

NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2005-02255-RB **Panel:** Rob Kyle **Decision Date:** April 29, 2005***Is Worker Occupation a Factor to Consider when Calculating Functional Impairment Permanent Disability Awards (Physical Impairment Awards) – Section 23(1) of Workers Compensation Act – Policy Item #39.00 Rehabilitation Services and Compensation Manual, Volume I - Scheduled Awards – Permanent Disability Evaluation Schedule – Non-Scheduled Awards (Judgment Awards)***

This decision is noteworthy for two reasons. First, because it discusses generally the nature of functional impairment permanent disability awards (functional awards) awarded under section 23(1) of the *Workers Compensation Act* (Act). Second, because the panel finds that the creation and application of the Worker's Compensation Board's (Board) Permanent Disability Evaluation Schedule (PDES), which sets out fixed functional awards for specific disabilities, satisfies the requirement in section 23(1) of the Act to "estimate" the impairment of a worker's earnings capacity where the worker is found to be disabled. Thus, the earnings and the occupation of a particular worker are not factors the Board can consider when determining an individual worker's functional award.

In this case, the worker, a plumber, received a functional award of 1.5% for the partial amputation of his thumb. The award was a "scheduled award", meaning that it was a fixed award that related to an injury that is included in the PDES (Appendix 4 of the *Rehabilitation Services and Compensation Manual, Volume I*). The worker appealed the Board assessment of his permanent disability award to WCAT. The worker argued that the scheduled award did not adequately compensate him for his loss as he was a highly skilled worker and needed good hand dexterity to perform his job.

The WCAT panel denied the worker's appeal. The panel found that the scheduled award was consistent with the PDES and there was insufficient evidence to establish that the scheduled award was insufficient.

To explain why the worker was fairly compensated under the Act and policy and to advise the worker of the logic of the functional impairment disability award, the WCAT panel explained that the permanent partial disability award system is designed to be neither entirely theoretical nor to reflect the actual experiences of individual workers. It is theoretical in the sense that degrees of impairment applied by the Board through the permanent disability evaluation schedules, or assessed on a judgment basis, are based historically on a fictional average worker carrying out labouring duties. Because the "average worker" represents a notional average, the actual impact on earning capacity of a particular physical impairment will most likely vary between actual workers experiencing the same type of permanently impairing injury. The nature of the system is such that some workers may experience an actual loss of earnings in excess of the disability award while others may experience no actual loss of earnings even without the disability award. The actual earnings of the worker are an irrelevant consideration in reaching a decision whether to award a disability pension based on a loss of function.

WCAT Decision Number : WCAT-2005-02255-RB
WCAT Decision Date: April 29, 2005
Panel: Rob Kyle, Vice Chair

Introduction

The worker appeals a November 4, 2002 decision of the Workers' Compensation Board (Board).

That decision informed the worker that he had been awarded a permanent functional impairment pension equal to 1.5% of a totally disabled person.

The worker is unrepresented. The employer is not participating.

There was a request for an oral hearing. The panel held an oral hearing at the WCAT offices on April 28, 2005.

Issue(s)

Does the worker's permanent functional impairment pension adequately reflect his degree of functional impairment?

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38).

WCAT may consider all questions of fact, discretion and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the *Workers Compensation Act (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's board of directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, discretion and law arising or required to be determined in an appeal before it (section 254).

Background

At the material time to this appeal, this now approximately 37-year-old worker was employed as a plumber. On July 11, 2000 he suffered a partial amputation of the left side of his right thumb after he dropped a heavy drain lid on the thumb. According to a later medical report, he avulsed a one and one-half centimetre area on the lower aspect of his thumb. There was no exposure of underlying tendon or bone.

This claim was accepted by the Board and the worker received wage loss benefits for a total of seven days from around the time of the injury and a further seven days at the time of his surgery.

He underwent a skin graft performed by Dr. Bush, a plastic surgeon, sometime in the spring of 2001. By mid-July 2001, Dr. Bush was opining that the graft was going to be successful, although by early August he was talking in terms of partial success. By early September 2001, Dr. Bush stated that the worker's thumb was fully healed and he had a good range of motion in his IP and MP joint of his right thumb. The worker had no sensation in his skin graft area, which Dr. Bush expected, and he opined that this should improve somewhat over the following six months. He noted the worker might have a problem returning to his pre-injury employment because of the insensitivity in his distal skin graft.

The Board referred the worker to its Disability Awards Department in mid-October 2001.

Dr. Bush examined the worker in mid-May 2002, at which time he noted that the worker was having difficulty with fine motor skills. He stated that because of the insensate patch, he did not think it likely that his condition would improve any more than it was at that time.

The Board undertook a permanent functional impairment review on November 1, 2002. The disability awards officer reviewed the medical evidence and apparently discussed a proposed disability award with a disability awards medical adviser. The disability awards officer did not seek a formal medical opinion or a formal assessment. He noted the worker had lost some of the pulp at the tip of his right thumb. He had a good range of motion of the joints of that thumb. His only apparent disability was a loss of sensation at the distal radial aspect of his thumb.

The disability awards officer decided that the worker was entitled to a permanent functional impairment award equal to 1.5% of total disability; this was a scheduled award as it was based on the Board's "Permanent Disability Evaluation Schedule". This was based on the slight loss of pulp of the thumb and sensory loss on the radial portion of the right thumb. As the worker had been able to return to his pre-injury employment, there was no consideration of a loss of earnings award.

The effective date of the pension was to be July 23, 2001, which was the date following finalization of wage loss benefits. The award was based on the worker's long-term wage rate of \$3,782 per month. The award was paid in a lump sum payment in early December 2002; this payment amounted to approximately \$9,600.

Dr. Bush's final consultation report is dated February 18, 2003. In that report, he states before concluding that the worker's findings were permanent:

I have reviewed [the worker's] settlement with WCB with him. Their findings are the same as mine. He has I believe permanent numbness of the distal pulse space of his thumb, more on the radial side than the ulnar side. He has full range of motion. The problem with his numbness is that he will have difficulty working in smaller holes with screwing on small bolts and screws with his finger due to the numbness.

The worker now brings his appeal of the November 4, 2002 decision to a panel of the WCAT.

Submissions

Worker's Submission

The worker provided a written submission in support of his appeal. The worker's position is that he was not compensated fairly for his permanent disability. He states that it is difficult to carry out his full employment duties after losing a portion of his thumb with an associated loss of sensation. The worker states he is a highly skilled tradesperson and the award provided by the Board does not adequately compensate for his impairment. He further states that he considers it very important to have feeling in his thumb to carry out his daily functions at work and at home.

Employer's Submission

The employer is not participating in the appeal and so did not provide a submission.

Oral Hearing

The worker attended an oral hearing at the WCAT offices on April 28, 2005. The worker described the basis of appeal essentially as set out in his submission above. He provided some documentation to the panel describing his trade qualifications.

Following the worker's presentation, I provided the worker with an oral decision. That oral decision is essentially as set out below

Analysis

Section 23(1) of the Act, as it was at the relevant time to this appeal, is applicable here:

Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.

Rehabilitation Services and Claims Manual, Volume I (RSCM I) policy item #39.00 is also applicable here (in part):

The physical impairment method is the primary one used for measuring permanent disabilities. It is the method provided for in section 23(1). In applying this method, the Board does not normally have regard to the individual worker's actual loss of earnings. It considers only the physical condition of the worker. It results in a percentage of disability being allocated to the claimant's condition.

Once the percentage of disability is determined, it is applied to the worker's average earnings, and the pension is 75 percent of the amount so determined.

The basis of the worker's appeal is that he does not consider he has been fairly compensated for his permanent disabilities. In order to hopefully provide the worker with a detailed explanation of the reasons behind functional impairment awards, I have adapted the following from *Appeal Division Decision #99-1150*.

The measurement of physical impairment and loss of earning capacity is represented for a permanent partial disability as a percentage of that of a totally disabled worker. For example, the amputation of a thumb at the M.P. joint will result, on average, in a loss of earning capacity of ten percent of that of a totally disabled worker, according to the Board "Permanent Disability Evaluation Schedule". Those disability schedules state that amputation of one-half of the distal phalanx will result in a disability award of 2% of a totally disabled person. This worker's injury resulted in a flap of skin at the tip of the distal phalanx being removed. That is considerably less than what he would have lost with an amputation of one-half of the distal phalanx.

The permanent partial disability award system is designed to be neither entirely theoretical nor to reflect the actual experiences of individual workers. It is theoretical in the sense that degrees of impairment applied by the Board through the permanent disability evaluation schedules, or assessed on a judgment basis, are based historically

on a fictional average worker carrying out labouring duties. This award was a scheduled award, as it was based on the permanent disability evaluation schedules.

Because the “average worker” represents a notional average, the actual impact on earning capacity of a particular physical impairment will most likely vary between actual workers experiencing the same type of permanently impairing injury. In this case, an injury resulting in some degree of permanent impairment to the thumb of a plumber will most likely have a different impact on earning capacity than it would for a sales representative whose day is spent traveling between clients and talking to those clients. The nature of the system is such that some workers may experience an actual loss of earnings in excess of the disability award while others may experience no actual loss of earnings even without the disability award. In the former case, workers may then be eligible for a loss of earnings pension pursuant to section 23(3) of the *Act*. In this case, the worker returned to his pre-injury employment and has not experienced any loss of actual earnings.

As is pointed out in *Appeal Division Decision #93-0661*, the actual earnings of the worker is an irrelevant consideration in reaching a decision whether to award a disability pension based on a loss of function. A passage from T.G. Ison’s text, *Worker’s Compensation in Canada*, is quoted in that decision:

The physical impairment method as traditionally used in Canada, does not include an occupational variable, and it is not part of this method to consider the actual impact of the disablement on earnings. Thus in the calculation of compensation by this method, it is irrelevant that no adverse effect of the disability upon earning capacity may be apparent. . . .

As was pointed out by Chief Justice Sloan, in his *1952 Royal Commission Report* into the Board (p. 151-152), the purpose of the physical impairment method of evaluating disability:

...is to evaluate the loss of function or capacity on a purely physical basis calculated on a percentage of total disability.... His future earnings do not affect his pension, notwithstanding the fact that he might receive a higher wage after the accident than he was receiving at the time of the accident. In other words, under this method of calculating the amount of this award an individual claimant, in many instances, is paid compensation when he has no immediate wage-loss. The reasoning back of this method is that the average wage-loss suffered in many thousands of cases over a life period will closely approximate the amount of an award based on what the relationship of a percentage of incapacity bears to total disability...

The two basic methods for assessing the percentage of a worker's permanent disability are discussed in *Appeal Division Decision #92-0193*:

...These are the scheduled method and the non-scheduled method. Under the physical impairment method (Section 23(1)), the schedule is used to establish degrees of partial disability.

The intent of the "Permanent Disability Evaluation Schedule" was discussed at length in the *Report of the Commissioner of Inquiry* into the Act reporting in 1965 (the *Tysoe Commission*). Mr. Justice Tysoe stated (at 273):

A percentage of impairment of earning capacity allotted under the scheduled or awarded in a judgment (non-scheduled) award represents an effort to state in terms of percentages, and on the average, the extent to which the particular disability will impair the workman's ability to earn. In arriving at this percentage, those preparing the schedule, or in the case of a judgement award those making the award, have had regard to the ability to the workman to do average labouring work. That is to say, regard is not had to the particular class of employment in which the particular workman has been engaged at the time of the injury.

One of the primary underpinnings of the assessment of permanent partial disabilities is that such assessments are based on an average worker, and not on whether the worker is a plumber, or a taxi driver, or a business executive. The underlying concepts as discussed above for compensating workers for functional impairment have been adopted and applied by the Board for many years.

Section 23(1) requires that once a permanent partial disability is found to exist as a result of a compensable injury, the Board is required to estimate an impairment of earning capacity. The use of the word "estimate", in my opinion, is meant to signify the acceptance through the Act by the legislature of basing permanent partial disability assessments on a general measurement of a loss of physical capacity. Those general measurements appear in the "Permanent Disability Evaluation Schedules", or if not present there, are left to the discretion of the disability awards officers to assess disability on a judgment basis, although still within the concept of an average worker. In my opinion, the intent of section 23(1) does not include consideration of the occupational circumstances of individual workers.

I agree that this injury has had some impact on the worker's ability to carry out his employment activities. The fact remains, however, that the worker has been able to return to his pre-injury employment and has presented no evidence that this injury has negatively impacted his actual earnings, other than the time lost at the time of the injury and at the time of his surgery. He was compensated for that time through payment of wage loss benefits. While this injury has had some impact in carrying on employment

activities, that impact has been minor and has been compensated for through the functional impairment award.

The worker has provided no evidence that the 1.5% loss of function award by the Board was insufficient. The award is consistent with the Board's "Permanent Disability Evaluation Schedule". There is no basis to alter the award as determined by the Board. The worker's appeal is denied.

Decision

The worker's appeal is denied. The November 4, 2002 decision of the Board is confirmed.

At the oral hearing, the worker stated that he was missing work to attend. The worker is entitled to reimbursement of any wages lost to attend this oral hearing upon satisfactory documentation from the employer and provided to the Board.

Rob Kyle
Vice Chair

RK/dw