been awarded compensation for permanent partial disability for the original injury and compensation for recurrence of

> temporary total disability under subsection (1) is calculated by reference to the average earnings of the worker at the date of the recurrence, the compensation must be without deduction of the compensation payable for the permanent partial disability; but the total compensation payable must not exceed the maximum payable under this Part at the date of the recurrence.
>
> (3) Where more than 3 years after an injury a permanent disability or an increased degree of permanent disability occurs, the compensation payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.
>
> [emphasis added]

[65] The worker's position on appeal is that the reference in section 32(1) to the Board having the ability to treat a recurrence more than three years from the date of injury as if it were "the happening of the injury" means that the Board equally has the jurisdiction to consider all matters anew when, more than three years after an injury, a worker experiences an increased degree of permanent disability as described in section 32(3) of the Act. Specifically, the worker submits that:

> It is submitted that, in practice, the reopening of a permanent disability award under section 32(3) is treated as the happening of the injury in the same way as under section 32(1). In addition to wage rate, the Board also re-evaluates the worker's ability to return to the pre-injury job and extent of his/her permanent functional impairment on reopening. The worker may be entitled to wage-loss benefits, in the same way as a temporarily injured worker, prior to the determination that his/her injuries are permanent. In effect, the worker's claim essentially starts anew. The absence of reference in section 32(3) to "the happening of the injury" thus takes no practical effect. Rather, the similarities between subsections (1) and (3) allow the Board to treat reopenings of temporary and permanent awards as functionally the same

[66] In taking that position, the worker relies in particular on Board Practice Directive, *#C5-1 – Duration of Benefits – Age 65*[4], which provides the following at item F:

> **F. Reopenings**
>
> There will be cases where a worker presents with a recurrence of temporary disability or an increased permanent functional impairment after his or her recognized retirement date. For example, a worker who was initially entitled to a pension for his knee injury payable until age 65, may call WorkSafeBC when he is 67 years old because he requires surgery for the compensable knee injury. The worker is employed at the time of the reopening and will be temporarily disabled from working while he recovers from surgery.

[4] Board Practice Directives are not binding policy as contemplated by section 250(2) of the Act.

> **If more than three years have elapsed since the date of injury, section 32 of the *Act* allows WorkSafeBC to calculate the compensation payable as though the date of reopening were the happening of the injury. As such, the previous decision to end compensation benefits at age 65 does not restrict the officer's ability to make a new decision on entitlement to benefits flowing from the reopening over three years. The officer will need to decide on the retirement age that will apply to the worker's new entitlements**. Because the worker was working at the time of reopening, he would be entitled to wage loss benefits for the period of his temporary disability up to two years from the date of injury or longer if the officer accepts the worker would not have retired in that two year period. If the worker is left with an increased permanent functional impairment following the reopening, his pension may be reassessed and the new retirement date would apply to the increased pension amount.
>
> If at the time of reopening, less than three years have elapsed since the happening of the injury, there is no authority to revisit the retirement age decision. In cases such as the example above, the retirement date has proven to be incorrect since the worker is still employed at age 67, but there is no ability to change the retirement age since the reconsideration provisions apply and it is only reopening over three years that allow for a recalculation of the compensation payable.
>
> [emphasis added]

[67] In my view, the above emphasised portion of Practice Directive #C5-1 is based on an incorrect interpretation of section 32 of the Act.

[68] As set out above, section 32(1) of the Act contains the language indicating that the Board may calculate compensation payable as though the date of reopening "were the happening of the injury." That section, however, applies to reopening for recurrences of "temporary total disability or temporary partial disability after a lapse of 3 years." Section 32(1) makes no mention of what the Board is able to do for instances of an increased degree of "permanent" disability, such as that which is at issue in this appeal.

[69] Rather, that issue is addressed in section 32(3).

[70] Section 32(3) does not include the "happening of the injury" language that the worker (and the Board in Practice Directive #C5-1) relies on as supporting a conclusion that the matter of the duration of the worker's permanent disability benefits may be considered anew in situations where an increased degree of permanent disability occurs more than three years after an injury.

[71] In fact, the text of section 32(3) does not make any reference to the duration of a worker's permanent disability benefits. Rather, section 32(3) provides that a worker's average earnings as of the date of the increased degree of permanent disability may be used to calculate the compensation payable.

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[72] In my view, an indication that the Board may use the worker's earnings at the time of increased permanent disability for the purposes of calculating a worker's average earnings under the Act cannot be read to mean that the Board is also able to once again consider the termination date of a worker's permanent disability benefits.

[73] With due respect to the worker's submissions on this issue, the words of section 32(3) do not provide any suggestion that the issue of duration of a worker's permanent disability benefits is to be considered once again. There is no reference to the duration of a worker's permanent disability benefits in section 32. In my view, there is nothing in the Act that would suggest that the calculation of a worker's average earnings at the time of reopening should be taken to have an effect on the decision of the duration of a worker's permanent disability benefits. I consider that the words of section 32(3), read in the manner required by *Rizzo Shoes*, make clear that that section is intended to accomplish one thing: To provide the Board with jurisdiction to address the previously decided matter of the worker's average earnings anew.

[74] I would note further that it is clear that, despite the fact that Practice Directive #C5-1 appears to read sections 32(1) and 32(3) conjunctively, those sections do not form part of a list. The two subsections address very different situations, with different language. I consider the practice directive's apparent reading of 32(1) and 32(3) as being joined, or forming part of a list, to be inconsistent with the words of those sections, read in their grammatical and ordinary sense.

[75] In my view, a reading of the words of section 32(3) in their grammatical and ordinary sense leads to the conclusion that, in enacting section 32(3), the legislature intended to ensure that a worker's increased permanent disability benefits were paid at an average earning rate that appropriately reflected the worker's level of average earnings at the time of the increased permanent disability.

[76] More precisely, I consider that the Board's interpretation of section 32(3) as set out in policy item #70.20 to fully identify the legislative intent of that section. Specifically, policy item #70.20 provides that where a worker's current earnings are higher than the original earnings, the current earnings will generally be used to calculate the compensation payable. Similarly, where a worker has reduced earnings compared to the original earnings for reasons unrelated to the worker's compensable disability:

> …the Board considers that the current earnings more nearly represent the actual loss of earnings suffered by the worker by reason of the recurrence of temporary disability or occurrence or increase in permanent disability.

[77] I note in passing, in setting out the above, that I consider the worker's submission that a worker's average earnings rate on reopening can be calculated either on reopening or time of injury earnings, "whichever leads to a more beneficial result for the worker" to be incorrect. As policy item #70.20 makes clear, the board of directors of the Board has interpreted the focus of section 32 to be on ensuring that workers receive compensation payments at the appropriate average earnings rate in claims that are being reopened more than three years after a prior average earnings decision has been made. Ensuring that the appropriate or most accurate average earnings rate applies on a reopening after three years will not always lead to the "more beneficial result for the worker," as has been submitted in this appeal.

[78] Leaving aside that fact, having consideration to the factors set out in *Rizzo Shoes*, I consider the board of directors' interpretation of section 32 at policy #70.20 to be an accurate one.

[79] Policy item #70.20 makes no reference to considering the duration of a worker's permanent disability benefits. Rather, that policy item is, again, correctly in my view, focused on the manner in which a worker's average earnings should be calculated in cases where a reopening has occurred more than three years from the date of injury. While I acknowledge the worker's submission that in a prior decision (*WCAT-2010-01326*) a WCAT panel described section 32(3) as having been "awkwardly drafted"[5], I consider it to be telling that the panel in that decision in fact reached the same conclusion as that set out in policy #70.20 as to the legislature's intention with respect to the purpose of section 32(3):

> [51] ….I interpret this statutory provision as indicating that the Board has discretion to use the date of the increased degree of permanent disability to calculate average earnings for a pension award for the increased degree of permanent disability, and that it has discretion to use the date of permanent disability (the first permanent disability) to calculate average earnings for that first pension award. For obvious reasons it makes no sense to interpret section 32(3) as giving a choice of both dates for both the first permanent disability and the increased permanent disability.

[80] Certainly, the panel in *WCAT-2010-01326* did not make any finding suggesting that it was of the view that section 32(3) provided the Board with the jurisdiction to calculate the duration of a worker's permanent disability benefits more than once.

[81] The worker submits, however, that when a permanent disability award is reopened, the Board will consider not only the amount of a worker's average earnings, but also a worker's ability to return to his or her pre-injury job. The worker submits that, in effect, his claim should be seen as "starting anew," and that the absence of a "reference in section 32(3) to 'the happening of the injury' thus takes no practical effect."

[82] With respect, I do not find this argument compelling. Rather than engaging in a consideration of the meaning of the words of the statute, the worker's position is essentially that the fact that the legislature included the words "the happening of the injury" in section 32(1), but did not include those words in section 32(3), should be ignored entirely. This is not a proper exercise of statutory interpretation.

[83] Further, I consider it to be difficult to reconcile the worker's submissions in that respect with the worker's reliance on Practice Directive #C5-1 as being supportive of his position. Practice Directive #C5-1 points specifically to the importance of the use of the words "the happening of the injury." In my view, the worker appears to be arguing the point both ways, suggesting that the words "the happening of the injury" are of importance (as contemplated by Practice Directive #C5-1), and also of no importance.

[84] As I have indicated above, I consider the former argument to be that which is correct at law. That, as the worker submits, the practice directive fails to grapple with the fact that the language

[5] *WCAT-2010-01326*, at paragraph 51.

of section 32(1) and section 32(3) are not the same, does not mean that the difference of language is immaterial. Rather, it means that the Board, in issuing the practice directive, failed to properly engage in the statutory interpretation required of it.

[85] Finally, in having consideration to the overall scheme and object of the Act, I consider it to be of note that section 32 pre-dates the existence of section 23.1 of the Act. Section 32 has existed in its current form in the Act since 1980. Section 23.1 was not enacted until 2002, as part of the *Workers Compensation Amendment Act, 2002* (Bill 49). Prior to the enactment of section 23.1, permanent functional impairment awards, such as that which the worker in this appeal has received, were payable for recipient's lifetime. I consider that context to further suggest that section 32(3) was not intended to provide the Board with jurisdiction to consider the matter of the duration of a worker's permanent disability benefits afresh. Such an intention would not likely have existed at the time section 32 (or its precursors) was drafted, given that permanent disability benefits were largely payable for life[6].

[86] I return to the worker's position that section 32 of the Act provides the Board with the jurisdiction to "reopen" a worker's permanent disability benefits. As noted above, the Board's jurisdiction to reopen a matter that has previously been decided, such as a worker's entitlement to permanent disability benefits, comes from section 96 of the Act.

[87] Again, section 32 provides the Board with the ability to re-calculate the amount of a worker's average earnings, for the purpose of ensuring that the average earnings used to calculate the compensation payable on reopening will be an accurate reflection of a worker's loss given the passage of time. The necessity of section 32 is driven by the fact that section 33, the section of the Act which provides for the method of calculating average earnings, sets out that:

> **33** (1) The Board must determine the amount of average earnings and the earning capacity of a worker with reference to the worker's average earnings and earning capacity **at the time of the worker's injury**.
>
> [emphasis added]

[88] In my view, absent section 32, the Board would not have the ability to calculate a worker's average earnings at a date other than the time of injury. This would be so, regardless of whether the matter of a worker's entitlement to permanent disability benefits was reopened more than three years after the date of injury. In sum, section 32 is a provision that is intended to provide the Board with the jurisdiction to calculate a worker's average earnings at a date other than the time of injury as provided for by section 33.

[89] No similar enabling section exists for section 23.1 of the Act.

[90] I consider that, similar to a determination of a worker's average earnings, the determination of the duration of a worker's permanent disability benefits is to be made in reference to whether, at the time of injury, the worker would have worked beyond age 65. In my view, absent a section specifically providing the Board with the jurisdiction to calculate the duration of a

[6] Under the provisions of the Act prior to the *Workers Compensation Amendment Act, 2002* (Bill 49), loss of earnings awards were payable for life.

worker's permanent disability benefits at a subsequent date, the Board does not have jurisdiction to consider subsequent changes that may have altered the worker's retirement intentions.

[91] In reaching this conclusion, I note that I agree with and adopt the reasoning on this issue set out in *WCAT-2010-02551*:

> [29] The magnitude of a worker's entitlement to a permanent partial disability award may change from time to time because the extent of the permanent disability may change or, as happened in the worker's case, further permanent disabilities may be accepted under the claim. **In contrast, the duration of the award is only determined once because it is derived by the Board determining whether, at the time of the injury, it was anticipated that the worker would retire at 65 or later than age 65.** Under item #41.00 of the RSCM II, the Board considers various evidence in order to establish the worker's intentions and the expected retirement date as of the time of the injury.
>
> [emphasis added]

[92] I consider that if the legislature had intended for section 32(3) to provide the Board with the ability to address the duration of a worker's permanent disability award on more than one occasion (such as where the amount of a permanent disability benefit has been reopened more than three years after the date of injury), it is more likely than not that it would have indicated as much, either explicitly, or at the very least implicitly by including language similar to the "happening of the injury" language found in section 32(1). Absent the inclusion of such explicit or implicit language, I do not consider that section 32(3) can be given the interpretation the worker urges.

[93] I therefore find that the Board did not have jurisdiction to consider the duration of the worker's permanent disability benefits in the August 11, 2016 decision letter. The appeal is denied on this issue.

Conclusion

[94] The appeal is allowed, in part. I vary *Review Reference #R0213010*, and find that the worker is entitled to an increase in his permanent partial disability benefits in the amount of 1.0%, in recognition of his moderate sensory loss. I also find that the worker is not entitled to permanent disability benefits for a loss of strength in his right lower extremity, and deny the worker's appeal on that issue.

[95] On the issue of whether the Board had jurisdiction to consider the duration of the worker's permanent disability benefits, the appeal is denied. I find that the Review Division correctly determined that the Board did not have jurisdiction to address that issue, as a final decision in that respect was issued in *WCAT-2013-00109*.

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Expenses

[96] Subsection 7(1)(b) of the *Workers Compensation Act Appeal Regulation* states that WCAT may order the Board to reimburse a party to an appeal for expenses associated with obtaining or producing evidence submitted to WCAT. Item #16.1.3 of the WCAT *Manual of Rules of Practice and* Procedure notes that WCAT will generally order reimbursement of expenses incurred in producing evidence if the evidence was useful or helpful to the consideration of the appeal or it was reasonable for the party to have sought such evidence in connection with the appeal.

[97] I consider that it was reasonable for the worker to have sought Dr. Parhar's report in connection with this appeal. As the amount billed by Dr. Parhar falls within the fee schedule established by the Board for similar expenses, I order that the Board reimburse the worker $1535.00 for the expense of obtaining Dr. Parhar's report.

Andrew Pendray
Chair

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