

Noteworthy Decision Summary

Decision: WCAT-2005-01671**Panel:** Elaine Murray**Decision Date:** April 5, 2005

Permanent Disability Award – Comparison of Injured to Uninjured Limb – Assessment of Range of Motion – Shoulder Tendonitis – Impingement Syndrome – Meaning of “Other Variables” – Crepitus – Specific Chronic Pain – Altered Sensation – Sections 23(1) and 23(2) of the Workers Compensation Act – Policy Items #39.02, #39.10, #39.11, and #39.40 of the Rehabilitation Services and Claims Manual, Volume II – Permanent Disability Evaluation Schedule

This decision is noteworthy as an example of analyses of the current chronic pain policy and permanent disability award (PDA) entitlement. The “other variables” that may be considered in increasing a PDA under policy item #39.10 of the *Rehabilitation Services and Claims Manual, Volume II* are only those variables relating to the degree of physical impairment of the worker. In claims involving injury to a limb, a comparison of the injured side to the uninjured side provides an accurate measurement of the worker's impairment.

The worker was employed as a laboratory technologist. The Workers' Compensation Board (Board) accepted the worker's claim for right shoulder tendonitis with secondary impingement syndrome on the basis of an occupational disease due to the nature of their employment. The Workers' Compensation Review Division confirmed the Board's decision. The worker appealed to the Workers' Compensation Appeal Tribunal.

The worker argued that the Board erred when it calculated the restricted range of motion in her right shoulder by comparing it to her uninjured shoulder. The worker argued that the range of motion in her right shoulder should have been compared with the Board's established norms. The worker also argued the Board should have taken into account her right shoulder and right finger pain, right shoulder crepitus, and altered sensation in her right arm when calculating the award.

The panel found that, as there was no evidence the worker's left shoulder had been injured at any time, the use of norms would have overestimated the worker's level of impairment, as the range of motion in the worker's uninjured limb was already restricted relative to the general population. Thus, the impairment rating was properly calculated in accordance with item #39.11.

The panel noted that, when applying the criteria in item #39.10, the Board was free to apply other variables beyond the loss of range of motion calculations based on the Permanent Disability Evaluation Schedule. The panel determined that “other variables” meant those variables relating to the degree of physical impairment. There was no evidence that the right shoulder crepitus impaired the worker in any way. Thus, an additional award was not warranted.

With respect to the worker's right shoulder pain, the panel found that the location and the degree of the worker's pain was consistent with that normally associated with her compensable physical impairment. Thus, the criteria for an additional award for disproportionate chronic pain under item #39.02 were not met.

Applying the criteria in item #39.40, there was no persuasive evidence that the worker's altered sensation restricted her work-related activities so as to impact her earning capacity. Thus, the worker was not entitled to an additional award for sensory changes.

The worker's appeal was denied.

WCAT Decision Number : WCAT-2005-01671
WCAT Decision Date: April 05, 2005
Panel: Elaine Murray, Vice Chair

Introduction

In a November 7, 2003 decision, the Workers' Compensation Board (Board) granted the worker a 0.59% permanent partial disability award related to her right shoulder impairment stemming from her employment duties and resulting surgery in October 2002.

A June 24, 2004 Review Division decision confirmed the November 7, 2003 decision.

The worker now appeals the Review Division decision. The employer is participating in this appeal, but did not provide submissions. The worker's representative, Mr. Wong, requested that this appeal proceed by way of written submissions. I am satisfied that this appeal may be considered fully and fairly on the basis of the evidence and submissions on file.

Mr. Wong submits that the Board erred in calculating the worker's restricted range of motion in her right shoulder by comparing it to her uninjured side. He contends that the worker's right shoulder range of motion ought to have been compared against the Board's established norms. Furthermore, Mr. Wong submits that the Board ought to have considered the worker's chronic right shoulder pain, along with the aching and numbness in her right fifth finger and the ulnar aspect of her right fourth finger when calculating her award.

Issue(s)

Did the Board correctly determine the worker's permanent partial disability award in relation to her right shoulder condition?

Jurisdiction

Section 239(1) of the *Workers Compensation Act* (Act) permits appeals from Review Division decisions to the Workers' Compensation Appeal Tribunal (WCAT), subject to the exceptions set out in section 239(2). Section 239(2)(c) of the Act provides that a review officer's decision may not be appealed to WCAT where the decision relates to the application under section 23(1) of rating schedules compiled under section 23(2) where the specified percentage of impairment has no range or has a range that does not exceed 5%.

I have considered whether I have jurisdiction to address the scheduled portion of the worker's pension award (0.57% for a scheduled award and 0.02% added for an age adaptability factor), in light of section 239(2)(c) of the Act. Because the assessment of the worker's pension occurred after August 1, 2003, the applicable rating schedule compiled under section 23(2) is the "Permanent Disability Evaluation Schedule" (PDES), published as Appendix 4 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) (see *Resolution 20030617-06* of the board of directors of the Board).

The worker's functional award was calculated with reference to item #6 of the PDES, which provides a range of percentages of impairment from 3.5% to 14% for certain movements of the shoulder, up to 35% for a frozen shoulder. Given that the range of percentage of impairment exceeds 5%, I conclude that I have jurisdiction to address the scheduled portion of the worker's section 23(1) award under the general provisions of section 239(1) of the Act.

I have further considered whether the limitation found in paragraph 239(2)(c) the Act affects my ability to review the worker's award associated with other variables. I find that my ability to review the issue of other variables is not affected by that provision in the statute, because an award for other variables is not calculated by application of the rating schedule compiled under subsection 23(2) of the Act.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent, as set out in section 250(1) of the Act. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board which is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it, as outlined in section 254 of the Act.

Background and Evidence

The worker, who is presently 50 years old, first reported right shoulder symptoms in March 2001, which she attributed to years of repetitive movements as a lab technologist. She continued to work, but her pain increased over time. On September 30, 2002, Dr. Tarazi, an orthopaedic surgeon, reported that the worker continued to complain of impingement pain that radiated to her forearm and hand. He recommended surgery.

The Board accepted the worker's claim for right shoulder tendinitis with secondary impingement syndrome on the basis of an occupational disease due to the nature of her employment. She underwent arthroscopic subacromial decompression surgery on October 10, 2002.

Following surgery, the worker's family physician, Dr. Ross, reported that the worker had good right shoulder range of motion with pain on use, and had developed numbness her left shoulder.

The Board paid the worker temporary disability benefits from October 10, 2002 until she returned to her full-time duties on April 5, 2003.

On May 12, 2003, Dr. Tarazi reported that the worker's right shoulder pain continued to improve. She was experiencing some discomfort deep in the deltoid muscle area with excessive repetitive activities. Dr. Tarazi noted that recovery after surgery could take up to 12 months.

On August 21, 2003, Dr. Ross reported that the worker had a worsening of right shoulder pain, and paralysis along the ulnar side of her forearm.

The worker attended a permanent functional impairment (PFI) evaluation on August 27, 2003, with a Board-recognized external service provider. The PFI physician, Dr. Khunkhun, concluded that the worker's shoulder range of motion findings were likely reliable and consistent with the diagnosis.

During the PFI evaluation, the worker expressed her symptoms of right shoulder aching/soreness, and numbness along the ulnar aspect of her right forearm and hand, which disturbed her sleep and prevented her from participating in certain activities such as biking, swimming, and going to the gym. Her right shoulder pain was brought on by repetitive activity, while the numbness and tingling remained at a fairly constant level. She was taking Naproxen daily for her pain.

Of the six ranges of shoulder motion that Dr. Khunkhun tested, only the worker's right shoulder internal rotation showed greater than 5 degrees of loss compared to her left shoulder.

On September 11, 2003, Dr. Tarazi reported that the worker continued to complain of some discomfort over the posterior aspect of her right shoulder, along with some anterior pain, which was associated with some dysesthesia on the ulnar border of her forearm and hand. He reported that her symptoms were relieved by massage treatment, ice and heat. In Dr. Tarazi's opinion, it was unpredictable whether the worker's discomfort would completely resolve. He thought that it was unlikely because of the repetitive nature of her job, which was an aggravating factor.

On November 5, 2003, the range of motion values from the PFI evaluation were entered into the Board's software system for calculating functional impairment. The results indicated a total impairment of 0.57% in the worker's right shoulder related to internal rotation. There was 0% impairment indicated for flexion, extension, abduction, adduction, and external rotation.

In a November 5, 2003 memorandum (form 24), a disability awards officer (DAO) concluded that the worker had a 0.57% PFI, for which a permanent partial disability pension would be awarded effective April 6, 2003. The DAO also considered whether there were any other variables that suggested the worker was disabled to any greater degree than was represented by the functional award and found none. Additionally, the DAO concluded that the worker's ongoing complaints of pain were not disproportionate to the associated objective physical findings so as to warrant an award for chronic pain.

The DAO informed the worker of the above in the November 7, 2003 decision. In addition, the DAO advised the worker that an age adaptability factor of 0.02% had been added to her functional award, and a lump sum had also been calculated as a retirement benefit equal to 5% of her disability award, as required under the Act.

On May 6, 2004, Dr. Tarazi reported that the worker continued to experience pain in the posterior aspect of her shoulder, which was not improving. He thought that she likely had an element of tendinitis in her right shoulder, which was aggravated by the repetitive nature of her job. He also noted that she had some crepitation within the shoulder with movement due to some scar tissue in the subacromial area. He provided her with a prescription for Celebrex and recommended that she continue with rotator cuff strengthening exercises.

In the June 24, 2004 decision under appeal, the review officer confirmed the Board's November 7, 2003 decision. She found that the Board correctly calculated the worker's functional impairment by comparing the range of motion findings of the worker's injured side to her uninjured side. The review officer also agreed that the worker's complaints of pain were not disproportionate to the objective findings so as to warrant an additional award for chronic pain. Finally, she concurred with the Board in its determination that there were no additional factors, which suggested an extent of disability beyond the functional award.

In support of this appeal, Mr. Wong provided an October 22, 2004 letter from Dr. Ross. She confirms that the worker has virtually full range of right shoulder motion, but experiences discomfort with abduction of her right shoulder, has considerable crepitus during movement, and continues to have pain and numbness in her right fifth finger and the ulnar aspect of her right fourth finger. In Dr. Ross's opinion, the worker has chronic right shoulder pain, along with aching and numbness in her right fourth and fifth fingers.

Reasons and Findings

Under section 6(2) of the Act, which pertains to occupational diseases, the date of disablement must be treated as the occurrence of the injury. In this case, the worker was first disabled after June 30, 2002. As such, the worker's entitlement to a permanent disability award is adjudicated based on the provisions of the Act, as amended by the *Workers Compensation Amendment Act, 2002*. Applicable published policy is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

The worker has not disputed the pension effective date or retirement benefit, and I see no basis to disturb those aspects of the award. The matters for determination on this appeal involve the worker's scheduled award and whether she is entitled to an additional award for crepitus, right shoulder pain, and sensory loss in the ulnar aspect of her right hand, specifically her fourth and fifth fingers. I will also address the new medical evidence from Dr. Ross concerning pain in the worker's fingers.

Section 23(1) of the Act provides that the physical impairment method is the mandatory method for assessing permanent partial disability, as discussed in RSCM II policy item #38.00.

RSCM II policy item #39.00 states that in assessing a worker's entitlement to a permanent partial disability award under section 23(1) of the Act, the Board may refer to section 23(2), which allows it to compile the PDES.

Mr. Wong submits that the Board ought to have calculated the worker's right shoulder impairment with reference to the norms in the PDES. The Board issued a document on December 1, 2004, entitled "23(1) Calculator Specifications and Calculations" (23(1) Calculator), which is available on the Board's website. The 23(1) Calculator provides as follows:

To be used with the revised Permanent Disability Evaluation Schedule, policy and additional factors guide, which came into effect August 1, 2003. The 23(1) Calculator is a tool to assist Officers in Disability Awards in determining appropriate compensation under Section 23(1) of the Workers Compensation Act. This document outlines the calculations/formulas used by the calculator to determine an impairment rating.

At page 3 of the 23(1) Calculator, under the subheading "Norms," it reads as follows:

Normally, when calculating impairment based on restricted range of movement, the injured side is compared with the uninjured side. If both sides are impaired then the injured sites are compared to established NORMs.

Although the 23(1) Calculator is not considered published policy of the Board's board of directors, it provides guidance in this situation.

Mr. Wong has not provided evidence that the worker's left shoulder had been injured at any time so as to require the use of norms for calculating the worker's right shoulder impairment. Rather, he submits that the Board's practice is to use the norms. It does not appear that he was aware that the Board normally compares the injured side to the uninjured side.

In cases involving the limbs, a comparison of the injured side to the uninjured side is generally used, as it provides an accurate measurement of the worker's impairment. In this worker's case, her range of motion in her uninjured left shoulder is less than the norms. It is reasonable to assume that she would have demonstrated a similar range of motion on the right side had she not been injured.

By comparing the restriction in the worker's right shoulder range of motion stemming from her compensable injury to the norms, without any evidence that the worker's left shoulder has been injured, would, in essence, overestimate the worker's level of impairment. In other words, the baseline for comparison purposes would exceed what the worker had in the first place, and therefore result in a level of impairment that is greater than her actual impairment.

Accordingly, I am satisfied that the Board properly compared the worker's injured side to her uninjured side when calculating her right shoulder impairment. I see no persuasive reason to depart from that method of calculating impairment in this case.

In addition, RSCM II policy items #39.01, #96.30 and #97.40 provide that the report on a section 23(1) evaluation conducted by an authorized external service provider is expert evidence which, in the absence of other expert evidence to the contrary, should not be disregarded. Although the evaluation is not the only medical evidence that the DAO may use, it is usually the primary input. The Board officer may conclude that, although the functional impairment of the worker is a certain percentage, the disability (i.e. the extent to which that impairment affects the worker's ability to earn a living) is greater or less than the percentage of impairment.

I have reviewed the measurements of the worker's right shoulder movements in the September 2003 PFI evaluation report, and the calculation of her PFI of 0.57% (prior to the addition of the age adaptability factor). I see no error in that calculation, which was based on the relevant values in the PDES. I confirm that impairment rating, based on the objective findings of impairment in the PFI evaluation. In addition, I see no error in the age adaptability factor that was applied to the scheduled award. I find that it was properly calculated in accordance with RSCM II policy item #39.11.

RSCM II policy item #39.10 states that the rating schedule of percentages of disability in the PDES is a set of guidelines, not a set of fixed rules. The DAO is free to apply other variables beyond the loss of range of motion calculations based on the PDES. The “other variables” means those variables relating to the degree of physical impairment. In this regard, I will consider whether the worker’s right shoulder crepitus warrants an additional award.

Crepitus describes the sound made when articular surfaces rub against one another. The evidence does not suggest that this impairs the worker in any way. Accordingly, I do not find that the presence of crepitus constitutes an impairment so as to warrant an additional award.

I now turn to the worker’s request for an award for chronic pain.

As the Board’s initial adjudication of the worker’s entitlement to compensation for chronic pain occurred after January 1, 2003, the current RSCM II policy item #39.02 applies. That policy provides for an award of 2.5% of total disability for a worker with chronic pain that is disproportionate to the associated objective physical impairment.

Mr. Wong submits that the worker has chronic right shoulder pain, along with right fourth and fifth finger pain. He contends, therefore, that the worker’s pain is not limited to her area of impairment. I note that the first mention of finger pain is found in Dr. Ross’ October 2004 letter provided in support of this appeal. Prior to that time, the worker complained of numbness and tingling in the ulnar aspect of her forearm and hand/fingers; however, she did not complain of pain in those areas. In particular, she did not mention finger pain during her PFI assessment. For purposes of this appeal, the worker’s new complaint of finger pain will not be considered. It remains open to the worker to ask the Board to determine whether her complaint of right fourth and fifth finger pain is a compensable consequence of her right shoulder condition and resulting surgery.

Under RSCM II policy item #39.02, the worker’s pain complaints fall into the category of “specific chronic pain,” which is pain with clear medical causation or reason, such as pain that is associated with a permanent partial or total physical disability. A worker may have chronic pain that is either consistent with or disproportionate to the impairment. It is only in the latter case that a separate section 23(1) award for chronic pain will be granted to the worker.

Pain is considered to be consistent with the associated compensable impairment where the pain is limited to the area of the impairment, or medical evidence indicates that the pain is an anticipated consequence of the physical or psychological impairment. In these cases, an additional award for the specific chronic pain will not be provided, as it would result in the worker being compensated twice for the impact of the pain.

Pain is considered to be disproportionate to the impairment where it is generalized rather than limited to the area of the impairment or the extent of the pain is greater than that expected from the impairment.

On the evidence before me, I conclude that the location (the right shoulder) and the degree (dull aching/soreness with use) of the worker's pain is consistent with that associated with her compensable physical impairment reflected in her 0.57% award. I therefore find she does not meet the criteria for an additional award for disproportionate chronic pain under RSCM II policy item #39.02.

Finally, with respect to sensory losses, policy item #39.40 of the RSCM II establishes that sensory losses not specifically referred to in the PDES may be assessed on a judgment basis as part of the overall disability incurred in a part of the body covered by the PDES.

The worker described having altered sensation in the ulnar aspect of her right forearm and hand. She has consistently reported this symptom since surgery, and mentioned it as being one of her main complaints at the PFI examination.

I note that the DAO did not specifically address the worker's complaints of altered sensation. The worker reported this complaint to Dr. Khunkhun, but there is no indication that he tested her for it. I accept the worker's evidence that she has had reduced sensation on the ulnar aspect of her right forearm and hand since her surgery. Drs. Ross and Tarazi have consistently reported this symptom. I also accept that Dr. Ross' reference to numbness in the worker's fourth and fifth fingers in her October 2004 report is a more definitive description of the previously mentioned numbness in the ulnar aspect of the worker's hand; rather than being a new symptom.

The worker told Dr. Khunkhun that this impaired sensation in her forearm and hand, along with her right shoulder pain, has limited her recreational activities. She also told him that the sensory changes in her right forearm and hand are constantly present. The worker has a hand-intensive job as a lab technician; however, there is no persuasive evidence that this numbness restricts her work-related activities so as to impact her earning capacity. Rather, the evidence suggests that these symptoms are an annoyance and may interfere with her recreational activities, but do not amount to an impairment. Accordingly, I do not find that the worker is entitled to any additional award for sensory changes.

I deny the worker's appeal.

Conclusion

I confirm the June 24, 2004 Review Division decision.

No expenses were requested, but if the worker incurred expenses for Dr. Ross' October 22, 2004 report, I would order reimbursement of that expense, in accordance with the tariff established by the Board (see item 13.23 of WCAT's *Manual of Rules of Practice and Procedure* and section 7(1)(b) of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02).

Elaine Murray
Vice Chair

EM/hb