

Permanent Disability Awards for Loss of Range of Motion – Chronic Pain

Jozipovic Decision

A judicial review decision of the B.C. Supreme Court, dated March 18, 2011 (*Jozipovic v. British Columbia (WCAT and Workers' Compensation Board)*), considered the entitlement of a worker to a permanent disability award for loss of range of motion.

The worker's claim had been accepted for permanent chronic pain and a permanent L5-S1 disc protrusion injury. The worker was assessed for a permanent partial disability award under section 23(1) of the *Act* (loss of function). The worker was granted an award of 2.5% in recognition of his permanent chronic pain but no pension award was given with respect to the worker's disc protrusion injury.

Although the worker demonstrated a loss of range of motion during the functional impairment assessment, it was difficult to measure the extent of the loss. The physician who conducted the assessment found that either through voluntary or involuntary protective guarding, the worker self-limited during the evaluation. This was attributed to the worker's complaints of pain and fear of re-injury. The Disability Awards Officer determined she was unable to calculate the worker's impairment according to the Permanent Disability Evaluation Schedule ("*Schedule*"), finding that the worker's demonstrated range of motion was not a true reflection of his abilities or functional impairment. As a result, no PFI award was granted for the permanent L5-S1 disc protrusion injury.

The B.C. Supreme Court found that there was no rational explanation for why the worker was denied an award for loss of range of motion in addition to the chronic pain award of 2.5%. The Court concluded that on the facts of this worker's case, the decision of WCAT confirming the Board decision not to grant the worker an award for loss of range of motion due to chronic pain was patently unreasonable. The fact that the loss of range of motion assessment may have been impacted by the worker's pain symptoms does not invalidate the results or negate the worker's entitlement to a PFI award for the permanent disc protrusion.

What does a Disability Awards Officer need to consider when a claim is referred with chronic pain accepted as a permanent condition?

The Disability Awards Officer needs to consider whether the worker's chronic pain is "specific" chronic pain or "non-specific" chronic pain and whether the pain is "disproportionate."

Specific Chronic Pain

“Specific” chronic pain is defined in Policy #39.02, *Chronic Pain*, as pain with clear medical causation or reason, such as pain that is associated with a permanent physical or psychological disability.

Because “specific” chronic pain is associated with permanent physical or psychological disability, it necessarily follows that workers with “specific” chronic pain will be assessed for functional impairment. In addition, the Officer needs to determine whether the worker’s specific chronic pain is consistent with, or disproportionate to, the associated physical or psychological impairment accepted on the claim.

Specific pain is considered disproportionate where it is generalized rather than limited to the area of the impairment and/or where the extent of the pain is greater than expected.

Policy #39.02 explains that if the worker’s specific chronic pain is consistent with the worker’s physical or psychological impairment, no additional award is granted for pain as doing so would result in the worker being compensated twice for the impact of pain.

If the worker’s specific chronic pain is disproportionate to the associated physical or psychological impairment, the worker may receive a separate award for chronic pain (2.5%) in addition to the award for objective permanent impairment.¹

Non-Specific Chronic Pain

Where a worker has recovered from a compensable injury but is left with permanent chronic pain (as a compensable consequence of a work injury or disease), the claim is referred to Disability Awards. Disability Awards is responsible for determining the worker’s entitlement to an award for “non-specific” chronic pain.

“Non-specific” chronic pain is defined as pain that exists without clear medical causation or reason that continues following the recovery of a work injury. In other words, a distinction can be drawn between non-specific chronic pain and the original injury. In these circumstances, the only condition referred to Disability Awards is the worker’s chronic pain and a functional impairment assessment is not necessary.

Policy #39.02 instructs Officers to consider whether or not the worker’s non-specific chronic pain is disproportionate. If the worker’s non-specific chronic pain is significantly greater than what would be reasonably expected given the type and nature of injury (i.e. disproportionate), a chronic pain award (2.5%) is granted.

¹ Mr. Jozipovic’s claim was accepted for a permanent disc injury as well as permanent specific chronic pain. The Disability Awards Officer found that Mr. Jozipovic’s chronic pain (specific) was disproportionate to his associated back injury. Therefore, Mr. Jozipovic is entitled to a chronic pain award, in addition to any entitlement he has to a permanent impairment award for his back.

In the case of non-specific chronic pain, the policy does not contemplate the worker being entitled to an award for chronic pain in addition to an award for objective permanent impairment. The only condition accepted as permanent in these cases is chronic pain and the pain award compensates the worker for any loss of function resulting from the pain.

When are loss of range of motion assessments completed?

When a physical injury is accepted as a permanent condition on a claim, a permanent functional impairment examination is completed in order to determine the worker's entitlement to a pension award under section 23(1). A worker's loss of range of motion is assessed as part of the functional impairment examination.

If the only permanent condition accepted on the claim is chronic pain, is a loss of range of motion assessment completed?

No, a loss of range of motion assessment is not completed on claims when the only permanent condition accepted is chronic pain. As noted above, where a worker continues to experience chronic pain after the compensable injuries have resolved, the pain is considered to be "non-specific" chronic pain. Disproportionate non-specific chronic pain is compensated under s. 23(1) by a chronic pain award of 2.5%. The 2.5% award recognizes any residual disability the worker may be experiencing due to chronic pain, including effects such as a loss of range of motion.

What is the remedy for a worker who feels he or she should receive a pension award for loss of range of motion but whose only accepted permanent condition is chronic pain?

The worker has the right to request a review of the Case Manager's decision to accept only chronic pain as a permanent condition on the claim. Loss of range of motion assessments, and any consequential entitlement, flow from a physical injury (or injuries) that have been accepted as permanent conditions. If the worker feels he or she should be assessed for a permanent functional impairment because the underlying physical injury has not resolved, the worker should appeal the decision not to accept the physical injury as a permanent condition on the claim.

The Case Manager should be providing the worker with a decision letter that outlines which conditions have been accepted as permanent at the time the claim is referred to Disability Awards. If that has not happened, the worker may request such a letter from the Case Manager.

What should Officers do where a worker's loss of range of motion is difficult to measure?

In cases where a permanent functional impairment assessment indicates the worker has a loss of range of motion, but the loss is difficult to quantify, the Disability Awards Officer uses the *Schedule* and the best available evidence to determine the amount of the functional award. For example, evidence may include reports from specialists or treatment programs. Evidence of loss of range of motion should not be dismissed on the basis that it is difficult to accurately evaluate and measure. In some cases, after considering the available evidence, the Officer may feel it is appropriate to provide the worker with another opportunity to be evaluated prior to the pension entitlement decision being made.

If chronic pain and a physical (or psychological) injury have been accepted as permanent conditions, is the worker always entitled to both a permanent functional impairment (“PFI”) award for the physical (or psychological) injury and 2.5% for chronic pain?

No, the worker will not always be entitled to both a PFI award and a 2.5% chronic pain award.

Where a claim is referred for a physical or psychological injury and chronic pain, the Disability Awards Officer determines if the worker's chronic pain is:

- consistent with the associated physical/psychological impairment, or
- disproportionate to the impairment (i.e. generalized rather than limited to the area of impairment or extent of pain is greater than expected).

If a worker's specific chronic pain is consistent with the associated compensable physical/psychological impairment, the worker is not entitled to an additional 2.5% chronic pain award. The PFI award, which may include recognition for a loss of range of motion, is considered appropriate compensation.

If a worker's specific chronic pain is disproportionate, an award of 2.5% for chronic pain is considered, in addition to any PFI award entitlement the worker may have for the permanent physical/psychological impairment.