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Michael S. Green

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THE WCAT LEADING CASE ON PENSIONS: VILLANUCCI

Michael S. Green*

The Workers' Compensation Appeals Tribunal (WCAT) released its decision¹ in the leading case on pensions on May 22, 1987. The decision culminated a 17 month long process in which the WCAT investigated the Workers' Compensation Board's (WCB) method of pension assessment in the context of a particular worker's pension appeal. A number of intervenors on behalf of workers and employers participated in the hearings. The case was part of WCAT's policy of treating selected individual cases as "leading cases" in order to develop statements of law and policy in various important areas early in the new Tribunal's existence.

The WCAT arrived at two conclusions:

1. the WCB's method of pension assessment is consistent with the requirements of the Workers' Compensation Act;²
2. there is a condition which the WCAT labels "enigmatic chronic pain" which the WCB does not compensate for in its permanent disability assessments and which is compensable under some circumstances and with some limitations.

In the course of arriving at the first conclusion, the WCAT made some surprising comments about the complementary role of pensions and pension supplements under the Workers' Compensation Act³. My focus in this article will be on the current state of permanent disability compensation in Ontario in light of these comments.

The Act provides for a two-stage permanent disability compensation process. Injured workers are assessed for a pension, pursuant to section 45(1). They are then considered for a pension supplement, pursuant to section 45(5) or section 45(7).

*Copyright © 1987 Michael S. Green. Michael Green is a lawyer in private practice in Toronto, Ontario and was one of several representatives of the Union of Injured Workers at the WCAT leading case on pensions. He is also a member of the Board of Directors of the Industrial Accident Victims Group of Ontario, a legal clinic in Toronto.

¹ Decision 915 (Ellis, Apsey, Cook, Heard and Jago), May 1987.

² R.S.O. 1980, Chapter 539, as amended.

³ *Ibid.*

1. THE STATUTORY CONTEXT

Section 45 of the Workers' Compensation Act⁴ provides:

(1) Where permanent disability results from the injury, the impairment of earning capacity of the worker shall be estimated from the nature and degree of the injury, and the compensation shall be a weekly or other periodical payment during the lifetime of the worker, or such other period as the Board may fix, of a sum proportionate to such impairment not exceeding in any case the like proportion of 90 per cent of the worker's net average earnings.

(3) The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations that may be used as a guide in determining the compensation payable in permanent disability cases.

(5) Notwithstanding subsection (1), where the impairment of the earning capacity of the worker is significantly greater than is usual for the nature and degree of the injury, the Board may supplement the amount awarded for permanent partial disability for such period as the Board may fix unless the worker,

(a) fails to co-operate in or is not available for a medical or vocational rehabilitation program which would, in the Board's opinion, aid in getting the worker back to work; or

(b) fails to accept or is not available for employment which is available and which in the opinion of the Board is suitable for the worker's capabilities.

(7) Notwithstanding subsections (1) and (5), where the impairment of earnings capacity for an older worker is significantly greater than is usual for the nature and degree of the worker's injury and, where in the opinion of the Board, the worker cannot return to work and is unlikely to benefit from a vocational rehabilitation program which would lead to employment, the Board may supplement the amount awarded for permanent partial disability with an amount not exceeding the old age security benefits that would be payable under section 3 of the Old Age Security Act, and amendments thereto, as if the worker were eligible therefor, and such supplement may continue until the worker is eligible for such old age security benefits or until the worker returns to employment.

⁴ *Ibid.*

(12) For the purposes of this section, "permanent disability" means any physical or functional abnormality or loss, and any psychological damage arising from such abnormality or loss, after maximal medical rehabilitation has been achieved.

2. THE WCB'S METHOD OF PENSION ASSESSMENT

Pensions are assessed by a doctor in the WCB's Permanent Impairment Section. The doctor will, after reviewing the worker's file, examine the worker and assess the seriousness of the injury as compared with certain "fixed points" in the WCB Permanent Disability Rating Schedule.⁵

The Rating Schedule consists of a listing of injuries and percentages, for example, the rating attached to a completely immobile lower back is 30%. A worker with a partially immobile back would be assessed at less than 30%.

The percentage in the Rating Schedule attached to a particular injury represents, according to Board policy, the approximate impairment of earnings capacity of an average unskilled worker with the injury. I will discuss below the appropriateness of the figures in the Rating Schedule.

The Rating Schedule is not complete. Heart and lung conditions and psychological conditions are two examples of conditions that are not covered. For these conditions, the Board will use another rating schedule, such as the American Medical Association Guide to the Evaluation of Permanent Impairment (the AMA Guide). Interestingly, the percentages in the AMA Guide purport to reflect the impairment of the activities of daily living associated with an injury — a different standard than the Ontario schedule.

The WCAT heard testimony from several WCB doctors on how the Rating Schedule is applied. It was unclear prior to the hearing how a worker with 1/2 mobility in his lower back, for example, would be assessed. The evidence at the hearing on this issue seemed to conflict with the Board's own policy — the doctors testified that they had regard to the impairment of activities of daily living in assessing the pension in these cases.

The WCAT decided⁶ that in applying the Schedule the doctors were estimating the seriousness of the worker's injury in comparison with the benchmarks in the Rating Schedule. In doing so, the doctors would not find the concept of the impairment of earnings capacity of an average unskilled worker to be of practical assistance and could instead use the concept of impairment of activities of daily living for the purpose of estimating the seriousness of the worker's injury.

⁵ Enacted pursuant to section 45(3) of the Act.

⁶ At page 20 of the decision.

3. IS THE WCB'S METHOD OF PENSION ASSESSMENT CONSISTENT WITH THE ACT?

Several of the intervenors on behalf of workers argued that the Act requires that the Board actually attempt to assess the impairment of earnings capacity of the worker in determining a pension. In particular, the intervenors argued that the Board should consider the worker's pre-accident occupation in setting the pension level.

The Tribunal rejected this argument. The key in the view of the Tribunal was the interrelationship of section 45(1) and sections 45(5) and (7), the pension supplement sections.

Section 45(5)⁷ has historically been interpreted in a restrictive manner by the WCB. The Board has interpreted the section as only authorizing temporary supplements to be paid to the worker for a rehabilitative purpose. As a result, the supplements cease when a worker who has not returned to work is determined to be unemployable.

The Tribunal holds in the Decision⁸ that the Board's interpretation of section 45(5) is correct. The enactment of section 45(7) in 1984, which authorizes the payment of a supplement (albeit in a lesser amount than under section 45(5)) to older workers who are determined to be unemployable is indicative of the Legislature's intention that non-older workers who are unemployable should not receive a supplement, in the view of the Tribunal. The enactment of section 45(6) which precludes the awarding of a partial supplement also suggests to the Tribunal that the Legislature did not intend that workers who are unemployable should receive a section 45(5) supplement.

The Tribunal then proceeds to deal with the interpretation of section 45(1) and holds that as the legislature has enacted section 45(7) which provides a measure of relief to permanently unemployable older workers, it could not have intended broader relief to be available under section 45(1) for unemployable non-older workers.

The Tribunal did not address the more general argument made by several of the worker side intervenors that the worker's pre-accident occupation should be considered in the pension assessment process. Workers whose disability prevents them from returning to their pre-accident occupation, but who are employable in some other occupation, arguably suffer a greater loss of earnings capacity in the long term. Where a worker must change occupations as a result of a disability, the risk of termination of the employment is greater because of the nature of the adjustment process. This risk is not compensated for under section 45(5) because of the

⁷ See pp 2-3 of the decision.

⁸ At page 34 of the decision.

temporary nature of the supplement under that section, nor, by reason of the Tribunal's decision, under section 45(1).

4. CHALLENGING THE BENCH-MARKS IN THE RATING SCHEDULE

One of the worker side intervenors⁹ argued that the Tribunal was not bound by the bench-mark ratings in the Rating Schedule, and that, for a number of reasons, the 30% rating for a totally immobile lower back was inappropriate.

The Tribunal agreed that it was not bound by the bench-mark ratings in the Rating Schedule, but found that it would need "very compelling reasons"¹⁰, for concluding that the ratings did not meet the requirements of the Act. The reasons for this decision are found in the following paragraphs of the Decision:

The nature and origins of the Board's Schedule and its similarities to rating schedules in other jurisdictions have been previously described. On the basis of that description, and having regard particularly to its similarities in principle and in result to other schedules in Canada and elsewhere, this Panel believes that the *bona fides* and reasonableness of the design of the schedule must be taken to have been generally established, at least for the purposes of this case.

The Schedule was developed by the Board's medical staff and other medical experts relating their professional knowledge of the nature of various disabilities and their effect on patients to how one type of disability compares to others in terms of their likely impact on the earnings capacity of average unskilled workers. It is not a scientific process, but under all the circumstances and having regard to the possible alternatives, it cannot be said to be insubstantial or inherently unreasonable.

The evidence concerning the expertise of the Board's medical staff and other medical experts on how "one type of disability compares to others in terms of their likely impact on the earnings capacity of average unskilled workers" was not impressive. The head of the Permanent Impairment Section of the Board, Dr. Young, was not aware that the purpose of the Rating Schedule was to measure the impact of disabilities on the earnings capacity on average unskilled workers. The process by which the 30% rating for a totally immobile lower back was added to

⁹ The Union of Injured Workers.

¹⁰ See page 41 of the decision.

the Rating Schedule¹¹ can only be described as casual, essentially consisting of one short memorandum.

More importantly, the Board has in setting up the schedule only consulted the medical profession, while not seeking the advice and opinions of rehabilitation counselors and economists. Such advice is crucial in a proper assessment of the likely impact of an injury on the average unskilled worker.

Notwithstanding these reasons for a more searching review of the benchmarks in the Rating Schedule, the Tribunal has decided to defer to the expertise of the Board, such as it is, on this issue.

5. WHERE DO PERMANENTLY DISABLED WORKERS STAND NOW?

There are three classes of permanently disabled injured workers:

- (1) employable,
- (2) older and unemployable,
- (3) younger and unemployable.

The employable injured worker will receive a pension and a section 45(5) supplement, provided he or she co-operates in a vocational rehabilitation program and is available for suitable work. When he or she finds work, a wage-loss supplement will be payable.¹²

The older unemployable worker will normally receive an older workers' supplement pursuant to section 45(7) of the Act,¹³ in addition to his or her pension. Such a worker will also receive as a matter of course a Canada

¹¹ Described at pp 39-40 of the decision.

¹² The WCB has as a matter of policy normally paid wage-loss supplements for 3 years, prior to the legislative changes in 1984. The basis for this policy was that wage-losses normally evaporated after 3 years because of inflationary increases in the post-accident wage-rate. In 1984, section 45(6) was added to the Act and as a result the Board was directed to compare post-accident earnings with pre-accident earnings, having regard to the effect of inflation on pre-accident earnings. The wage-loss will not now evaporate. The Board has not yet decided what it will do with its policy respecting the payment of wage-loss supplements: see page 37 of the Decision for a discussion of this.

¹³ Technically, the worker must show that his or her impairment of earnings capacity is "significantly greater than is usual for the nature and degree of the injury", in addition to showing that he or she is unemployable. It is however hard to conceive a situation where a worker who receives less than a 100% pension and is unemployable would fail to meet this condition.

Pension Plan (CPP) disability pension.¹⁴ As a result of recent increases in the amount of the CPP disability pension, a worker in this position will usually have a fair income, taking into consideration the WCB pension, the older workers' supplement and the CPP disability pension.

The younger unemployable worker is in the most precarious position. Such a worker will receive only their pension (which may be 20% of their pre-accident wages or less) and possibly a CPP disability pension.¹⁵

The reader may wonder how it could be that a younger worker with a small WCB pension would be unemployable. An example may help — consider a 40 year old butcher with a Grade 3 education and a moderately severe learning disability who speaks Portuguese only. Suppose that he injures the wrist of his dominant right hand so that he cannot return to his occupation as a butcher. Such a worker will receive a small WCB pension and yet may very well be unemployable. This example may sound contrived, but in fact is very similar to a case of the author's.

6. ALTERNATIVE METHODS OF PERMANENT DISABILITY COMPENSATION

A number of legislative changes could be made which would in particular aid the younger unemployable worker. One possibility is the introduction of the "projected loss of earnings" method of permanent disability compensation¹⁶. This method would require the Board to assess what work the worker can do, after all vocational rehabilitation measures have been taken. If the work is available in the labour market, the Board would then make a projection of the worker's loss of earnings between the pre- and post- accident work. The difference would be expressed in percentage terms and this percentage would be the worker's pension. Under this method, the unemployable worker receives a 100% pension.

Another possibility would involve a more modest change. The older workers' supplement could be extended to all workers who cannot return to work. This would improve the financial circumstances of younger unemployable injured workers (who presently are in the most difficult situation) to some extent.

¹⁴ In some situations the amount of the older workers' supplement may be reduced by reason of receipt of CPP: see section 45(6).

¹⁵ It will be difficult in many cases to show that the younger worker suffers from a "severe and prolonged" disability, as is required for entitlement to a CPP disability pension.

¹⁶ See British Columbia Decision no. 8 for a longer description of the projected loss of earnings method.

7. CHRONIC PAIN

Chronic pain¹⁷ is a phenomenon where a patient suffers from pain of long-lasting nature without there being any known organic or non-organic (psychological) cause for the pain. A related phenomenon is what has been called pain magnification — a patient suffers from pain to a much greater extent than is usual for a particular organic or psychological condition.

Historically, chronic pain cases have not received an enthusiastic response from the WCB. The Board has traditionally compensated for certain psychological conditions that may be associated with chronic pain,¹⁸ such as anxiety neurosis. Where the worker's only symptom, however, was persistent pain in excess of what could reasonably be expected from the organic injury or without any explanation whatsoever, the Board has traditionally not compensated for the pain.

The WCAT has taken a different approach from its inception. In the temporary disability context, the Tribunal held in a trilogy of early decisions¹⁹ that chronic pain is a compensable disability provided the following conditions are met:

1. the chronic pain was genuine, that is, not consciously produced;
2. the chronic pain was disabling, that is, prevented the worker from performing some kind of work; and,
3. the chronic pain resulted from the injury at work.

In Decision 915, the Tribunal dealt with chronic pain for the first time in the permanent disability context. In so doing, the Tribunal affirmed the principles stated in its earlier decisions, however it also made some surprising comments about the third condition listed above — proof of causation — in cases where there may be said to be multiple causes for the chronic pain.

It is generally accepted that a variety of personal and social factors can affect a patient's perception of pain. Factors that have been considered in the literature include marital discord, loss of a family member, and certain personality characteristics. The Tribunal was particularly interested in the role of motivation or lack thereof in chronic pain cases.

¹⁷ The Tribunal has coined the phrase "enigmatic chronic pain" in Decision 915 to describe this phenomenon.

¹⁸ See WCB Claims Services Division Manual, pp. 207-211 for the Board's policy on psychological disability.

¹⁹ Decision 9 (February, 1986; Ellis, Cook, Jago), Decision 11 (February, 1986; Ellis, Heard, Jago), and Decision 50 (April, 1986; Ellis, Cook, Preston).

The Tribunal found that there was a class of workers with chronic pain who were not entitled to a pension because of an absence of motivation.²⁰ The disabilities of such workers could not be said to "result from the accident" in the view of the Tribunal. The Tribunal however states that,²¹

"We expect however that it will be relatively rare to find a level of motivation so low as to render the causative role of the injury effectively insignificant. In such a case, motivation would be so low as to effectively make the case one of malingering. What is more likely is levels of motivation that fall to varying degrees below a reasonable standard."

There is another group of workers who while not being completely unmotivated, are undermotivated to such an extent that such undermotivation can be seen "to have made a significant contribution to the degree of the disability".²² About this class of workers, the Tribunal states:²³

"In a workers' compensation scheme, the system is entitled to expect a reasonable level of motivation. Where the motivation falls significantly below that level, but not so far as to be entirely absent, it would seem right to regard that circumstance as a contributing cause. In such circumstances, the undermotivation's contribution to the extent of the disability could not be fairly construed as a natural result of the compensable injury and it would be possible to be satisfied that not all of the disability has resulted from the compensable injury. In those circumstances, an allocation of responsibility for part of the disability to the motivation problem with a corresponding reduction in the benefits would be indicated."

There are some obvious difficulties with this analysis:

1. Some workers lose their motivation due to problems with the WCB — be they benefits or vocational rehabilitation problems.
2. In some cases, the worker may not be a motivated person in general. It is difficult to reconcile the treatment of this pre-existing personality characteristic with the treatment of pre-existing medical conditions, such as degenerative disc disease.

An example will serve to illustrate the second point. A worker with asymptomatic degenerative disc disease who aggravates this back con-

²⁰ See page 110 of the decision.

²¹ See page 115 of the decision.

²² See page 117 of the decision.

²³ *Ibid.*

dition in an industrial accident, will be assessed for a pension on the basis of the entire disability at the time of the pension assessment. This is so despite the fact that the pre-existing degenerative disc disease plays a significant role in the permanent disability.

On the other hand, a generally unmotivated worker who suffers from chronic pain syndrome may have his or her pension assessed on the basis of only the accident injury.

Bearing this criticism in mind, it seems that the effect of the ruling with respect to chronic pain will be limited. Certain workers who have pain not explicable by reason of known organic cause and who did not qualify under the Board's policies regarding psychological disability entitlement will receive a somewhat higher pension than previously allowed them. The reduction for "undermotivation" will ensure that in many, if not most, cases the increase in pension amount will be small.

8. SOME UNANSWERED QUESTIONS

Some issues arose in the hearing which were not dealt with by the Tribunal in its decision. The most important of these issues were:

1. is the Board's practice of rating injuries or conditions not found in the Ontario Rating Schedule by reference to other Schedules such as the AMA Guides consistent with the Workers' Compensation Act?
2. how should the Board rate multiple injuries?

As mentioned earlier, the Ontario Rating Schedule is not comprehensive. It is for example silent with respect to conditions of the heart and lungs: As a result, most occupational disease cases where the worker is permanently disabled cannot be assessed using the Ontario Schedule.

In such cases, the WCB relies on other Schedules to provide the reference points for the assessment of permanent disability. The difficulty this presents is that other schedules attempt to measure different entities than the Ontario Schedule.²⁴

The Act in section 45(3) mandates the use of Rating Schedules "of percentages of impairment of earnings capacity". The Ontario Rating Schedule, in the view of the Panel, complies with this requirement. It is arguable, however, that the other rating schedules used by the Board do not comply with this requirement.

²⁴ This is dealt with peripherally at pp. 20-21 of the decision.

With respect to multiple injuries, the Board's practice in most cases is to calculate the pension by adding together the pensions for each injury.²⁵ It is arguable that this does not result in an adequate estimate of the usual impairment of earnings capacity for the injuries. To take an example a worker with a low back injury which essentially prevents him or her from returning to heavy work and with a hand injury that prevents him or her from returning to clerical work most likely will be unable to work, even if he or she is not unusual in any respect. Yet, the sum of pensions for the two injuries may be small.

10. CONCLUSIONS

Most injured workers' representatives see the WCAT Leading Case on Pensions as providing a justification (perhaps not a persuasive one) for the Board's long-standing practices in pension assessment and little else. The decisions made in this case with respect to chronic pain represent, if anything, a step backwards from previous Tribunal decisions.

²⁵ One exception to this is multiple amputations of fingers, where the pension will be more than the sum of the pensions for each amputated finger. A second exception is injuries to both legs.

