

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2013-089

THE WORKERS COMPENSATION BOARD

REPORT ISSUED ON DECEMBER 11, 2014

CASE SUMMARY

An injured worker complained that the Workers Compensation Board's (WCB) policy on calculating loss of movement/function does not fairly assess a worker's abilities.

At the complainant's hearing before the WCB Appeal Commission, his physician and his occupational health physician acknowledged that WCB policy directs range of motion measurements to be calculated using passive range. However, they argued that by restricting their assessment to using this form of measurement it did not accurately calculate the loss of movement/ function the complainant was experiencing. The Appeal Commission heard the evidence, but being bound by WCB policy, did not have the statutory authority to render a decision that was based upon facts not supported in policy.

Our investigation found that there have been advancements in the field of impairment assessment since the WCB policy was revised in 1992. In addition, we learned that Manitoba's policy is inconsistent with other provincial policies.

Manitoba Ombudsman recommended:

1. That the WCB Board of Directors review the loss of movement/function portion of the policy; and
2. That the WCB Board of Directors consider the complainant's case in determining an effective date for any resulting policy revisions.

In response to the recommendations, the WCB reviewed and revised their policy. The WCB also agreed to contact the complainant regarding a reassessment under the revised policy.

OMBUDSMAN JURISDICTION AND ROLE

Manitoba Ombudsman is an independent office of the Legislative Assembly of Manitoba, reporting to the assembly through the Office of the Speaker. The responsibilities and authority of the ombudsman are set out in *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act*, and *The Public Interest Disclosure (Whistleblower Protection) Act*.

Under *The Ombudsman Act (the Act)*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, municipalities, and their officers and employees. Investigations may be undertaken on the basis of a written complaint from a member of the public, or upon the ombudsman's own initiative.

In this case, the subject of our review was the loss of movement/function portion of the policy the Workers Compensation Board and the Appeal Commission relied on in making their decisions under *The Workers Compensation Act*.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or a municipal by-law. On other occasions, it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits, we also examine the fairness of the action or decision. A complaint can raise questions of procedural fairness, substantive fairness or relational fairness. Procedural fairness relates to how decisions are reached; the steps followed before, during and after decisions are made. Substantive fairness relates to the fairness of the decision itself and relational fairness relates to how people are treated during the decision making process.

While our office has a mandate to investigate complaints, the investigative process we follow is non-adversarial. We carefully and independently consider the information provided by the complainant, the decision maker, and any witnesses we determine to be relevant to the case. Administrative investigations can involve an analysis of statute or by-law provisions, document reviews, interviews and site visits.

The goal of administrative investigations is to determine the validity of complaints and to identify areas requiring improvement. If a complaint is supported by a finding of maladministration, the ombudsman may make recommendations pursuant to section 36 of *The Ombudsman Act*.

Administrative investigations can also identify areas where improvements may be suggested to a government body without a finding of maladministration. Such suggestions are made to support and help government bodies achieve better administration, often through the adoption of best practices. Improved administrative practices can enhance the relationship between government and the public, and reduce administrative complaints.

THE COMPLAINT

On May 10, 2013, our office received a complaint about a Workers Compensation Board (WCB) policy pertaining to loss of movement/function. The complainant's family physician and his occupational health physician are of the view range of motion should be measured on the active range to properly assess a worker's functional capacity. WCB policy directs range of motion to be measured on the passive range. The complainant's physicians explained their reasoning at a hearing before the WCB Appeal Commission. The Appeal Commission recognized the physicians' concerns, but stated that it is required to apply WCB policy as written.

KEY ISSUES

- 1. Was the Appeal Commission's decision clearly wrong or unreasonable?**
- 2. Does the WCB policy, which was last revised in 1992, reflect current practices in the impairment assessment field?**
- 3. Is the loss of movement/function portion of the policy consistent with policies in other Canadian provinces?**

BACKGROUND INFORMATION

The complainant was injured in a workplace accident in November 2008 and requested a permanent partial impairment (PPI) award for his left shoulder. He was assessed by a WCB medical advisor and given a 4.4% PPI rating. The complainant disagreed with the rating and had his shoulder assessed by his treating physician and by an occupational health physician, both of whom arrived at a different PPI rating than the WCB medical advisor. When the WCB would not accept their ratings, he appealed the decision.

WCB Policy 44.90.10, Permanent Impairment Rating Schedule, directs that impairment ratings should be determined according to the guidelines provided in Appendix A of the schedule. With respect to loss of movement/function in upper extremities, Appendix A states that "range of motion will be calculated on the passive rather than the active range." When range of motion is calculated on the passive range, the practitioner manipulates the worker's joint through the range of motion. In contrast, an active range means that the worker moves their joint without assistance from the practitioner.

At the appeal hearing, the complainant's family physician and the occupational health physician challenged the policy. They explained that they found the policy's requirement for passive measurements to be problematic and had calculated the complainant's range of motion on the active range. The occupational health physician explained his concerns using the example of an individual with a paralyzed arm. When measured on the passive range, the paralyzed individual's arm would move through the full range of motion as it is manipulated by the medical practitioner. However, if measured on the active range, the individual would have no range of

motion because he or she would be unable to move the arm on their own – a substantial difference in the result. The occupational health physician expressed that measurements on the active range more accurately represent an individual's functional ability. The Appeal Commission recognized the argument, but noted that it is bound to follow WCB policy.

SCOPE OF THE INVESTIGATION

In investigating the policy, our office:

- Reviewed the decision by the Appeal Commission;
- Communicated with legal counsel for the WCB;
- Made inquiries with the Manitoba WCB regarding the history of the policy and reviewed several documents including:
 - the 1986 Permanent Impairment Rating Schedule (PIRS);
 - the 1992 revised PIRS; and
 - memos and board of directors meeting materials on the changes incorporated into the 1992 revised PIRS;
- Made inquiries with WCBs in the other Canadian provinces regarding their respective loss of movement/function policies;
- Reviewed current legislation and policies from each of the Canadian provinces; and
- Researched impairment assessment practices from the AMA (American Medical Association) Guides, 3rd edition onward.

ANALYSIS OF ISSUES AND EVIDENCE

Issue 1: Was the Appeal Commission's decision clearly wrong or unreasonable?

As noted above, Appendix A of the Permanent Impairment Rating Schedule (PIRS) directs loss of movement/function to be assessed by calculating a worker's passive range of motion. Despite the policy, the complainant's physicians measured his active range of motion, being of the view that the active range more accurately reflects his abilities. The physicians explained their reasons to the Appeal Commission at the hearing.

The Appeal Commission acknowledged the physicians' evidence, but explained that it is required to follow the WCB policy:

The panel acknowledges the submissions regarding the wisdom of using passive range of motion to establish a PPI rating and how this method does not effectively reflect the loss of function caused by a compensable injury. It is not, however, within our jurisdiction to make changes to the policies established by the WCB. Subsection 60.8(6) of the Act [The Workers Compensation Act] specifically states: "The appeal commission is bound by the policies of the Board of Directors." As such, this panel is limited to applying the terms of the Policy as written.

Responsibility for WCB policies rests with the Board of Directors, who must, “approve and supervise the policies and direction of the board, including policies respecting compensation...” pursuant to section 51.1 of *The Workers Compensation Act*. The Policy and Planning Committee of the Board of Directors oversees the development of new policy in a process that includes consultation with stakeholders. A number of factors are considered in determining when the policy should take effect, including fairness to those who may have been unfairly dealt with by the previous policy. Once a policy has been approved by the Board of Directors, the WCB and the Appeal Commission are bound by that policy.

Recognizing the limits on the jurisdiction of the Appeal Commission, Manitoba Ombudsman cannot conclude that its decision was clearly wrong or unreasonable, pursuant to subsection 23(2) of *The Ombudsman Act*.

Issue 2: Does the WCB policy, which was last revised in 1992, reflect current practices in the impairment assessment field?

Historically, the Manitoba WCB, like other Canadian jurisdictions, used the guidelines developed by Dr. D.E. Bell for the Association of Workmen’s Compensation Boards of Canada to assess impairment. In 1986, the WCB created and adopted its own Permanent Impairment Rating Schedule (PIRS). Over the next few years, a number of amendments to the PIRS were adopted by the WCB.

In 1992, the PIRS was revised to incorporate the various amendments. At that time, a section standardizing the method for measuring ranges of motion was added to make medical assessments more accurate and more consistent. The standardization was based on information from the *American Medical Association Guides to the Evaluation of Permanent Impairment* (AMA Guides), 3rd edition. Like the PIRS, the AMA Guides, 3rd edition (1984) and 3rd edition revised (1989) use range of motion, albeit measured on an active range, to assess impairment.

However, the AMA Guides approach to impairment has shifted over time. The AMA Guides, 4th edition (1993) introduces diagnosis related estimates as an alternative assessment method. The 5th edition (2000) expanded the use of diagnosis related estimates and the current 6th edition (2008), which calls them diagnosis-based estimates, uses them instead of range of motion measurements. This is a fundamental change in the manner in which impairments are assessed under the AMA Guides.

Recently Saskatchewan and British Columbia reviewed their compensation regimes, considering the AMA Guides, 6th edition and arriving at different outcomes. Saskatchewan shifted from a schedule-based assessment to using the AMA Guides, 6th edition in 2010. The rationale was to improve consistency (all insurers in Saskatchewan now use the 6th edition) and to bring in the most current practices in impairment assessment. In contrast, British Columbia’s review highlighted a number of concerns with whether the assessment methodology of the 6th edition was consistent with their legislation. British Columbia was of the view that it would not be possible to adopt the 6th edition in place of its impairment schedule, though the AMA Guides continue to be used as a reference tool.

The field of impairment assessment has evolved since the PIRS was revised in 1992. The latest AMA Guides now uses a different methodology and other Canadian jurisdictions are evaluating whether to follow suit.

Issue 3: Consistency with other Canadian Provinces

There are a variety of workers compensation regimes in Canada. Six provinces (Alberta, British Columbia, Manitoba, Quebec, New Brunswick and Newfoundland and Labrador) use impairment schedules based on the guidelines of Dr. Bell. They also use the AMA Guides as a reference when assessing conditions not included in their respective schedules. The other four provinces use various editions of the AMA Guides. Ontario uses the 3rd edition revised, Nova Scotia uses the 4th edition and Saskatchewan and Prince Edward Island use the 6th edition.

Nevertheless, Manitoba is only province to direct that range of motion should be calculated on the passive range. In other provinces with impairment schedules, there is no direction as to the range to be measured and the decision of how to appropriately calculate the range is left to the medical practitioner. Where range of motion measurements are required in a province using a version of the AMA Guides, they are calculated on the active range. The AMA Guides clarify that measurements may be taken on the passive range, but only to verify the validity of active measurements.

FINDINGS AND RECOMMENDATIONS

Manitoba Ombudsman was unable to conclude that the Appeal Commission's decision was clearly wrong or unreasonable pursuant to subsection 23(2) of *The Ombudsman Act*. The Appeal Commission is bound by Workers Compensation Board policy which directs the method by which loss of movement/function is assessed.

Nevertheless, our investigation shows that there have been advancements in the impairment assessment field since the Manitoba PIRS was revised in 1992. The latest edition of the AMA Guides, for example, uses a diagnosis-based methodology. Some provinces have subsequently reviewed their policies and followed suit, while others find the methodology problematic.

In addition, our investigation finds that Manitoba's policy on range of motion measurements is inconsistent with other provincial policies. Manitoba requires range of motion to be taken on the passive range. Other provincial impairment schedules allow the medical practitioner to determine how to calculate range of motion, while the AMA Guides direct it to be taken on the active range.

Consequently, and pursuant to subclause 36(1)(a)(vi) Manitoba Ombudsman is of the opinion that a decision has been reached in accordance with a practice that may be unreasonable.

Recommendation 1

In light of this, I make the following recommendation pursuant to clause 36(2)(d):

- That the WCB Board of Directors review Policy 44.90.10, Permanent Impairment Rating Schedule, and consider revisions to the loss of movement/function portion of the policy.

Recommendation 2

I also make the following recommendation pursuant to clause 36(2)(g):

- That the WCB Board of Directors consider the complainant's case in determining an effective date for any resulting policy revisions in order to fully achieve the principles of fairness.

WCB RESPONSE TO THE RECOMMENDATIONS

The ombudsman's report with recommendations was sent to the Workers Compensation Board on February 6, 2014.

The WCB accepted the recommendations in a response dated February 13, 2014, explaining that:

...the WCB has already commenced an in-depth review of policy 44.90.10. This review will continue into 2014. Any recommendations regarding substantive policy changes must be presented to the WCB's Policy, Planning, Governance and Service Committee and then in turn will be forwarded on to the WCB's Board of Directors for consideration.

The loss of movement/function section of the policy will be examined as a part of the policy review. The Ombudsman's report will serve as a source of information in this respect. As a matter of course, policy effective dates are generally reviewed when substantive policy changes are being considered. The WCB will consider the Ombudsman's recommendation when determining possible effective dates.

The WCB provided further information with respect to the policy in a letter dated November 19, 2014:

I can advise that on October 30, 2014 the WCB's Board of Directors approved changes to the WCB's policy 44.90.10 Permanent Impairment Rating Schedule. With respect to range of motion these are some of the changes made:

1. *The Board decided that to obtain valid results and minimize potential discomfort for the examinee, we would maintain guidance of movement in the desired plane of motion but introduce the "active guided movement" and assessment of the "end-feel" of body part motion as the required approach for determining impairment.*

2. *To account for the inherent variability of goniometric measurement, we are introducing the assessment of range of motion to the nearest five degree increment.*
3. *There will also now be definitions for “expected” and “measured” range of motion and we have clarified the use of these terms in the method for range of motion rating.*
4. *We have also clarified the 5-step process required for determining range of motion ratings of either upper or lower extremities.*

With respect to the effective date, the WCB advised that the revised policy will take effect on January 1, 2015. The complainant will be contacted by the WCB to be reassessed under the revised policy.

In light of the response to our report and recommendations, we consider this matter concluded.

MANITOBA OMBUDSMAN

DECEMBER 2014