NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2005-02034 **Panel**: Marguerite Mousseau **Decision Date**: April 22, 2005

WCAT Jurisdiction over Decisions based on Scheduled Awards with No Range or Range Less than 5% – Permanent Disability Awards – Section 239(2)(c) of the Workers Compensation Act – Section 23(1), 23(2), and 23(3) of the Act – Additional Factors

Pursuant to section 239(2)(c) of the *Workers Compensation Act*, WCAT does not have the jurisdiction to hear an appeal from a review officer's decision respecting the application of the permanent disability evaluation schedule (PDES) under section 23(2) of the Act where the scheduled percentage has no range or has a range that does not exceed 5%.

However, the scheduled percentage may be only one of several elements used in order to arrive at an "estimate of impairment of earning capacity" as required under section 23(1) of the Act. Thus, WCAT has jurisdiction over other aspects of a permanent disability award decision under section 23(1), including chronic pain, whether the worker is entitled to a loss of earnings permanent disability award, and other variables which have not been included in the scheduled percentage.

In this case, the worker sought an increase of his 1.6% permanent functional impairment award for the partial amputation of a finger. However, the worker was not appealing the decision that he is entitled to the amount of 1.6% under the PDES (WCAT would have no jurisdiction to hear such an appeal); rather, he appealed a number of issues incidental to that decision, including whether the Board properly refused to increase his award by applying "additional factors."

On appeal, the WCAT panel first considered whether it had jurisdiction to hear the appeal. The WCAT panel considered whether the phrase "decision respecting the application under section 23(1) of rating schedules compiled under section 23(2)" in section 239(2)(c) removes WCAT's jurisdiction to hear appeals from all aspects of the decision or whether it refers only to the decision regarding the application of the schedule percentages. The panel adopted the latter, narrow, interpretation as a result of the statutory provisions, legislature debates, and the nature of the rights involved. To adopt the broad interpretation would mean, among other things, that there would be no appeal from a review officer's decision made under section 23(3) of the Act - if the impairment of earning capacity was based on the application of the PDES (and there is no range or the range exceeds less than 5%). The panel considered it unlikely that the legislature intended to limit a worker's appeal rights with respect to loss of earnings permanent disability awards in the absence of specific language to that effect.

After concluding that WCAT's jurisdiction is limited by section 239(2)(c) only in relation to decisions regarding a worker's entitlement under the PDES, the WCAT panel then specifically considered whether consideration of "additional factors" forms part of that decision or is an unrelated decision over which WCAT would have jurisdiction. WCAT concluded that in cases where the scheduled award does not include a value for additional factors, WCAT has the jurisdiction to address the worker's entitlement to compensation for additional factors.

WCAT confirmed the Board decision on the basis that the 1.6% award adequately reflected the worker's impairment of earning capacity. The section of the Additional Factors Outline that

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

deals with amputations states that the PDES values have “built in” enhancement factors. Thus, the WCAT panel found there was no basis to address the issue of additional factors.

Workers’ Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

This decision has been published in the *Workers' Compensation Reporter*: 21 WCR 185, #2005-02034, WCAT's Jurisdiction - Permanent Disability Award for Additional Factors

WCAT Decision Number: WCAT-2005-02034
WCAT Decision Date: April 22, 2005
Panel: Marguerite Mousseau, Vice Chair

Introduction

The worker seeks an increase of his permanent functional impairment award for the partial amputation of his right index finger. In *Review Reference #14493*, dated July 28, 2004, a review officer confirmed the decision of the Workers' Compensation Board (Board) awarding the worker a pension based on 1.6% of a totally disabled person. The worker appeals that decision to the Workers' Compensation Appeal Tribunal (WCAT).

The worker was represented by legal counsel when he initiated this appeal but counsel has indicated, by letter dated February 11, 2005, that he no longer represents the worker. The worker was self-employed at the time of the injury. Accordingly, there is no participating employer.

The worker requested that his appeal proceed by way of "read and review". After considering the issues and the evidence and submissions on file, I agree that the worker's appeal may be fairly adjudicated without an oral hearing.

Issue(s)

The issue on this appeal is whether the permanent partial disability award of 1.6% reflects the impairment of earning capacity due to the worker's injury.

Preliminary Matter - Jurisdiction

The date of injury is July 11, 2003. As such, the worker's entitlement to a permanent disability award is based on the provisions of the *Workers Compensation Act* (Act) as amended by the *Workers Compensation Amendment Act, 2002* (Bill 49).

Additional amendments to the Act, which deal with the appeal structure, appeal rights, the application of policy and other procedural matters which are contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) are also relevant to the appeal and to the question of the jurisdiction of WCAT on this appeal. Applicable published policy is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Section 239(1) of the Act, provides that a final decision made by a review officer under section 96.2 of the Act may be appealed to WCAT. Section 239(2), however, establishes some restrictions on these appeal rights.

Section 239(2)(c) states that there is no appeal to WCAT of "a decision respecting 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%".

Accordingly, the first question is whether WCAT has the jurisdiction to hear the worker's appeal.

The worker's permanent disability assessment occurred on January 6, 2004. His award was based on the application of the Permanent Disability Evaluation Schedule (PDES), which is a rating schedule compiled under section 23(2) of the Act. It is published at Appendix 4 of the RSCM II. Chart 2 of the PDES applies to an amputation involving a single finger. It provides that an amputation at the distal interphalangeal joint (DIP), which is the first finger joint, results in a permanent functional impairment of 1.6%.

Since the decision to grant an award of 1.6% is a decision respecting the application of a schedule under section 23(2) of the Act and the specified percentage may be interpreted as either having no range or a range that does not exceed 5%, this decision may not be appealed to WCAT.

The worker, however, is not appealing the decision that he is entitled to the amount of 1.6% under the PDES. Rather, he is appealing a number of issues that might be described as incidental to the decision awarding him 1.6%.

In his notice of appeal to WCAT the worker said that he wanted to have a "PFI assessment granted". Subsequently, his representative said that the worker relied on his submission to the Review Division and his position remained the same as in that submission.

In that submission, dated April 28, 2004, the worker requested findings that:

- the Board underestimated the degree of impaired earning capacity,
- the Board be directed to refer the file to a disability awards medical advisor for a thorough permanent functional impairment examination,
- the worker be assessed for loss of range of motion, grip testing and sensory testing, and
- a value of 0.25% for cold intolerance be added to the revised pension award subsequent to the permanent functional impairment examination.

Whether these matters may be appealed to WCAT is a question of interpretation of section 239(2)(c), specifically, what is "a *decision respecting* the application under section 23(1) of rating schedules compiled under section 23(2)". On the one hand, this phrase may be interpreted as referring to all aspects of the decision made by the review officer. The effect of this interpretation is that no aspect of the review officer's decision could be appealed where the award was based on the application of the schedule under section 23(2) and the "specified percentage of impairment has no range or has a range that does not exceed 5%". In the present case, this interpretation would result in the worker having no right of appeal to WCAT.

Another interpretation of section 239(2)(c) is to interpret "*a decision respecting* the application under section 23(1) of rating schedules compiled under section 23(2)" more narrowly. According to this interpretation "decision" is taken to refer only to the decision regarding the application of the schedule. The effect of this interpretation is that all aspects of the review officer's decision may be appealed except the decision as to the scheduled percentage of impairment caused by the injury.

Section 23 of the Act establishes entitlement to compensation for a permanent partial disability. There is no definition of permanent (partial or total) disability provided in the Act although the worker's entitlement to compensation is based on the effects of his or her permanent partial disability.

Section 23(1) requires the Board to make certain payments "if a permanent partial disability results from a worker's injury". The compensation payable must be based on an estimate of "the impairment of earning capacity from the nature and degree of the injury".

Section 23(2) permits the Board to "compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases." The Board has established a schedule, which, as noted above, is published as Appendix 4 of the RSCM II.

Section 23(3) provides an alternative method of calculating a worker's entitlement to compensation for a permanent partial disability. This method is used if the worker has a permanent partial disability and the Board decides that "the combined effect of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is so exceptional that an amount determined under subsection (1) does not adequately compensate the worker".

It is evident from these subsections that the compensation or award for permanent partial disability is based on a number of factors but always takes into account a determination or decision as to the "extent of the impairment of earning capacity…" Where the injury or affected body part is identified in the PDES, the decision regarding the extent of impairment is based on that schedule.

Returning to section 239(2)(c), the terminology used and the process described in subsections 23(1)(2) and (3) indicate that the better interpretation of the phrase "a decision respecting the application … of rating schedules" is that it refers to the narrow decision regarding the percentage of impairment that is due to an injury as per the schedule in Appendix 4. This is only one of the decisions made when deciding a worker's entitlement to compensation for permanent partial disability.

Consistent with this interpretation, I note that, if the term "decision" is construed broadly to refer to the permanent disability award decision, there would be no appeal from a review officer's decision made under section 23(3) of the Act - if the impairment of earning capacity was based on the application of the PDES (and there is no range or the range exceeds less than 5%). Permanent disability awards made under section 23(3) are frequently referred to as loss-of-earnings awards. I consider it unlikely that the legislature intended to limit a worker's appeal rights with respect to loss of earnings pensions in the absence of specific language to that effect.

I am drawn to the narrow interpretation of the term "decision" as a result of the statutory provisions and the nature of the rights involved. I have also, however, referred to the Debates of the Legislative Assembly (*Hansard*) regarding the enactment of subsection 239(2)(c), and I view that statements regarding the purpose of subsection 239(2)(c) also support that interpretation.

At the House in Committee of the Whole session on October 28 and 29, 2002, the following exchange took place between Joy MacPhail and the Honourable Graham Bruce, Minister of Skills Development and Labour:

> **J. MacPhail**: This is the second division of the whole appeal process. It's entitled "Appeal Rights." I have two areas of concern. The first is under sections 239(2) (b) and (c)…These decisions were appealable…Why was the change made to make this not appealable now?
>
> Hon. G. Bruce: …In regards to (2)(c), this isn't in the aspect of whether there is to be an amount that is awarded. This speaks to where that amount - and there's some debate within 5 percent one way or the other – is not appealable. Basically, it's trying to focus people on those things – and the board and the tribunal – in bringing through a timely decision rather than having these things extended through appeal after appeal.
>
> [1040]
>
> **J. MacPhail**: So just to be clear on the second point, which says…. Yes, 239(2)(c) says that there will be no appeal "where the specified percentage of impairment has no range or has a range that does not exceed 5 percent."

> My understanding, then, from the briefing that we received, is that if the decision for compensation is 23 percent and you want to appeal it….If the range for compensation was 21 to 25 percent, that's not appealable, *but you can appeal the level of compensation awarded*.
>
> **Hon. G. Bruce**: The member is correct in that definition.[1]
>
> [emphasis added]

These comments indicate that the competing values underlying this amendment are the preservation of adequate appeal rights on the one hand and efficiency and timeliness of decision making on the other.

The comments directed specifically to an explanation of the section indicate that the legislature intended to restrict the right of appeal with respect to one aspect of the permanent disability award only: the scheduled percentage of impairment. The larger question of the worker's entitlement to compensation, that is, the amount of the permanent disability award is appealable.

Accordingly, with respect to this appeal, the worker may not appeal the decision that the scheduled portion of his award is 1.6%. He may however appeal other aspects of the permanent disability award.

Admittedly, this interpretation leads to the result that section 239(2)(c) has little effect in terms of altering the practice that was in place prior to the enactment of this provision. This would also appear to run counter to the stated legislative intent of improving efficiency and timeliness of decision-making by restricting certain rights of appeal. In my view though, this interpretation of section 239(2)(c) accurately reflects the language of the section in the context of the related provisions and the specific intent of the section as recorded in *Hansard*.

WCAT Jurisdiction Respecting Impairment of Earning Capacity

Returning to subsection 23(2), it authorizes the compilation of "a rating schedule of percentages of impairment of earning capacity for specified injuries…which may be used as a guide in determining the compensation payable" for the purpose of subsection 23(1) – which requires the Board to "estimate the impairment of earning capacity from the nature and degree of the injury".

Section 23(2) describes the schedule as a "guide" to determining the percentage of impairment. Similarly, item #39.10 of the RSCM II describes the PDES as a set of guide rules and states that the Board officer in Disability Awards is free to apply other

[1] British Columbia, Debates of the Legislative Assembly (Hansard), volume 9,10 (29 October 2002) at 4126. The Hansard index is accessible at http://www.leg.bc.ca/37th3rd/hansard

variables in arriving at a final award under section 23(1). In addition, the introduction to Appendix 4 explains that the PDES does not determine the final amount of the section 23(1) award.

Accordingly, the percentage of impairment of earning capacity determined by applying the schedule under section 23(2) may be only one of several elements used in order to arrive at an "estimate of impairment of earning capacity" under section 23(1).

As a result, I consider that WCAT has the jurisdiction to address the review officer's estimate of impairment of earning capacity under section 23(1) although it does not have the jurisdiction to review the decision as to the percentage of impairment under section 23(2) (where the scheduled impairment has no range or the range does not exceed 5%).

WCAT Jurisdiction Respecting Additional Factors

As previously noted, item #39.10 of the RSCM II describes the PDES as a set of guide rules and states that the Board officer in Disability Awards is free to apply other variables in arriving at a final award. The "other variables" must relate to physical or psychological impairment. Similarly, the introduction to Appendix 4 explains that the PDES does not determine the final amount of the section 23(1) award. It states that the Board is free to take other factors into account and that the PDES provides a guideline or starting point for the measurement rather than a fixed result.

The *Additional Factors Outline* [2] provides guidelines for consideration of additional factors that are not formally contained in the PDES. It states that policies #39.10 and #39.50 should be referenced "to determine if the additional factor is scheduled or unscheduled".

The section of the *Additional Factors Outline* that deals with amputations states that the values in hand charts 2 to 5 "have 'built in' enhancement factors". With regard to those charts "Amputation value includes loss of sensation at the amputation site and any resulting loss of pinch/grip strength".

In this case, chart 2, which is the chart applicable for amputation involving one finger only, is used to determine the percentage of impairment. Since the award of 1.6% includes an award for loss of sensation and loss of pinch/grip strength, WCAT does not have jurisdiction to address the issue of additional factors. They are included in the scheduled amount which is not appealable to WCAT under section 239(2)(c). However, in cases where the scheduled award does not include a value for additional factors,

[2] Additional Factors Outline accessible at http://www.worksafebc.com/law_and_policy/practice_directives/default.asp

WCAT likely has the jurisdiction to address the worker's entitlement to compensation for additional factors.

Summary

Section 239(2)(c) prohibits an appeal of the narrow decision respecting the application of the schedule under section 23(2) where the scheduled percentage has no range or the range does not exceed 5%. This is only one aspect of a permanent partial disability award under section 23(1) of the Act. WCAT has the jurisdiction to address chronic pain, other variables where they have not been included in the scheduled percentage, and the estimated impairment of earning capacity.

Evidence, Reasons and Decision

The worker was self-employed as a local hauling truck driver. On June 11, 2003 he caught his right index finger between the fan belt and a pulley on his truck resulting in an amputation of the tip of the finger.

Dr. Pugash, plastic surgeon, saw the worker on June 13, 2003. He described the injury as a transverse amputation through the mid-portion of the distal phalanx and noted that no nail structures appeared to be present. He recommended that he perform a revision amputation. Dr. Pugash performed this surgery the same day. He shortened the digital nerves at that time.

Dr. Pugash submitted several more reports to the Board over the next two months. His report of August 6, 2003 states that the injury is well healed; the worker still has tenderness and some sensitivity at the tip but he is able to return to work on August 18, 2003.

A Board officer contacted the worker after receiving this report. The worker said that he did not have a job to return to. His wage loss benefits were brought to conclusion as of August 18, 2003 and his file was referred to a Board medical advisor for review. In a memo dated August 25, 2003, the Board medical advisor recommended that the worker be assessed for permanent functional impairment.

The permanent functional impairment assessment was conducted by a disability awards officer (DAO). The DAO noted that, although the operative report did not specify the exact level of amputation, the subsequent progress report stated that the amputation was at the distal interphalangeal joint. The DAO considered that no further medical examination was required to determine the worker's permanent partial disability.

Policy item #39.01 of the RSCM II provides that a DAO may decide a worker's entitlement under section 23(1) in the absence of an examination of the worker by a Disability Awards medical advisor if there is sufficient medical evidence on file to do so. Taking into account the nature of the injury and the subsequent procedures and medical

reports which did not reveal complications, I consider that it was appropriate for the DAO to decide the worker's permanent disability award without a further medical assessment. The worker's appeal on this aspect is denied.

The DAO noted that the scheduled values for finger amputations include any resulting weakness of hand grip or pinch grip. He also found that any remaining sensitivity was not disproportionate to the objective impairment. The DAO is correct in stating that the scheduled value of 1.6% includes the effects of the other variables. Accordingly, there is no basis for referring the worker to Disability Awards to have these assessed. There is no medical foundation for a referral to Disability Awards with respect to cold intolerance.

Conclusion

I find that the permanent disability award of 1.6% reflects the impairment of earning capacity due to the worker's injury. I confirm the decision of the review officer dated July 28, 2004.

Marguerite Mousseau
Vice Chair

MM/gw