

Decision of the Appeal Division**Number: 2001-0916****Date: May 9, 2001****Panel: Herb Morton****Subject: Whether Medical Review Panel Certificate was Properly Implemented**

WAGE LOSS BENEFITS (PROPORTIONATE ENTITLEMENT) (SUBJECTIVE COMPLAINTS) – Medical Review Panel certified that degenerative disc disease was major cause of worker's disability and that worker's lifting strains at work accounted for approximately one-third – Board apportioned worker's wage loss benefits – Review Board denied worker's appeal on apportionment of wage loss benefits and request for increase in pension award for subjective complaints – Worker appeal allowed on proportionate entitlement issue – Board not obliged to apply proportionate entitlement to wage loss benefits in implementation of the Medical Review Panel certificate – Merits and justice do not warrant a departure from general policy – Worker appeal denied on issue of pension increase – Panel notes four interpretations of policy #39.01 (subjective complaints) – Subjective complaints not of a nature and extent beyond what would normally be associated with assessed impairment.

Law: WCA (1996): s. 5(5), s. 65**Policy:** RSCM: #39.01, #44.10, #44.20; Governors' Decision No. 86, 10 *Workers' Compensation Reporter* 781; Decision No. 17, 1 *Workers' Compensation Reporter* 78; Decision No. 270, 2 *Workers' Compensation Reporter* 6; Decision No. 318, 5 *Workers' Compensation Reporter* 55; Decision No. 407, 6 *Workers' Compensation Reporter* 61**Decisions:** Appeal Division Decision No. 91-0388, 7 *Workers' Compensation Reporter* 119; Appeal Division Decision No. 93-0329, 9 *Workers' Compensation Reporter* 389; Appeal Division Decision No. 93-0277, 9 *Workers' Compensation Reporter* 259; Appeal Division Decision No. 93-0740, 10 *Workers' Compensation Reporter* 127; Appeal Division Decision No. 96-1721, 13 *Workers' Compensation Reporter* 353; *Sebastian v. Saskatchewan (Workers' Compensation Board)* (1994), 7 C.C.E.L. (2d) 270 (Sask.C.A.)*Appeal Division Decision No. 2001-0916**Implementation of Medical Review Panel Certificate [worker appeal (rev. brd.)]**17 Workers' Compensation Reporter* [533]

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- (1) The worker appeals the November 16, 2000 Workers' Compensation Review Board (Review Board) finding.

Issue(s)

- (2) At issue is whether the Medical Review Panel certificate has been correctly implemented. This concerns whether proportionate entitlement should be applied to the worker's wage loss benefits, and whether her pension award should be increased based on her subjective complaints.

Jurisdiction

- (3) The worker's appeal is brought under section 91 of the *Workers Compensation Act* (the Act). Section 96(3) of the Act provides that on an appeal under section 91(1), the Appeal Division may reopen, rehear and redetermine any matter that has been dealt with by the Review Board. Governors' policy in Decision No. 75 (Appeal Division Administration, Practice and Procedure, 10 *Workers' Compensation Reporter* 753) further provides that the Appeal Division has the discretion to initiate and conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it.

Background

- (4) In a prior Appeal Division decision dated January 7, 1997 (#97-0024), the panel found the worker's back problems were not causally related to her work injury of April 24, 1994. The worker appealed to a Medical Review Panel. She was examined on September 29, 1998 by a Medical Review Panel with specialists in orthopaedic surgery.
- (5) In a certificate dated September 29, 1998, the Medical Review Panel found the worker had a disability with respect to her back. The Panel certified that degenerative disc disease was the major cause of the worker's disability, accounting for approximately two-thirds. The worker's lifting strains at work on various occasions were, taken together, the minor cause of her disability, accounting for approximately one-third. This was true both for her permanent disability, and for her temporary disability from mid-December 1994 to September 1997. The April 24, 1994 work injury was one of approximately four significant known back strains, which contributed to the worker's disability. The Medical Review Panel further certified that the worker did suffer from a pre-existing condition prior to April 24, 1994, and that the worker did suffer intermittently from pre-existing disability prior to April 24, 1994.
- (6) By decision dated November 20, 1998, the worker was advised that section 5(5) of the Act would be applied in calculating her entitlement to wage loss benefits. By decision of December 20, 1999, the worker was advised of her pension award. Her functional impairment with respect to her back was assessed at 4.2% of total disability. This was apportioned by one-third to 1.4%, plus age adaptability of 0.04%, for an award of 1.44% of total. Her pension award was made effective July 21, 1997, the day following the termination of wage loss benefits (notwithstanding the Medical Review Panel certification that the worker was temporarily disabled until September, 1997, and that her disability stabilized in September, 1997).
- (7) The apportionment of the worker's wage loss benefits was confirmed by the manager in a decision dated December 14, 1998. The manager advised:

Under Section 44.20 of the Claims Adjudication Manual, the Board [Workers' Compensation Board] does not normally apply Section 5(5) to wage loss, based on the premise that the claimant was fit to carry on regular duties prior to the injury and is at the time of receiving wage loss totally or partially unable to perform those duties.

This is not the situation here. This claimant was injured and off work for a period of time when wage loss was paid. She returned to work and subsequently laid off, for a combination of reasons, given in the Medical Review Panel Certificate. Only a portion of this disability was caused by the compensable injury.

We have perfect information in this instance and the Medical Review Panel certificate and their decision is clearly within the criteria of Section 5(5). It does not meet the criteria for exception under Section 44.20.

If we never apply Section 5(5) to wage loss under any circumstances we risk violating Section 5(5) of the Statute. It appears the Legislation should be applied and while the exception shown above is reasonable this does not mean the Legislation should be ignored in all cases.

As indicated in decision #1 of the Appeal Division entitled "Practice and Procedures" Section 3.8, "***In the event of a conflict between the Act or Regulations and the published policy of the Governor's, the Act and Regulations are paramount.***" [emphasis in original]

Based on the above it is my opinion that the Adjudicator rightly applied Section 5(5) to the benefits.

- (8) The worker previously received full wage loss benefits from April 27 until May 3, 1994. It appears that following the Medical Review Panel certificate she received wage loss benefits at a $\frac{1}{3}$ value from December 15, 1994 until July 20, 1997. These payments amounted to slightly more than \$20.00 per day. Although not addressed in the decision letters, it appears these benefits were paid up to July 20, 1997 rather than continuing to September 1997, on the basis the worker was working during this latter period (following a graduated return to work from July 14–20, 1997).
- (9) The worker appealed to the Review Board. By finding dated November 16, 2000, the Review Board denied the worker's appeal. With respect to the apportionment of wage loss benefits, the Review Board panel reasoned (at page 7):

... [The worker's] representative submitted that under Paragraph #44.20 of the *Manual* the Board does not apply Section 5(5) to wage loss. However, according to the Medical Review Panel Certificate, only $\frac{1}{3}$ of the temporary disability as [sic] caused by the compensable injury. The panel also notes that Section 5(5) of the *Act* states that where the personal injury or disease is superimposed on an already existing disability, compensation shall be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The question of further periods of temporary disability and the causes of any such disability were squarely before the Medical Review Panel and they certified as to the portion of disability that was to be attributed to injury. The Board, and this panel are bound by that finding.

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- (10) With respect to the worker's request for an increase in her pension award for subjective complaints, the Review Board panel further reasoned at page 8:

While the worker's representative has submitted that a further award should be given for [the worker's] subjective complaints, we cannot agree. Lawful Board policy requires that for an award to be given for [the worker's] subjective complaints, there must be evidence that the complaints themselves are disabling in a manner which can affect [the worker's] earning capacity and the complaints are not reflected in the measurable functional impairment. Furthermore, Policy 39.01, "Subjective Complaints", is not applicable in this case. [The worker] has been able to return to full-time employment. There is no evidence that she is receiving any less earnings than she would have otherwise.

- (11) The worker has appealed the Review Board finding to the Appeal Division. The worker seeks payment of full wage loss benefits from December 1994 until September 1997. The worker's representative submits that the worker's disability plateaued in September 1997, not December 1994, and that there is no practice, policy or legal requirement in the Act to apply section 5(5) to a period of temporary disability. To this extent, the Medical Review Panel certificate does not bind the Board. The worker also seeks an increase in her pension award, for her subjective complaints of pain and restrictions resulting from pain. The employer's representative expresses support for the decisions by the Board officers and the Review Board.

Law and Policy

- (12) Section 65 of the Act provides:

A certificate of a panel under sections 58 to 64 is conclusive as to the matters certified and is binding on the board. The certificate is not open to question or review in any court, and proceedings by or before the panel must not be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise in any court.

- (13) Section 5(5) of the Act provides:

Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

- (14) Decision No. 86 of the governors (Bylaw No. 4 – Published Policy of the Governors, 10 *Workers' Compensation Reporter* 781, November 16, 1994) provides under item 2.1:

In the event of a conflict between the Act or Regulations and the published policies of the governors, the Act and Regulations are paramount.

- (15) This wording is the same as that provided in Decision No. 3 of the governors (Published Policy of the Governors, 7 *Workers' Compensation Reporter* 17, April 8, 1991), except that Decision No. 3 used the singular in referring to “the published policy.” A similar passage in Appeal Division Decision No. 1 (Practice and Procedure, 7 *Workers' Compensation Reporter* 33, May 29, 1991, at item 3.8, page 45) was a reference to the policy provided earlier by the governors.
- (16) Policy at #44.20 of the *Rehabilitation Services and Claims Manual* (the Manual) states:

44.20 Temporary Disability and Health Care Benefits

It is not the policy of the Board to apply the provisions of Section 5(5) to health care benefits or temporary disability benefits. Ordinary wage loss will be paid on the simple presumption that the claimant was fit and able to carry on regular duties prior to the injury and is, at the time of receiving wage-loss benefits, totally or partially unable. The only conclusion to be derived from these facts is that the injury itself is the sole cause of that immediate total or partial disability. Proportionate Entitlement is thus a concept applicable only to permanent disability awards.

- (17) The current policy at #44.20 is a longstanding one. This policy was first expressed in Decision No. 270 (Re Subsection 6(5): Proportionate Entitlement, 2 *Workers' Compensation Reporter* 6, March 6, 1978), which similarly states at pages 8-9:

It must be pointed out that it has been and will continue to be the policy of the Board not to apply the provisions of subsection 6(5) – regardless of whether a “disability” is found to have pre-existed the injury – to medical aid or temporary disability benefits. Ordinary wage loss will be paid on the simple presumption that the claimant was fit and able to carry on regular duties prior to the injury and is, at the time he is receiving wage loss benefits, totally or partially unable. The only conclusion to be derived from these facts is that the injury itself is the sole cause of that immediate total or partial disability. Proportionate Entitlement is thus a concept applicable only to Permanent Disability Awards.

- (18) Policy at #44.10 concerns the meaning of the phrase “already existing disability,” for the purposes of section 5(5) of the Act. It concludes by noting that “These rules apply to all permanent partial disability awards assessed on or after March 15, 1978.”

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- (19) Policy in Decision No. 17, Re Disablement Following Unauthorized Surgery, 1 *Workers' Compensation Reporter* 78, November 3, 1973, provides (at page 79):

The real problem in this case centres on the use of the word "cause" in Section 55(9). Under Section 55(9)(a)(iv), a Medical Review Panel is required to certify as to ". . . the cause of the disability." But "cause" is an ambiguous word, referring sometimes to matters of natural science, sometimes to moral value judgments, and sometimes to questions of law. The purpose of a Medical Review Panel, as explained in Section 55, is to provide an appeal from ". . . a medical decision of the Board," and that function is paramount in the interpretation of other language in the Section. It is in this context that the word "cause" must be interpreted. In Section 55(9), therefore, "cause" refers to the etiology of the condition. It means cause insofar as it is a matter of medical science; but not cause insofar as it is a matter of moral value judgments, of law, or of non-medical fact.

- (20) A published Appeal Division decision concerning the topic of apportionment following a Medical Review Panel certificate is #96-1721 (Discretionary Policy Change and Apportionment, 13 *Workers' Compensation Reporter* 353).
- (21) With respect to the second issue raised in the worker's appeal, policy in the Manual provides:

39.01 Subjective Complaints

In making a determination under Section 23(1), the Disability Awards Officer or Adjudicator in Disability Awards will enquire carefully into all of the circumstances of a worker's condition resulting from a compensable injury. This means that both the objective physical findings noted by the doctors who examined the claimant and the subjective complaints of pain will be considered. The fact that the complaints are largely subjective does not automatically preclude a finding that a worker has a disability within the meaning of Section 23(1). Nor, on the other hand, does the fact that subjective complaints exist automatically warrant a finding of disability. In all cases, a decision must be made on the particular facts of the claim as to whether or not a disability exists.

With regard to the question as to what type of evidence will be sufficient to justify a conclusion that a permanent disability exists in these cases, it is not possible to lay down an exclusive list. However, some suggestions can be made. There will, in the first place, be the claimant's own evidence regarding the nature and extent of the complaints and whether that evidence is credible and consistent. Regard must also be had to the claimant's conduct and activities and whether they are consistent with the complaints. There will then be the evaluations of the claimant by the various professional personnel and Board's staff who have been involved in the case, for example, doctors, psychologists, rehabilitation consultants, and assessors in the Board's Industrial Department.

Consideration will have to be given to the objective observations of these persons as well as their subjective assessments. They may be able to comment on whether the claimant's complaints are of a type and extent that might reasonably result from the type of injury which was suffered.

When there is little clinical evidence of objective impairment, extreme caution must be exercised in concluding that there is a permanent disability resulting from that injury. The evidence that is relied upon to support the assessment of such an award must be fully documented. It must clearly demonstrate that there is a permanent disability for which the payment of a pension award may be supported.

Sometimes cases occur where, although the worker has subjective complaints of pain and discomfort, the actual impairment which can be objectively seen by the Disability Awards Medical Advisor is negligible or too minimal to justify an award of the lowest percentage of disability ordinarily recognized. Where there is appropriate medical rationale to support the subjective complaints, the Disability Awards Officer or Adjudicator still has some discretion to make an award, having regard to the worker's particular circumstances, and may do so where, for instance, the Disability Awards Medical Advisor is of the opinion that the stress of the claimant's occupation or other physical activity could result in an impairment. The Disability Awards Officer or Adjudicator will not grant an award if she or he considers that the impairment is unlikely to affect the claimant's earning capacity. There is, in that situation, felt to be no "impairment of earning capacity" within the meaning of Section 23(1).

In making this determination, the Disability Awards Officer or Adjudicator may, in some cases, have to ask the Rehabilitation Consultant to investigate the jobs which are, in the long term, available and which the claimant is able to do. This represents one exception to the general principle that, in assessing the degree of physical impairment, no regard is had to the actual loss of earnings suffered by the claimant because of permanent impairment. On the other hand, if in such a case it is ultimately determined that the impairment, though minimal, will affect earning capacity, the assessment of the pension on a physical impairment basis is still on a percentage basis. A separate assessment of the pension will be made under the projected loss of earnings method which will result in a pension based on the actual loss of earnings. The higher of the two pensions will, according to normal principles, be the one awarded.

Findings and Reasons

(a) Proportionate Entitlement

- (22) Pursuant to section 65 of the Act, a certificate of a Medical Review Panel on a medical issue is conclusive and binding. As set out in Decision No. 17, however, it is only binding insofar as it involves a medical determination. Consideration as to the effect of the Medical Review Panel certificate, in respect of a worker's entitlement to compensation, may also involve issues of law and policy. The Medical Review Panel does not adjudicate issues of compensation entitlement.
- (23) Given the binding effect of a Medical Review Panel certificate, the conclusions of the Medical Review Panel will commonly, but not always, be determinative of the adjudication to be made on the claim. The scope for consideration of issues of law and policy will often not be apparent. However, it must be kept in mind that the determination of a worker's entitlement to compensation is always a separate matter in the implementation of a Medical Review Panel certificate.
- (24) Pursuant to section 82 of the Act, the governors must approve and superintend the policies and direction of the Board, including policies respecting compensation. Under section 83.1, the powers of the governors are currently exercised by a Panel of Administrators. The published policies provide direction, in the strongest possible terms, that "Proportionate Entitlement is thus a concept applicable only to permanent disability awards." This sentence is contained in published policy at #44.20 of the Manual, and in Decision No. 270.
- (25) The policies do not address this as a matter on which clear or unequivocal medical evidence would be required. Rather, the policies exclude in the broadest terms, the consideration of proportionate entitlement under section 5(5) of the Act to wage loss and health care benefits, on the basis that this is a concept which is applicable only to permanent disability awards. This is not qualified by reference to situations involving Medical Review Panel certificates, or reopenings on claims following an initial period of wage loss benefits immediately following an injury.
- (26) It is true that the policy cannot be considered determinative of the outcome. In *Sebastian v. Saskatchewan (Workers' Compensation Board)*, (1994) 7 C.C.E.L. (2d) 270, the Saskatchewan Court of Appeal stated (at para. 57):

The role of policy in administrative decisions is generally recognized. A board or tribunal is entitled to develop guidelines for application of statutory provisions which facilitate consistency and enable those governed by the legislation to know what factors may affect a claim. A policy may not remove the decision from the Board; if it predetermines a matter without an opportunity to address the merits, the Board disables itself from exercising the power to decide entrusted to it by statute. . . .

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- (27) On the other hand, there is a clear potential for unfairness if one worker's entitlement is adjudicated on terms different from those expressed in the policy, in the absence of clear and compelling reasons to support a departure from the policy in the circumstances of the particular worker's case.
- (28) The worker's representative submits that it is consistent with policy and the Act for the M.R.P. certificate to be interpreted so as to apply the one-third/two-thirds apportionment to the pension award, but not to the worker's wage loss benefits.
- (29) I note, in this regard, that a determination of compensation entitlement does not require a finding that the worker's employment was the sole or major cause of his or her injury or disease. It suffices that the work injury or work process is a significant cause of the worker's disability due to injury or disease. To that extent, it will commonly be the case that there are multiple causes of a worker's temporary and permanent disability. However, clear direction is provided by policy that proportionate entitlement does not apply to wage loss benefits.
- (30) Upon careful consideration of this matter, I am not persuaded that the Board is obliged, as a matter of law, to apply proportionate entitlement to the determination of the worker's entitlement to wage loss benefits in implementation of the Medical Review Panel certificate. Section 99 directs that the Board's decision be given according to the merits and justice of the case. I do not consider that the merits and justice of the case support a departure from the general policy in the circumstances of this particular case. I consider it more equitable to adjudicate the worker's entitlement based on the terms of the general policy. I find that the policy at #44.20 provides useful policy guidance with respect to the meaning of the phrase ". . . the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease."
- (31) I do not consider that the policy at #44.20 of the Manual is contrary to the Act. Nor do I consider that applying that policy in the circumstances of this claim, and the September 29, 1998 Medical Review Panel certificate, involves an unlawful fettering of discretion. Accordingly, I allow the worker's appeal on this issue. Proportionate entitlement should not be applied to the calculation of the worker's wage loss benefits in implementation of the Medical Review Panel certificate.
- (32) I will not address the duration of the worker's wage loss benefits in this decision. The Medical Review Panel has certified the worker was temporarily disabled until September, 1997. If, in fact, the worker did not return to full duties by July 20, 1997 (when wage loss benefits were terminated), that information should be brought to the attention of the claims adjudicator. The worker is entitled to wage loss benefits up to September, 1997 in respect of any time loss from work, based on the Medical Review Panel certificate.

(b) Pension Award – Subjective Complaints

- (33) The worker seeks an increase in her loss of function pension award, for her subjective complaints of pain and restrictions resulting from pain.

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- (34) In clause three of the Medical Review Panel certificate, the panel found that at the time of examination, the worker had a disability. The panel certified “The disability consists of back pain, mild in extent now but severe in the past, limiting bending, lifting, long standing, prolonged sitting, and any strenuous activity utilizing the trunk; mildly now, but substantially in the past.”
- (35) I note, in this regard, the Medical Review Panel’s use of the terms “mild in extent” and “mildly now” to qualify its references to both the worker’s back pain and her restrictions due to the back pain.
- (36) The “pension decision letter” dated December 20, 1999 was in the nature of a standardized form letter concerning the pension award on the worker’s claim. A copy of a memo dated December 10, 1999 was attached to provide the details of how the decision was reached. Neither the memo nor the decision letter reveals any mention of consideration being provided to the worker’s subjective complaints.
- (37) The December 2, 1999 permanent functional impairment evaluation report by the Disability Awards medical advisor included the following information:

Present Complaints (Aggravating Factors, Relieving Factors, Associated Features)

[The worker] has decreased some of her recreational activities and states that she does not like vacuuming at home anymore and also had to give up quite a bit of the garden. She looks after her husband at home who apparently has severe migraines and does not work. She does walk the dogs for 1 to 2 hours everyday as this is her main exercise.

Her job has changed from being in the chef’s position to being salad preparer. She does not do much of the cooking anymore as this involved heavier lifting. She stated that she uses an occasional Naprosyn or Naproxen. She occasionally gets intermittent pain to the hip but she has an aching in the back most of the time. After her third surgery, she returned to work 2½ years ago and has been able to stay at work with the occasional day of discomfort. She uses a chair to sit at work sometimes as the job is mostly standing and this causes an increasing ache in her back.

- (38) Section 23(1) of the Act provides:

Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.

(39) Policy concerning pension awards for subjective complaints is set out at #39.01 of the Manual, and in Decision No. 318 (Re Stress Testing, 5 *Workers' Compensation Reporter* 55) and Decision No. 407 (Re Assessment of Permanent Disabilities, 6 *Workers' Compensation Reporter* 61).

(40) Published Appeal Division decisions include:

- #91-0388, Permanent Disability Awards for Subjective Pain, 7 *Workers' Compensation Reporter* 119
- #93-0329, Subjective Complaints of Pain, 9 *Workers' Compensation Reporter* 389
- #93-0277, Chronic Pain Syndrome, 9 *Workers' Compensation Reporter* 259
- #93-0740, Right to Reconsider Appeal Division Decisions, 10 *Workers' Compensation Reporter* 127

(41) In Decision #91-0388, the panel reasoned:

Since the Disability Awards Medical Advisor here found the objective functional assessment to be 3% and the Medical Review Panel had already found the worker to have a disability involving pain, the total award for objective plus subjective factors had to be greater than 3%. Otherwise, the subjective factors would only be assessed at 0%, which would contradict the binding Certificate of the Medical Review Panel.

The functional assessment has to be increased due to the subjective factors. Complaints of pain will not always mean that subjective factors will increase the functional impairment assessment. It is the effect of pain and whether or not it is disabling that must be considered by the Disability Awards Officer. It is not easy to assess and measure the effects of pain, but it must be done as Section 23(1) of the Act directs the Board to consider disability and impairment. This cannot be limited to objective factors. In this case, the assessment of the subjective factors was made easier by the Certificate of the Medical Review Panel.

(42) In considering the worker's appeal, I note that the policy concerning subjective complaints is not entirely clear and appears capable of differing interpretations:

- I. A first interpretation is that loss of function pension awards under section 23(1) are generally made based on an assessment of a worker's objectively measured impairment of function. However, even where such an assessment would tend not to support the making of any pension award as little or no objectively verifiable or measurable impairment is present, there is discretion to consider making an award on the basis of the worker's subjective complaints. This is done where the evidence supports a conclusion that these complaints would cause an impairment which is likely to adversely affect the worker's earning capacity, even though not objectively measurable in an examination. The making of such an award based largely on subjective complaints has the associated benefit of

permitting entry to consideration of a loss of earnings pension award under section 23(3) of the Act. Under this first interpretation, consideration of a pension award for subjective complaints is only undertaken where the assessment of loss of function would not otherwise support the granting of a pension award. If a measurable impairment of function is present, the pension award will be assessed on that basis alone. The worker's subjective complaints need not be considered where a pension is being awarded based on a loss of function basis.

- II. A second interpretation of the policy concerning subjective complaints is that such complaints are always addressed as a separate component in determining the worker's pension award. To the extent the subjective complaints are considered to cause an impairment which is likely to adversely affect the worker's earning capacity, an additional award should always be made on this basis in addition to any award made for the measured loss of function. Appeal Division #91-0388 might be interpreted as supporting this interpretation, although that is not the only way to interpret that decision.
- III. A third interpretation of the policy concerning subjective complaints is that an injury and resulting measurable objective impairment of function is considered to normally involve subjective complaints of a certain nature and extent. Where these are within the range of what is normally to be expected with a particular type of injury and impairment, no additional award is made for the subjective complaints. These complaints are considered part of the disability for which the loss of function pension award is made, and are subsumed in that award. Where, however, the subjective complaints are found to be genuine and credible, but are disproportionate to what would normally be associated with the particular type of injury and impairment, consideration may be given to making an additional award based on these subjective complaints (i.e. where these are of a nature and degree such that they are considered to cause an impairment which is likely to adversely affect the worker's earning capacity, beyond the extent recognized by the objectively measurable impairment of function alone).
- IV. A fourth interpretation is that it is necessary to consider whether the worker is suffering from an actual loss of earnings as a result of the injury, as a prerequisite to making a pension award for subjective complaints. The Review Board panel in this case found the policy at #39.01 of the Manual inapplicable, on the basis that the worker has been able to return to full-time employment and that there is no evidence that she is receiving any less earnings than she would have otherwise. I note, in this regard, Appeal Division reconsideration Decision #93-0740. That related to an Appeal Division decision in which the panel noted, perhaps in a similar vein:

In [the worker's] case, the objective findings were measurable and a functional award of 7% was allocated. The Disability Awards adjudicator noted the subjective complaints; however, concluded there was no loss in earnings greater than reflected by the functional impairment. We find no error in the Disability Awards adjudicator's rationale and calculations.

In Decision #93-0740, it was noted that the prior Appeal Division panel's comment regarding loss of earnings appeared to be gratuitous and unrelated to the determination of the amount of the pension award. Accordingly, it was found there was no error of law going to jurisdiction.

- (43) The wording of the policy concerning subjective complaints is somewhat ambiguous. It is not obvious that one of the various approaches most clearly reflects the intent of the policy, although Decision #93-0740 appears to indicate that the fourth approach would involve an error of law going to jurisdiction if it formed the basis for the decision (i.e. if evidence of an actual loss of earnings was considered a prerequisite, rather than merely a relevant consideration).
- (44) The facts of the case addressed in Decision No. 318 would tend to support the first interpretation. However, if the reasoning and analysis is viewed as having broader application beyond the facts of that situation, that reasoning would tend to support the second or third interpretations. It may be that clarification of #39.01 would assist in promoting consistency in the manner in which it is to be applied.
- (45) For the purposes of considering the worker's appeal, I am inclined to interpret the policy in the fashion described as the "third interpretation" set out above. The first interpretation may, in fact, be viewed as one situation in which the analysis applies (with respect to the recognition that subjective complaints may constitute a disability, where no measurable impairment is present), but the analysis need not be restricted to that particular situation (it may also apply where measurable impairment is present). This provides for a measure of discretion in considering the circumstances of individual cases. Under section 23(1), the impairment of earning capacity must be estimated from the nature and degree of the injury. It is appropriate to take into account the worker's subjective complaints in undertaking this assessment.
- (46) Upon considering the evidence and argument in this case, I am not persuaded that any additional award is warranted for the worker's subjective complaints. It is unfortunate the memo and decision letter providing details of the worker's pension award did not explain the consideration given to the worker's subjective complaints. Upon consideration of these complaints, however, I am not persuaded that they are of a nature and extent beyond what would normally be associated with an impairment of 4.2% of total disability (i.e. her assessed impairment before proportionate entitlement was applied). I find insufficient basis to conclude that there was any error in estimating the worker's impairment of earning capacity from the nature and degree of her injury.
- (47) In reaching this decision, I have considered the analysis in Appeal Division Decision #91-0388. However, in the present appeal, the Medical Review Panel certified that the worker's "disability consists of back pain, mild in extent now but severe in the past, limiting bending, lifting, long standing, prolonged sitting, and any strenuous activity utilizing the trunk; mildly now. . . ." In other words, she has mild back pain producing mild restrictions. I do not read the Medical Review Panel's certificate in this case as requiring separate recognition for her subjective complaints and objective impairment in the determination of her pension award, as these are very much interlinked and are mild in nature. I am not persuaded that the worker's pain and subjective complaints are the source of any additional disability greater than is reflected by the pension award based on the worker's objective impairment of function.

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- (48) The worker's appeal is, therefore, denied on this issue. I find that no increase is warranted in the worker's pension award based on her subjective complaints.

Conclusion

- (49) The worker's appeal is allowed in part. On the first issue, her appeal is allowed. Proportionate entitlement should not be applied in calculating her wage loss benefits, in implementing the Medical Review Panel certificate. On the second issue, her appeal is denied. No increase is warranted in the worker's pension award based on her subjective complaints.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.